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Personal tax

Beginning of the year tax planning 2023/24 (Lecture P1377 – 20.19 minutes)

There is often a concentration on tax planning at the end of the tax year but not at the beginning, despite there being significant advantages to starting tax planning early. This article highlights tax planning opportunities at the beginning of the tax year.

Charitable contributions

Charitable contributions through Gift Aid can be carried back to 2022/23. This is the taxpayer's choice. Gift Aid covers contributions to registered charities. The advantage of making charitable contributions early in the tax year is that one then has the flexibility of whether to carry them back to the 2022/23 tax year or use them in the 2023/24 tax year.

ISAs/ Junior ISAs

Many taxpayers leave it to the end of the tax year to make their ISA investments. Making them early in the year increases the opportunity to earn more dividends tax free and enjoy tax free appreciation.

Pension Contributions

The same consideration applies to pension contributions. The longer that the funds are in the pension schemes, the more they benefit from tax-free growth. The annual allowance has gone up to £60,000 which is deductible against the taxpayer's highest rate of tax.

Higher Earners

Persons with income and pension contributions over £260,000, (Adjusted Gross Income) will want to make a projection regarding their earnings and therefore the amount of annual allowance left to them. Remember the phase-down works that for every £2 of income above £260,000 one loses £1 of annual allowance until it reaches £360,000. At that point it reaches the floor of £10,000 contributions. For example, if an individual has adjusted gross income of £280,000 the AGI is therefore £20,000 beyond the threshold and therefore the annual allowance will go down to £50,000.

The income threshold, without pension contributions went up to £220,000, which means that an individual could make large pension contributions including unused relief carried forward which is higher than the AGI threshold as long as their earnings do not exceed £220,000.

Remember the 3 years unused relief of £40,000 maximum per year. There is however no provision to carry back contributions and treat them as if they were made in an earlier year.

The abolition of the lifetime allowance charge and the prospective abolition of the lifetime allowance (currently £1,073,100) altogether gives a window of opportunity for individuals to consider how to maximise their pension and when to take it. The window of opportunity may close after the next General Election if there is a change of administration.

Caution is required in terms of any predictions of either the General Election result or subsequent policies that might be adopted.

EIS and SEIS investments

The start of the tax year is a good time to consider them without feeling pressurised by the imminent end of the tax year. Remember that both EIS and SEIS investments can be carried back 1 year and set against the 2022/23 tax liabilities (not against taxable income). The current limit for EIS is £2million which includes knowledge intensive companies. The SEIS amount has also increased to £200,000 per person.

There have also been some interesting relaxations in the SEIS rules starting 6 April 2023

The faster that investments are made, the quicker that the two-year period is reached under which Business Property Relief is then available on those investments. The date of the investment also starts the three-year clock for CGT relief.

The VCT (venture capital trust) does not have the carry back provision, nor does it have the CGT relief given by SEIS or the CGT deferral given by EIS. Generally, VCTs are seen as more secure investments than SEIS or EIS.

Capital Gains

The start of the tax year also gives greater opportunity for planning in terms of making disposals of assets particularly ones which are less liquid. Also, consideration needs to be given to the applicability of business asset disposal relief and whether the proceeds are going to be reinvested in a tax efficient format. The annual exemption is this year at £6,000 per person and is due to fall to £3,000 for the 2024/25 tax year.

Corporation Tax

100% expensing has come into play for the next three years. The plan is to extend it but large companies which spend more than £1m on capital expenditure per annum should be thinking of planning how to use this window in the most effective way.

Sales of Residence

Spring is here and there is normally an uptick in residential property sales. Clients need to be aware of the 60-day deadline from completion of a sale of a property to file a return and pay the relevant tax on a gain. Given the number of details that one may require in terms of:

- Acquisition cost
- Acquisition expenditure
- Improvement expenditure
- March 1982 valuations
- 2015 valuation for residential property owned by non-residents
- 2019 valuation for non-residential property owned by non-residents
- Other valuations for connected party disposals

- Connected party disposals
- Completion costs

It is important that there is some planning regarding the compilation of this information.

Separation and divorce

The new rules for separating couples which effectively give them three years after the year of separation to make transfers on a nil-gain, nil-loss basis. This effectively defers any CGT and is likely to mean that the donor will pay less, and the donee will eventually pick up the CGT as and when the residence or other chargeable assets are sold. This means that those advising separating couples need to adapt their CGT advise accordingly.

Inheritance Tax

This is a good time to consider gifts out of regular income. The tax return should have indicated the levels of income and tax. This makes an excellent starting point for calculations of surplus income that can be given away. One should note that a successful gift is neither a potentially exempt transfer nor a chargeable transfer of value making it a particularly valuable element of IHT planning.

Tax Returns

There are significant advantages to filing tax returns early:

1) A lot of third-party information is produced shortly after the tax year giving clients less time to lose it;

2) The tax return is the best document for starting personal financial planning and tax planning. It is more valuable the earlier it is done;

3) It allows for valuable "what-if" calculations which software providers often offer;

4) If you get the tax return in before the end of July, you may be able to reduce the on-account payments;

5) Smaller liabilities can be collected through the tax code;

6) Early filers of tax returns do have the opportunities to complete a paper return without penalty;

7) Preparing the tax return early gives more time to consider complex issues.

Contributed by Jeremy Mindell

Forms P11D and Payrolling of Benefits in Kind **(Lecture B1377 – 24.58 minutes)**

Benefits in Kind and Forms P11D and P11D(b)

Following the end of each tax year employers must report taxable benefits and expenses to HMRC on form P11D unless the employer has opted to payroll benefits, see below. The P11D must be completed for all employees including directors regardless of their earnings.

The employee is taxed not only on the benefits and expenses provided to them but also those provided to their "family or household". "Family or household" includes spouse, registered civil partner, children and their spouses, parents, servants, dependents and guests.

There is an exception where the employer is an individual and the benefit provided by the employer has been made in the course of a family or personal relationship.

What is to be reported to HMRC?

HMRC requires the employer to report the "cash equivalent", or taxable benefit, figure for those employment related benefits on forms P11D. The basis for calculating the "cash equivalent" of most benefits is the cost to the employer of providing the benefit including VAT less any sums made good by the employee.

For certain benefits the taxable amount is calculated using the special rules set out in the legislation, e.g., company cars, fuel scale charge, vans, living accommodation and loans.

Filing Deadline for forms P11D and P11D(b)

Forms P11D

The filing deadline for the Forms P11D is 6th July following the end of the tax year to which they relate. For late submission of the forms there is a maximum initial penalty of £300 per document plus a further £60 per document per day until submission completed. HMRC must make an application to the FTT for the initial penalty to be imposed. If imposed HMRC can then charge the additional daily penalty.

It is a legal requirement that employees, still in employment at the end of the tax year 5 April, must be given a copy of their form P11D by 6 July following. Employees who have left during the tax year can write to their previous employer and request a copy of their P11D any time up to 3 years after the end of the tax year. The employer must meet the request within 30 days. Copy forms P11D must be kept for at least three years after the end of the tax year to which they relate.

Form P11D(b) – Return of Class 1A National Insurance Contributions due and Return of Expenses and Benefits - Employer Declaration

The filing date is the 6 July following the end of the tax year to which it relates. HMRC will issue reminders following the end of the tax year and again at the end of June. If the return is not received by 19 July a letter will be issued advising that a penalty may have been incurred and that the return must be filed by 6 August.

Late filing of the P11D(b) will result in a fine of £100 per month or part month for each group of fifty or part employees provided with benefits. The fine will run from 19 July following the end of the tax year. If the filing is not made until twelve months after the due date an additional penalty can be charged of the lower of £1,200 or 100% of the Class 1A NICs paid late. If no Class1A due, then no penalty raised.

Should the employer submit an incorrect P11D(b) return the penalty regime will apply. Any penalty charged cannot exceed the difference between the Class 1A NICs shown on the return and the amount that should have been shown on the return.

UPDATE: In Employer Bulletin February 2023 HMRC announced that for the 2022 to 2023 reporting year they will not accept paper P11D or P11D(b), including lists. Forms must be filed using HMRC PAYE online service or commercial software. The HMRC service is free and allows submissions of up to 500 employees.

Payrolling of Expenses and Benefits in Kind

To reduce the number of P11D returns that require processing HMRC has introduced the option for employers to payroll most benefits in kind. The PAYE regulations allow employers to payroll all benefits in kind except employer provided accommodation and beneficial loans.

Where an employer opts to payroll benefits in kind, they no longer have to submit forms P11D for those payrolled benefits as their value is reported each pay run through Real Time Information. But where an employer payrolls some benefits and not others then P11Ds must be filed to report the "other" non-payrolled benefits.

NOTE: From 6 April 2023 HMRC will no longer accept new informal payrolling benefits arrangements. Employers with informal payrolling in place must now register to payroll expenses and benefits for 2023/24. If they already have an informal agreement with HMRC to payroll benefits for 2022/23 they can continue to submit P11Ds marked "Payrolled" and must formalize the agreement as soon as possible.

Timing is Key

An employer who wishes to payroll benefits (BiKs) must make an online application for authorisation using HMRC's payroll registration service. This must be completed BEFORE the start of the tax year. If the deadline is missed the employer will have to wait until the following tax year to start payrolling the BiKs. The application must give the employer's PAYE scheme details, select the employees and the benefit(s) which will be payrolled. Where an employer wants to stop payrolling they can make an application to withdraw from being an authorised employer. The withdrawal takes effect from the end of the tax year in which notification is given to HMRC.

If registered to payroll benefits, then:

- NO P11D required for those employees where ALL their benefits have been payrolled;

- P11D required where some benefits payrolled and some not BUT only reporting those benefits that have not been payrolled;

- P11D required for those employees where benefits not payrolled.

The good news is that for employers, and employees, the payrolling of BiKs should result in fewer tax code changes for employees during the tax year.

Employer Class 1A NIC on BiKs

There is no employee NIC to pay on BiKs but employers must pay Class 1A NIC on BiKs. Payrolling of BiKs only deals with the collection of the tax that is due, not national insurance. The employer's Class1A NIC is payable to HMRC by 19 July after the tax year. Even though the employer may no longer have to file P11Ds they do still have to calculate the Class 1A NIC due on the BiKs payrolled, file the P11D(b) and pay the Class 1A on time.

For 2022/23 tax year the Class 1A will be calculated at 14.53% due to the short lived 1.25% increase in NIC rates for part of the 2022/23 tax year. The rate will be 13.8% for the 2023/24 tax year, payable 19 July 2024.

Informing employees where benefits are being payrolled

The employer must give written notice to their employees explaining that benefits are being payrolled and what it means to them. This can be done by letter, email or payslip. In the first year of payrolling benefits employees should be made aware that:

- their tax code will be amended to remove the benefit in kind adjustment;
- the BIK adjusted amount will go through payroll and be subject to tax; and
- at the end of the tax year they will be told the value of the taxable benefits they had in the year and what this related to.

After the end of each tax year a notification must be sent to each employee, by 1st June, that they will not be taxed twice because the employer registered to payroll BiKs before start of the tax year. The information which must be provided is:

- Details of the benefits that have been payrolled;
- The cash equivalent of each payrolled benefit;
- Separate details of any benefits not payrolled.

Benefit value to be payrolled

The employer should calculate the "cash equivalent" of the benefit for payrolling in the same way as for reporting on the P11D. If the value of the benefit is not known the employer can use an estimate and adjust later in the tax year. The cash equivalent figure is then divided by the number of pay periods in the tax year. The result is the taxable benefit per pay day. That figure is added to the employee's gross pay and tax calculated as usual based on the new tax code issued by HMRC.

Where the employee pays towards the cost of the benefit, "makes good", the cash equivalent is reduced by the amount the employee pays. This will apply if the employee makes good during the year or is expected to have made good the full amount by the end of the tax year. Should the employee fail to make good by the final pay period of the year the employer must work out the benefit still to be taxed, add to the final salary for tax year and calculate tax due.

Payrolling BiKs gives reduced or NIL net pay

Where an employee has a high value benefit, such as company car, combined with low pay there may be some pay periods where gross pay is reduced or even NIL, for example when

an employee is on long term sick leave, maternity, adoption or paternity leave. In such a situation it is possible that the tax cannot be collected as that would leave little or no net pay. To protect employee's take home pay in a given pay period HMRC state that employers must only deduct tax to the value of 50% of an employee's gross taxable pay. This is called the overriding regulatory limit. In that situation the employer has two options:

1. Remove the benefit and employee from payrolling using the online service. If they are excluded for the rest of the tax year the benefit will be brought back into their tax code so they may over or under pay tax. A P11D will then be required. If the employer wants to restart them for payrolling in the new tax year they will have to wait until after filing the P11D as that will trigger the tax code amendment.

2. Retain the benefit and employee within the payrolling and carry forward any tax underpaid into the next payday for collection if possible.

Failing to "make good" personal costs

Making good - car and van fuel benefit – it is possible that the employer may not know the actual costs of private fuel at the end of the tax year because the invoice has not been received or the employee has not worked out their private mileage at 5 April. Once the figures are known the employee has until 6 July to make good the private fuel cost. If they fail to do so the employer must work out the fuel benefit charge and add to the next pay run on or after 6 July to calculate the PAYE. Where the benefit continues after 6 July the employer must recalculate the car or van fuel benefit for the current tax year and include each payday.

Making good - credit tokens /credit card– where the employer has an arrangement with an employee allowing them to use the business credit card and repay any private costs at a later date the amount due may not be known by 5 April. Once the credit card statement is received the employee has until 6 July to make good the cost of any private purchases. If they do not, the employer must work out the benefit to be taxed and add to first payment of salary on or after 1 July. In addition, the employer must payroll the cost of any use of the credit card in current year without allowing the making good promise.

Contributed by Alexandra Durrant

Subsistence expenses (Lecture P1376 – 17.05 minutes)

Summary – Subsistence payments made to employees were not liable to income tax or NICs as they were covered by a dispensation where the relevant conditions had been met.

This appeal related to payments made by NWM Solutions Limited to its employees for subsistence expenses using scale rates set by HMRC. In order for subsistence payments to be made, employees were required to submit the company's standard expenses form which included a statement clearly saying that employees did not need to submit receipts to support their claim but that "By making a subsistence claim, you confirm that you have incurred a cost on a meal (food and drink) after starting the journey and understand that you will be required to submit receipts to support the claim should NWM request that you do so". The form also contained a signed declaration made by the employee stating, "I declare that this claim relates to expenses incurred wholly, exclusively, and necessarily in the course of my work…".

However, HMRC issued determinations for £511,274.69 arguing that the payments were not the reimbursement of expenses incurred by the employees under a dispensation (S.65 ITEPA 2003) but rather, were "round sum allowances" with no evidence supporting the expenditure occurred. Consequently, the sums were liable to tax and national insurance.

NWM Solutions Limited appealed.

Decision

The Tribunal found that HMRC did not have the power to make determinations without first cancelling the dispensation.

It was common ground that the dispensation was in "full force and effect throughout the relevant period" and that provided the relevant conditions were met, the dispensation removed payments from the charge to tax completely. The expense payments were not 'round sum allowances' chargeable under s.62 ITEPA 2003.

The dispensation included HMRC scale rates to be used for subsistence claims. The Tribunal disagreed with HMRC regarding the receipt evidence that was required when a claim was made. It stated that if detailed receipts were required when the subsistence scale rates were being used, "one wonders what benefit would be derived from having the scale rates at all." After all, the scale rates are supposed to ease the administrative burden for all concerned (Employers, employees and HMRC). The First Tier Tribunal considered that the form submitted and signed by the employees was 'slim' evidence that the subsistence expenditure had been incurred and decided that 'on the balance of probabilities' the expenditure had been incurred as claimed. As the relevant conditions had been met, the dispensation applied.

The payments were not taxable round sum allowances. HMRC was not permitted to impose best practice conditions requiring the validating of expense receipts which were not specified in the dispensation agreement.

NWM Solutions Limited v HMRC (TC08788)

Tennis commentator and IR35 (Lecture P1376 – 17.05 minutes)

Summary – A late appeal against IR35 determinations was denied as the taxpayer's advisors should have known better and the sum involved did not justify the appeal.

Barry Cowan was a member of the partnership intermediary, Cranham Sports LLP. He performed services as a tennis commentator for matches broadcast by Sky UK Limited (Sky).

HMRC asserted that the arrangements between the partnership and Sky were such that had they taken the form of a contract between Barry Cowan and Sky, he would have been regarded as employed by Sky, with income tax and class 1 national insurance contributions falling due. HMRC issued determinations accordingly for the years 2014/15 to 2018/19.

The LLP's representative complained about how the enquiry had been handled by HMRC including the fact that some of the correspondence from Sky was not disclosed to the LLP before the decision was made. HMRC invited the LLP to take up its offer of a review and made a 'without prejudice' approach to the LLP to settle the dispute.

Having confirmed that the determinations had been validly raised, HMRC gave the LLP's advisors a 30-day window to request a statutory review or notify the tribunal of their intention to appeal. However, despite ongoing correspondence, no appeal was made until 10 March 2022, 60 days late.

The LLP appealed to the Tribunal to allow a late appeal.

Decision

The Tribunal stated that where the statutory 30-day period had expired without the taxpayer requesting a review or notifying the appeal, s.49H TMA 1970 provides that notification of the appeal may be given only with the Tribunal's permission. Further, the test to be applied in making this decision was provided by the Upper Tribunal in Martland v HMRC [2018] UKUT 178 (TCC).

The Tribunal considered the three stages:

1. HMRC's letter of 8 December 2021 notified the need to act within 30 days but also requested a response by 22 January 2022. Up until this date, the Tribunal found that a failure to notify the appeal was not unreasonable conduct. After that date, the advisor "continued to lock horns with what he considered to be the outrageous conduct of HMRC." He did not appeal to the Tribunal until 10 March 2022. This delay was found to be both significant and serious;

2. The reason for the delay was due to human error by the LLP's advisors, which was not an adequate reason as they were Chartered Accountants who should have known better.

3. The Tribunal evaluated 'all the circumstances of the case' and concluded:

   - The sum at stake and the loss of the opportunity to challenge that sum did not carry significant weight.

   - Further, the Tribunal considered it inappropriate in an IR35 case to conclude anything other than "success is likely to be arguable." Such cases are highly fact specific requiring a multifactual evaluation of the relationships between the parties. The Tribunal noted that there are cases which fall on both sides of the line and so expressed no opinion.

The First Tier Tribunal did not allow the late appeal and the case was dismissed.

Cranham Sports LLP v HMRC (TC08794)

Planning - £3,600 pension contribution limit **(Lecture P1379 – 8.02 minutes)**

Annual pension contributions of up to £3,600 can be paid without reference to the level of an individual's earnings by virtue of s.190 FA 2004. This facet of the pension legislation allows the owners of family businesses to make tax-efficient pension provision for, e.g., their grandchildren from birth.

The pension arrangement will initially have to be set up on the youngster's behalf by a parent, but, once this has been done, a grandparent can then make regular payments into the grandchild's pension scheme, using the normal expenditure exemption for lifetime gifts under s.21 IHTA 1984. Provided that the payments are regular (for example, a monthly direct debit), are paid out of income as opposed to capital and do not adversely reduce the grandparent's normal standard of living, the IHT relief will be available ab initio. There is no seven-year rule here.

Making contributions in this way will be a useful means for a wealthy grandparent to take money out of their estate for IHT purposes. Note that there is no restriction on the number of grandchildren who can benefit from this favourable regime.

The grandparent, who will be paying into a 'relief at source' pension scheme, is allowed to invest £240 per month (£2,880 per year) from birth up to the date of the young person's 18th birthday and, because such contributions are deemed to be net of basic rate tax, HMRC add an additional £60 per month (£720 per year) to the youngster's pension pot. As a result, the fund, which grows free of tax, can receive a maximum of £3,600 annually.

Typically, such a fund, if started from birth, could be worth in excess of £100,000 in today's money by the time of the grandchild's 18th birthday. If left to accumulate until the grandchild reaches pensionable age, one is likely to be looking at a value of well over £500,000 to which the individual has never had to make a single contribution!

Although the pension beneficiary cannot start to draw their pension until they attain the age of 55 (57 from 6 April 2028), this fact is unlikely to matter. The substantial sum invested on the grandchild's behalf will undoubtedly free up their own savings to be invested in other more flexible ways.

Contributed by Robert Jamieson

Foreign special dividend (Lecture P1376 – 17.05 minutes)

Summary – A special dividend, paid out as part of a merger, should be taxed as partly income and partly capital in line with Delaware law.

John Buckingham held shares in the Dr Pepper Snapple Group. In 2018, using a special purpose vehicle, the company merged with Keurig Green Mountain Inc.

Just before the merger, a 'Special Dividend' of $103.75 per share was paid to Dr Pepper Snapple Group shareholders. John Buckingham received just shy of £110,000, which he included as a capital disposal on his tax return, as the capital value of his shareholding was significantly lower than before the merger.

HMRC received information under the Foreign Account Tax Compliance Act confirming that $29.50 of the $103.75 should be treated as income, with the balance being capital.

In 2020, with the income/ capital split confirmed within documentation published at the time of the Special Dividend, HMRC issued a discovery assessment treating $29.50 of the Special Dividend as a distribution and the balance of $74.25 as capital.

John Buckingham requested a statutory review, which subsequently found that the whole of the Special Dividend should be treated as income for UK tax purposes, and so the discovery assessment was "varied", increasing the tax due.

John Buckingham appealed accepting the initial income capital split but disputing the review decision.

Decision

The First Tier Tribunal stated that "questions of foreign law are questions of fact for the Tribunal" and went on to say that in this case it was "for the Tribunal to determine whether the Special Dividend paid under Delaware law was income, capital, or part income and part capital." Interestingly, neither party sought to rely on expert evidence relating to the application of Delaware law.

The Tribunal found that under Delaware law, as a matter of fact, $29.50 of the Special Dividend was income and $74.25 was capital. The income portion of the Special Dividend was funded by earnings and profits, while the balance was funded by external investors and so was capital. The balance of the dividend "could not have been paid as a distribution of earnings or profits because there were insufficient funds of that nature to do so." Their decision was arrived at based on documentation provided by both Dr Pepper Snapple Group and Keurig Green Mountain Inc. and the split was in line with Delaware law and the principle confirmed in HMRC's own manuals.

The First Tribunal was critical of HMRC's review work as:

1. the officer had failed to take into account IRS forms confirming the income versus capital split. The Tribunal stated that it was 'not credible that the IRS would have signed off on a capital/revenue split which was not in accordance with the applicable company law';

2. the officer appeared to have ignored notes in the company's accounts explaining the nature of the dividend and said that it 'appeared to be described as a straightforward dividend' but was unable to find that reference when asked to refer to it by the tribunal.

3. when considering the documents after the hearing, the Tribunal stated that it appeared that the review decision was actually made out of time. However, 'this possibility was not identified by the parties so there were no related submissions.'

HMRC's original assessment was upheld. As neither party sought to adjust that split to allow for exchange differences and withholding taxes, the income element of the Special Dividend was £32,234 and the capital element £83,551.

John Buckingham v HMRC (TC08782)

Capital taxes

Recycling business relief (Lecture P1378 – 16.30 minutes)

FA 1996 widened the scope of the 100% business relief. In his Budget speech on 28 November 1995, the Chancellor (Ken Clarke) had this to say about the IHT relief for relevant business property:

> 'IHT can . . . have a direct effect on enterprise. A family company may have to be broken up when the owner dies. We already recognise this problem through the existence of business property relief for qualifying unquoted companies. I now propose to remove the burden altogether by extending 100% relief to unquoted shareholdings whatever their size.'

This change took effect for transfers of value and other chargeable events occurring on or after 6 April 1996. Previously, small minority holdings of unquoted shares (i.e. those carrying 25% or less of the votes) only attracted a 50% relief.

It was at this time that the idea of recycling the benefit of full relief (i.e. effectively a complete IHT exemption) was born. The arrangement is described in the example below.

Example 1

Patrick died on 1 May 2023, leaving the following assets:

	£
Freehold house	500,000
Shares in family trading company (held since 1980)	900,000
Portfolio of quoted shares	800,000
Cash	……600,000
	£2,800,000

In his will, Patrick leaves his family company shares to his daughter, along with cash of £120,000. The residue of Patrick's estate is bequeathed to his widow absolutely.

The residue comprises:

	£
Freehold house	500,000
Quoted shares	800,000
Cash (600,000 – 120,000)	…..480,000
	£1,780,000

On the assumption that Patrick had made no chargeable lifetime gifts within the seven years before his death, the IHT liability on his estate is nil:

	£
Shares in family company	900,000
Less: Business relief (100%)	900,000
	–
Other assets (500,000 + 800,000 + 600,000)	1,900,000
	1,900,000
Less: Spouse exemption	1,780,000
Chargeable estate	£120,000

Patrick's chargeable estate falls comfortably within the IHT nil rate band.

However, in order to implement the recycling arrangement, the daughter's next step is to sell the family company shares to her mother for £900,000. This purchase will be financed out of the mother's cash legacy and the sale of some of the quoted shares (but do not overlook the fact that there is also a 0.5% stamp duty cost). Provided that the mother survives this transaction by two years (which will ensure that, on her death, the shares are eligible for business relief) and amend her will so that they are left to the daughter, the end result is that the daughter has cash of = £1,020,000 (£120,000 + £900,000) and the mother has family company shares worth £900,000, a freehold house worth £500,000 and quoted shares worth £380,000. Assuming that the mother leaves her entire estate to the daughter, the IHT liability on her death should be nil (although this depends on what other assets the mother owned). As you can see, the family company shares will have attracted business relief of 100% twice over.

There are two final points to make about this recycling arrangement:

1. In the past, it was customary where the mother had insufficient assets to afford the acquisition of the shares from the daughter, for her to give the daughter an IOU for the sum owed. This technique will no longer work because of the legislative change in FA 2013. The mother is borrowing to buy favoured property, i.e. the family company shareholding.

2. Following the introduction of the Inheritance Tax Avoidance Schemes (Prescribed Descriptions Of Arrangements) Regulations 2017 (SI 2017/1172), which took effect on 1 April 2018, it has to be asked whether this form of planning falls foul of the latest IHT hallmarks. It would certainly seem that the ploy is caught by the first of the two required conditions (Condition 1), namely that there is a reduction in the value of a person's estate without giving rise to a chargeable transfer or a PET. However, in order to be subject to the Disclosure Of Tax Avoidance Schemes (DOTAS) legislation, the arrangements must also involve one or more contrived or abnormal steps without which a tax advantage could not be obtained (Condition 2). It is difficult to see how the market value sale of an asset to a family member could be classified as 'contrived or abnormal' and so hopefully this is not a problem, but the speaker is unaware of any official DOTAS pronouncements – one way or another – from HMRC on planning of this sort.

Contributed by Robert Jamieson

Reducing share capital to create distributable reserves (Lecture B1378 – 17.17 minutes)

Family and owner-managed companies can more readily reduce their share capital in a way which was not possible prior to the enactment of Companies Act 2006. The previous company law legislation stated that a company might, if authorised by its Articles of Association, reduce its share capital. The key requirements were then:

- a special resolution to this effect had to be passed by the company's members; and
- the reduction needed to be confirmed by the Court (which was an expensive exercise).

By virtue of Ss.641 – 653 Companies Act 2006 (which came into force on 1 October 2009), a private company is now able to reduce its share capital by using a solvency statement procedure as an easier and cheaper alternative to obtaining Court approval. The passing of a special resolution is still a prerequisite, but the necessity for prior authorisation in the Articles of Association has not been retained by Companies Act 2006.

These capital reduction rules are used in a variety of circumstances to assist private companies to, for example, create distributable reserves (often by removing a debit balance on the company's profit and loss account) which can then enable a legal dividend to be paid.

Although many private companies have small amounts of issued share capital, it is important to remember that the ability to reduce share capital includes the reduction or elimination of a share premium account and/or capital redemption reserves. In addition, as one commentator has pointed out:

> 'While it is not permissible to apply a property revaluation reserve as part of a capital reduction exercise, the same result can be achieved by first using the revaluation reserve to create fully paid-up bonus shares equal to the capitalised amount. Having created additional share capital, this can then be reduced in accordance with the Companies Act 2006 provisions.'

Briefly, the legal procedure for private companies involves the following:

- Within the 15-day period prior to the passing of the special resolution, the directors must support the capital reduction by providing a solvency statement which complies with S643 Companies Act 2006.
- This statement, which must be approved by each director, has to confirm that:
  - there is no ground on which the company could be found to be unable to pay its debts; and
  - any winding up of the company within the next 12 months would be a solvent liquidation.
- After the special resolution has been passed, the company must, within the next 15 days, deliver to the Registrar of Companies:

- a copy of the special resolution;
- a copy of the solvency statement; and
- a statement of capital setting out the information specified in S644(2) Companies Act 2006.

In practice, one of the more common uses of this capital reduction process is to eradicate a profit and loss account deficit. The company simply reduces its share capital (with each member's interest contracting on a *pro rata* basis). A corresponding credit is made to the company's distributable reserves. This then forms part of the company's distributable profits as confirmed by The Companies (Reduction Of Share Capital) Order 2008 (SI 2008/1915).

HMRC's view is that dividends paid out of profits created in this way represent normal income distributions for tax purposes under s.1027A CTA 2010 – see Para CTM15440 of the Company Taxation Manual. This is the case despite the fact that the distribution originally arose from a share capital reduction.

Where a company's share capital is reduced by a transfer to distributable profits, the shareholders' equity stake in the company should not alter. Since no payment is involved, the share capital reduction will fall within the share reorganisation rules in s.126 TCGA 1992. The elimination of part of the shares does not therefore involve a CGT disposal (s.127 TCGA 1992).

Example 1

An extract from the balance sheet of Peter Paul & Mary (Music Publishers) Ltd as at 30 June 2023 shows the following:

	£
Share capital – 3,000 ordinary shares of £1 each	3,000
Share premium account	180,000
Profit and loss account	(66,000)
	117,000

Peter, Paul and Mary have identical shareholdings and are the company's only directors. The company was adversely affected by the COVID pandemic – hence the debit balance on the company's profit and loss account which has only recently come into being.

The shareholders need to have dividends of £30,000 each in 2023/24, but unfortunately Peter Paul & Mary (Music Publishers) Ltd has no distributable reserves. However, the directors have been told by their tax adviser that they can create the necessary reserves by reducing the company's share capital under s.641 Companies Act 2006.

They would like to create reserves of £105,000 and so a special resolution is passed to eliminate £171,000 from the share premium account.

After the reduction, the shareholders' funds in the balance sheet are made up as follows:

	£
Share capital – 3,000 ordinary shares of £1 each	3,000

Share premium account (180,000 – 171,000)	9,000
Profit and loss account (171,000 – 66,000)	105,000
	117,000

Peter Paul & Mary (Music Publishers) Ltd now has sufficient reserves to declare dividends totalling £90,000 for the three shareholders. These dividends will be subject to income tax in the normal way.

Contributed by Robert Jamieson

Woodlands were grounds (Lecture P1376 – 17.05 minutes)

Summary – Woodlands were found to be part of the property's grounds, meaning that residential rates of SDLT applied.

In March 2018, The How Development 1 Ltd bought property for £2.8 million. This consisted of a main house, a lodge, outbuildings, areas previously used as market gardens, orchards, gardens, grounds and woodland that formed part of a larger area of woodland known as "The Thicket". The SDLT return was submitted on the basis that this was a residential property.

On 20 March 2018, the company claimed that the property should have been classified as mixed-use, on the basis that the woodland was non-residential property.

HMRC disagreed and denied the refund of £204,250.

The First Tier Tribunal agreed with HMRC, finding that:

- the whole property including the woodland was residential as there was no evidence of the woodland being used commercially;

- following both the *Hyman* and *Goodfellow cases,* the "grounds" should have a wide meaning reflecting the character of the property. The woodland formed a natural hillside barrier between the main house and the River Ouse, providing privacy and security to the house as well as enhancing its setting.

The company appealed to the Upper Tribunal arguing that the woodlands were inaccessible from the main house and would never be habitable for residential planning. Consequently, it must be non-residential. Further, certain oral evidence had not been considered.

Decision

The Upper Tribunal found that the First Tier Tribunal had considered a non-relevant factor but had not based their decision solely on the fact that there was a lack of evidence of the use or exploitation of the woodland for commercial purposes. The use of the woodland was one factor, amongst other factors that they had been taken into account.

However, the Upper Tribunal accepted that as a result of the one-year delay between the hearing and the First Tier Tribunal issuing its judgement, certain oral evidence went unrecorded and that the delay in producing the decision meant that the First Tier Tribunal

"could or might not have had a clear recollection" of that evidence. Indeed, the decision did not reflect certain points emphasised in that oral evidence.

The Upper Tribunal weighed up the pros and cons of referring the decision back to the First Tier Tribunal.

To avoid additional costs and delay, the Upper Tribunal re-made the decision taking the following into account (all of which were taken into account by the First tier Tribunal):

1. There was no evidence supporting the woodlands' use or exploitation as anything other than that of woodland;

2. The woodland did provide privacy and security for the main house for the same reason reached by the First Tier Tribunal;

3. The woodland was within the legal title of the property;

4. The woodland was not excessively far away from the house and its size and location increased the privacy and security of property.

On balance, the Upper Tribunal concluded that the woodland formed part of the grounds.

The appeal was dismissed.

The How Development 1 Ltd v HMRC [2023] UKUT 00084 (TCC)

Property previously used as a dwelling (Lecture P1376 – 17.05 minutes)

Summary – Despite significant repairs and renovation being needed prior to occupation, the property bought was residential property for SDLT.

In August 2019 Amarjeet and Tajinder Mudan bought a property in London for £1,755,000. The couple submitted their return and paid SDLT of £177,000 on the basis that the property was residential property.

In July 2020 they sought to amend their return on the basis that the property was not suitable for use as a dwelling and so was not residential property (section 116(1) Finance Act 2003). They supported this claim by stating that the house was infested and was not safe to live in. The house needed rewiring, the boiler was detached from the wall and there was a hole in the roof letting in rainwater. Further, external doors and windows were broken, the basement was flooded. The couple only moved into the property with their family in May 2020, once the building work was partially completed.

On 13 August 2020 a repayment of £99,750 was made to Mr and Mrs Mudan. However, the following April, HMRC opened an enquiry, later issuing a closure notice confirming that the property was residential property and that the SDLT payable was the original sum paid over.

Decision

The First Tier Tribunal found that at the effective date, the property had been used relatively recently as a dwelling and was structurally sound. The Tribunal acknowledged that before a

reasonable buyer would consider the property “ready to move into”, the work that was undertaken was required.

The Tribunal stated that statute counts a dwelling as “any building which (as at the effective date) is used or suitable for use as a dwelling, is in the process of being constructed or adapted for such use or is to be constructed/adapted for such use by the seller.”

The First Tier Tribunal found that the property was a dwelling as it had been recently used as a dwelling and while empty, it had not been adapted for another purpose. With no structural issues, the property was capable of being used as a dwelling once more, once the repairs and renovation work had been carried out. None of this work was sufficiently fundamental to make it non-residential property.

Amarjeet Mudan and Tajinder Mudan v HMRC (TC08777)

Administration

Careless and deliberate behaviour?

Summary – The First Tier Tribunal had made errors of law by finding that both the taxpayer and his accountant had acted carelessly and deliberately.

Until the end of October 2012, Ramasamy Danapal worked as a full time NHS A&E consultant. He also ran a private clinic in Harley Street, but this was taken over in November 2012.

HMRC opened an enquiry into his tax returns for both 2010/11 and 2011/12, querying various expenses, capital allowances and commission. During this time, Ramasamy Danapal was represented by a firm of accountants, referred to as Firm A, who agreed that:

- there were some inaccuracies in the 2010/2011 return;
- profits should be increased by disallowing various expenses.

Under the Presumption of Continuity, HMRC argued that similar adjustments were due for earlier years. Further, HMRC looked at the capital allowances claimed on an asset that had been bought several years ago.

HMRC raised discovery assessments for £77,000 relating to 2006/07, 2007/08 and 2009/10.

Ramasamy Danapal appealed to the First Tier Tribunal, who upheld HMRC's assessments.

Dr Danapal was granted permission to appeal to the Upper Tribunal on the basis that the First Tier Tribunal had erred in law in a number of areas.

Decision

The Upper Tribunal found that HMRC's Statement of Case claimed that a loss of tax had arisen because Ramasamy Danapal had acted deliberately or carelessly in completing the returns in respect of various items. HMRC had made no such allegations against Firm A. The Upper Tribunal found that the First Tier Tribunal had made errors of law by concluding that Firm A had acted deliberately/ carelessly. Further, the Tribunal provided no explanation as to why the returns had been completed carelessly by Firm A. The accountants gave no evidence during the appeal and so could not be cross-examined and so the First Tier Tribunal had been wrong to conclude that Firm A had acted dishonesty.

Moving to Dr Danapal's actions, the Upper Tribunal concluded that the First Tier Tribunal were wrong in their conclusions relating to the taxpayer as well. On the basis of the evidence before them, it was not open to the First Tier Tribunal to find that Dr Danapal had deliberately omitted fee income from his tax returns. The First Tier Tribunal did not record any arguments relating to deliberate behaviour that were put to Dr Danapal in cross examination and this behaviour could not simply be inferred. The Tribunal had removed the requirement that HMRC needed to prove the serious allegation of deliberate behaviour made against Dr Danapal.

With these material errors of law, the decision was remade by the Upper Tribunal who found that:

- HMRC had not proven that either Dr Danapal or Firm A had acted carelessly or deliberately in relation to the loss of tax;
- The discovery assessments were made out of time.

The appeal was allowed.

Ramasamy Danapal v HMRC [2023] UKUT 00086 (TCC)

Different sets of rules for offshore time limits

Summary – HMRC had raised their discovery assessments in time as under the 'requirement to correct' rules, HMRC could raise such assessments until 4 April 2021, which it had done.

James Scott was the beneficiary of loans from a trust. No interest was payable on the loans, which gave rise to a taxable benefit. However, this was mistakenly not included in the taxpayer's returns.

In December 2018, under the worldwide disclosure facility, James Scott disclosed the tax due for the years 2014/15 to 2016/17. After an enquiry, it transpired that tax was also due for 2013/14.

In March 2021, HMRC raised discovery assessments for all the years in question.

James Scott appealed arguing that:

- under the standard time limits, HMRC would have four years from the end of the tax year to raise the assessments.
- The 'requirement to correct' rules for offshore income (F(No 2)A 2017, Sch 18 para 26) extended the assessing periods to 4 April 2021. However, James Scott argued that the extended deadline was in effect superseded when new time limits for loss of tax involving an offshore matter were introduced by FA 2019, s 80(5) (TMA 1970, s 36A).
- He argued that this new extended 'offshore' 12-year time limit would apply if the loss of tax had been brought about carelessly. Having not acted carelessly, these later rules would not apply.
- Consequently, the standard four-year time limit would apply, and HMRC would be out of time to raise assessments for the years 2013-14 and 2014-15.

Decision

The First Tier Tribunal noted it was agreed that HMRC had made a discovery and that the taxpayer had been neither careless nor deliberate in relation to the inaccuracy in his returns.

However, under the 'requirement to correct' rules, HMRC could raise an assessment until 4 April 2021 – which it had done. These were 'a specific time-limited set of provisions

predicated on the fact that at the end of the tax year 2016/17 the person has a relevant offshore non-compliance to correct'.

The 12-year extended time limits were a set of provisions allowing HMRC to raise an assessment only when the loss of tax was brought about carelessly. The aim was specifically to deny HMRC a second chance where it had not raised an assessment by April 2021 under the earlier rules. This protected taxpayers from an additional five years of potential assessment for whom HMRC had not assessed by April 2021 by applying the extended time limit.

There was no inconsistency between the two rules 'that could give rise to the need to consider implied repeal' – the later rules were not 'automatically rendered futile by the interaction with the requirement to correct rules'.

The appeal was dismissed.

James Scott v HMRC (TC8784)

Adapted from the case summary in Taxation (27 April 2023)

No duty of care to investors **(Lecture P1376 – 17.05 minutes)**

Summary - The High Court had not made an error of law. A tax barrister, who had advised a failed film finance tax scheme, did not owe a duty of care to investors in the scheme. However, the High Court was wrong to conclude that, had such a duty of care been owed, it would not have been breached.

The appellants in this case were members of limited liability partnerships (LLPs). The partnerships were formed to acquire and exploit distribution rights to films. The scheme was marketed to potential investors on the basis that they would be entitled (as a member of the LLP) to tax relief for trading losses the LLP was anticipated to make and that these losses could be set off against their personal income or capital gains to reduce their tax liability. Mr Thornhill was engaged by the promoter of the scheme to provide a series of opinions on the tax consequences of the scheme.

HMRC challenged the purported tax benefits of investing in the scheme on the basis that the LLPs were not trading on a commercial basis with a view to a profit. The investors entered into a settlement agreement with HMRC in 2017. They also brought a claim against Mr Thornhill under the tort of negligence on the basis that his advice to the promoter, which was communicated to them, was negligent and breached the duty of care he owed to them. The High Court dismissed the claim, holding that no such duty of care existed and that, even if it had, Mr Thornhill's advice would not have breached it.

Decision

The Court of Appeal applied the 'assumption of responsibility' test to determine whether Mr Thornhill owed a duty of care to the appellants. This test required consideration of whether:

1. It was reasonable for the investors to have relied on any representations made by Mr Thornhill;

2. Mr Thornhill should reasonably have foreseen that it was likely they would do so.

Both Simler LJ, who gave the leading judgment, and Carr LJ highlighted that there were factors pointing towards the existence of a duty of care, such as Mr Thornhill declining to add a disclaimer of responsibility to the information memorandum, which he approved.

However, as a totality, the factors weighed against the appellants. Crucially, the tax analysis in the information memorandum was qualified by the statement that prospective investors 'are advised to consult their tax advisers' and Mr Thornhill only consented to his advice being made available to prospective investors on the basis that they took their own tax advice. Accordingly, the Court of Appeal concluded that:

1. It was objectively unreasonable for investors to rely on Mr Thornhill's advice; and

2. He could not reasonably have foreseen that they would do so.

On that basis, no duty of care arose.

Given this conclusion, it was not necessary for the Court of Appeal to consider the appellants' other grounds of appeal, namely that Mr Thornhill's advice was so negligent that it breached his duty of care.

However, it did address this question on the hypothetical basis that such a duty of care had existed. It did so, partly, because the Court of Appeal considered that the High Court had misconstrued the appellants' arguments on this point.

Simler LJ criticised the unequivocal terms in which Mr Thornhill expressed his view that the LLPs would be trading on a commercial basis with a view to a profit, without identifying the risk of HMRC challenging this view. If the High Court had properly considered the matter, it 'could not but have concluded that no reasonably competent tax silk could have expressed such an unequivocal view.' Accordingly, the High Court had been wrong to conclude that, had a duty of care been owed by Mr Thornhill to the appellants, it would not have been breached.

McClean and others v Thornhill KC [2023] EWCA Civ 466

Adapted from the case summary in Tax Journal (5 May 2023)

Dealing with information requests **(Lecture P1380 – 21.31 minutes)**

This article provides two practical examples of information requests from HMRC in the context of an enquiry into a tax return. The session focuses on HMRC's civil information powers at Schedule 36, Finance Act 2008. This article cannot cover every piece of information, or document, that can be requested, but is intended to raise an adviser's awareness as to the points they should be considering when dealing with an information request from HMRC. Reference should be made to the connected session, 'Dealing with information requests from HMRC', where I covered various aspects of the subject, including statutory provisions and guiding principles to apply when responding to an information request.

Sample information requests

The examples have been compiled from documents sent to me when providing support to advisers and are typical of the information and items that are requested by HMRC. Please remember that each case is different, and any information request you receive should be

considered by reference to your client's circumstances, and the associated facts. What is considered reasonably required in one case, may not be so in another.

Advisers should verify that the enquiry letter is valid before dealing with the information request. Another important caveat to include is that where your client indicates that there is a disclosure to be made, it will not usually be appropriate to simply provide the information requested by the enquiry officer. In such circumstances, reference should be made to my session on making a voluntary disclosure. In particular, advisers should proceed with extreme caution where a client indicates that they have a substantive disclosure to make, and to also refer to the session on the Contractual Disclosure Facility. Failure to do so may result in your client facing a criminal investigation. Formal Notice requests under Schedule 36 require that any items requested by HMRC must be reasonably required to enable them to check the taxpayer's tax position. This is also a useful starting point when dealing with an informal information request.

Example 1

This example relates to a self-employed individual who has also had part-time employment during the year. We are assuming that a valid enquiry is being made into the 2021/22 tax return.

Here is an extract of a letter received from HMRC, requesting various bits of information:

Schedule of information and documents needed to carry out our check

Customer name: xxxxxxxxxxxx
Our reference number: xxxxxxxxxx

To help us with our check we need the following information and documents:

Information and documents

1. All forms P60 held for the year ending 05/04/2022.

2. Statements from all bank accounts operated by the business for the year ending 05/04/2022, including paying-in books and cheque counterfoils.

3. All books and records used in the year ending 05/04/2022 including Cash Books, Sales Day Book, customer receipts, etc.

4. Please list all bank/building society accounts held either solely or jointly in the period, providing all account and sort code numbers.

5. Statements from all interest-bearing bank/building society accounts held either solely or jointly in the period.

6. Details of any further income received during the period not already covered here, for example cash or online sales.

7. Any other information or documentation that you consider should be brought to my attention.

It is tempting to read through the list and assume that all of the items requested should be sent to HMRC. It is worth looking closely at each item in turn.

Item 1 – The P60 is information that HMRC should already have and so it would not be harmful to send this information to HMRC again.

Item 2 – It is not unreasonable to request bank statements as they could be argued to form part of the statutory records. However, before sending, it is important to understand why HMRC want to see these statements and what in particular they are looking to understand.

Item 3 – Requesting the business books and records is a fairly typical request and not one to challenge.

Items 4 and 5 – Before agreeing to send this information, it is important to establish why HMRC want this information and how it ties into what appears on the tax return. If HMRC are looking to verify interest received, it would be more appropriate to send in Certificates of Interest for the relevant accounts. This information should only be supplied once you are clear what HMRC's concerns are and then, only if appropriate to do so.

Item 6 – Here HMRC are effectively challenging figures included on the tax return and inviting a disclosure. Before doing anything, it is important to establish with your client whether there is such a disclosure to be made.

Item 7 – Extreme care is needed when responding to this 'catch all' request. There is a danger that the more information that you give HMRC, the more questions they will come back with. Information that clarifies matters might be helpful but otherwise, it is probably best not to volunteer any additional information.

Example 2

This second example concerns a valid company enquiry into the return for the accounting period ended 31 March 2021.

Schedule of information and documents needed to carry out our check

Customer name: xxxxxx Limited
Our reference number: xxxxxxxxxx

To help us with our check we need the following information and documents:

Information and documents

Please provide the following documents and information for the period 1 April 2020 to 31 March 2021 inclusive. If there is no information/documents available or the question is not applicable, then please explicitly state this in your response.

1. **UK and Overseas Land and Property**
    a. Please provide a list of all land and property owned in the UK or overseas during the Account Period Ending (APE) 31 March 2021,

whether let or not, whether owned jointly or solely, directly or indirectly and its use.

b. Full details of when the property was acquired, from whom and how the purchase was financed.

c. The date the letting of the property commenced.

d. A full breakdown of all rental income the company received or was entitled to receive in the APE 31 March 2021.

e. Copies of all Tenancy Agreements for all property let by the company in the APE 31 March 2021.

f. Full documentation in respect of all disposals by the company during the APE 31 March 2021, including documentation in support of the consideration received and the acquisition costs claimed. Please provide a full description of the land and/or property sold.

g. State for what purpose the land or property was intended to be used at the time of purchase and how the land or property was utilised.

h. A Capital Gains computation for the company for the APE 31 March 2021 including a full breakdown of the allowable expenditure with supporting documentation, eg receipts, invoices, etc.

i. Please advise if the land or property sold was disposed of to a connected party, and, if so, provide details.

j. If any professional valuations were used when the land or property was sold, please provide the supporting documentation.

2. Loans due to Shareholders
   a. Please provide Loan Agreements for all loans between the company and its shareholders.

3. Other Debtors
   a. Please tell me how the £185,625 figure was calculated.

4. Dividends
   a. Please provide a copy of all Notes of Meeting or written resolutions where dividends were declared in the APE 31 March 2021.

   b. Please provide copies of the dividend vouchers in support of the dividends issued by the company in the APE 31 March 2021.

   c. Please confirm how and when the dividends were paid/credited to the shareholders.

   d. Please provide a full history of all shareholdings in the company in the APE 31 March 2021.

5. Directors and Directors' Control Accounts (DCA)
   a. Please provide a chronological analysis of all non-cash transactions through the company's DCAs in the year ending 31 March 2021 for each director, along with an explanation of what has been introduced or withdrawn by the directors.

   b. Where funds have been introduced by the directors, please provide evidence of the source of funds.

c. Details of any interest paid or accrued in respect of money lent to the company by the directors or shareholders.

6. Bank and Building Society Accounts
    a. Please provide an analysis of all bank and building society accounts in the APE 31 March 2021 held solely or jointly in the UK or overseas. The analysis should include:
        i. Bank/Building society account name.
        ii. Bank/Building society account number.
        iii. Account sort code.
        iv. Type of account.
        v. The date each account was opened and/or closed.
        vi. Confirm details of any other accounts on which the company had power to draw upon in the APE 31 March 2021, providing all the same information as requested in 6,a,i to 6,a,ii.

Notes

In this context 'documents' means anything in which information of any description is recorded. This includes any records held on computer, magnetic tape, optical disk (CD-ROM/DVD), hard disk memory stick, flash drive, floppy disk or other recording media.

Item 1 – Information requests in respect of land and property may or may not be an onerous request. The information actually supplied will, once again, depend on why HMRC are requesting the information. If the request relates to property purchased or let during the accounting period, that may well be considered to be a reasonable request. Information requested for prior periods would need some kind of justification from HMRC as to why the information was needed. Where the request covers a large number of properties, it may be possible to agree a basis for supplying a representative sample rather than the information for the property portfolio as a whole.

When considering the information request, as well as considering each item in turn, it is also important look at the information request as a whole. This could impact on your ability to meet the usual 30-day time limit that has been set. Where there is a significant volume of information to collect, it is sensible to go back to HMRC and agree a revised timeline.

With any of the items where you are unclear as to why HMRC are requesting those items, or you cannot agree that it is reasonably required, then you are entitled to challenge HMRC.

Item 3 – It is worth considering whether it might be less onerous to provide a summary of small debtors and only provide detail for debtors above an agreed threshold.

Item 4 – This is an area where you may well want to discuss what concerns HMRC have regarding dividends. It maybe that the details on the company's returns are not consistent with information shown by the individual shareholders.

Item 5 – Care is needed here as a director is separate from the company. Item 5.b. concerning funds introduced by directors should be requested from the director, rather than the company.

In summary, remember you can challenge HMRC where you are not sure and consider seeking a second opinion. Where a formal information notice has been issued, there is a right of appeal.

Adapted from the seminar recorded by Phil Berwick (Director at Berwick Tax)

Deadlines

1 June 2023

- CT liabilities for periods ended 31 August 2022 (SMEs not paying by instalments)

7 June 2023

- Electronic filing and payment of VAT liability for quarter ended 30 April 2023

14 June 2023

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

19 June 2023

- PAYE/NIC/CIS/student loan sums for month to 5 June 2022 not paying electronically
- File monthly construction industry scheme return

21 June 2023

- Monthly online EC sales list for businesses based in Northern Ireland selling goods
- Supplementary intrastat declarations for May 2023
  - arrivals only for a GB business
  - arrivals and despatch for a business in Northern Ireland
- Electronic PAYE/CIS for month to 5 June 2023 should have cleared HMRC's bank account

30 June 2023

- Accounts to Companies House
  - private companies with 30 September 2022 year end
  - public limited companies with 31 December 2022 year end
- CTSA returns for companies with accounting periods ended 30 June 2022
- CT61 – quarterly period ends
- Notification of uncertain tax treatments
- Payment of gift aid by charity subsidiaries

News

HMRC updates interest rates

Following the latest Bank of England increase in the base rate to 4.5%, HMRC's has also increased its rates.

From 31 May 2023:

- most late payment interest rate for most taxes will be increased to 7%
- the repayment interest rate to 3.5%.
- These increases apply from 22 May 2023.

From 22 May 2023:

- Interest charged on underpaid quarterly instalments of corporation tax is increased to 5.5%;
- interest paid on overpaid quarterly instalments (and on early payments of corporation tax not due by instalments) is increased to 4.25%.

Business Taxation

SEISS incorrectly claimed (Lecture B1376 – 21.05 minutes)

Summary –Self Employment Income Support Scheme claims were invalid as the taxpayer was not self-employed at the relevant time and had no legitimate expectation of receiving the support.

Thomas Ash had been self-employed as a TV and film editor until August 2018 when he incorporated and started working through a company, Ysgydion Ltd.

In May 2020, roughly four months after filing his return, HMRC emailed, informing him that he might be eligible for the coronavirus Self-Employed Income Support Scheme (SEISS).

When Thomas Ash logged on to the GOV.UK website he saw a screen that stated in large block capital letters 'YOU ARE ELIGIBLE TO MAKE A CLAIM' followed by a button saying 'continue'. He proceeded to make two claims for SEISS, one in May and the second in August 2020.

Meanwhile, his co-director had made Coronavirus Job Retention Scheme claims in relation to her work for the company, as well as a claim for Thomas Ash.

Not surprisingly, in October 2020 HMRC informed Thomas Ash that because he had stopped being self-employed in 2018, he was not eligible for the SEISS and would have to repay the two grants and raised an assessment accordingly. HMRC accepted that he had made an innocent error and so no penalties were charged.

Thomas Ash appealed arguing that he had a legitimate expectation to the money after being invited to apply for it by HMRC, even though he was ineligible.

HMRC argued that the First Tier Tribunal had no jurisdiction to allow an appeal on such grounds and that once they had proven a valid assessment for the correct amount, the appeal must be dismissed.

Decision

The First Tier Tribunal found that the assessment was valid. Thomas Ash was not entitled to the SEISS payments received as he was not trading on a self-employed basis at the relevant time.

The fact that the assessments were correctly issued was sufficient to decide the appeal in HMRC's favour as the First Tier Tribunal agreed with HMRC that it had no jurisdiction to consider Thomas Ash's further submissions. The Tribunal stated that:

> "the terms of s.50 TMA 1970 are clear and leave no room for the importing of a consideration of the appeal by reference to public law grounds such as legitimate expectation."

However, in case they were wrong, the Tribunal considered each of Thomas Ash's arguments in turn finding that:

- it was self-evident that this was a scheme for self-employed people and Thomas Ash knew he was working through a company;
- HMRC's email included a sentence that stated 'you can ask your accountant to help you'; and
- It was Thomas Ash's responsibility to check that he was making a valid claim and the published guidance did make it clear that claiming through a limited company was not permissible.

The appeal was dismissed.

NOTE: The Tribunal observed that had HMRC used clearer wording at the time and provided their published guidance, rather than simply referring to it, it was likely that Thomas Ash would never have made his claims.

Thomas Merlin Ash v HMRC (TC08749)

Business premises renovation allowance (Lecture B1376 – 21.05 minutes)

Summary – Adopting a narrow construction of the words "on or in connection with the conversion" meant the BPRA claim was restricted to HMRC's original view of qualifying expenditure.

In its 2010/11 tax return, London Luton Hotel BPRA Property Fund LLP claimed business premises renovation allowances (BPRA) of £12,478,201. This was the amount paid under a contract with a property developer for the conversion of a flight-training centre near London Luton Airport into a 124-room hotel.

The LLP said the full sum was eligible because it was negotiated at arm's length and used for works 'on or in connection with the conversion, renovation or repair' of a qualifying building into qualifying business premises.

HMRC disallowed £5,255,761 on the basis that some elements did not qualify.

The First Tier Tribunal allowed the taxpayer's appeal in part. The Upper Tribunal remade the decision, allowing some of the taxpayer's and HMRC's grounds of appeal.

Both parties appealed.

Decision

The Court of Appeal said both tribunals had given the words 'in connection with' in s.360B(1) CAA too broad a meaning. Instead, they should be construed relatively narrowly, as requiring a strong and close nexus with the physical work that enabled the building to become suitable for business use.

Further, the court said the Upper Tribunal had been wrong to conclude that the target of the BPRA was a functioning building which was open for business. The measure had as its focus the works of conversion, renovation or repair which led to business premises being either used or available and suitable for letting.

Finally, the court broadly accepted HMRC's claims that some disputed elements of a development sum paid by the taxpayer to the developer did not qualify for BPRA. The court also dismissed the taxpayer's appeal against the Upper Tribunal's finding that another element did not qualify, and that each constituent element of the development sum had to be considered separately.

London Luton Hotel BPRA Property Fund LLP v HMRC [2023] EWCA Civ 362

Adapted from the case summary in Taxation (4 May 2023)

New ground of appeal

Summary – The Court of Appeal granted HMRC permission to raise its new ground of appeal.

The taxpayers entered into arrangements designed to enhance their entitlement to capital allowances on assets they already owned. Broadly, they sold the assets to a bank, the bank leased them back to the taxpayers for three or four weeks, and then the bank sold the assets to the taxpayers. In essence, the taxpayers said they had ceased to own the assets when they sold them to the bank and claimed capital allowances on their reacquisition. HMRC argued on Ramsay grounds that this was not the case.

The First Tier Tribunal dismissed the taxpayer's appeal, but the Upper Tribunal overturned that decision.

HMRC wished to appeal on the ground that the companies had not incurred qualifying expenditure on the reacquisition.

Decision

The Court of Appeal had to decide whether this was a new ground of appeal and, if so, whether granting HMRC permission to argue it would be prejudice to the taxpayers.

Lady Justice Whipple delivered the main judgment. She said the most 'obvious place to verify' whether HMRC had previously raised this point was in the pleadings in the First Tier Tribunal. She could find nothing that reflected HMRC's new ground of appeal. Indeed, it seemed to have arisen in response to the Upper Tribunal's comments. She concluded that this was a new ground of appeal.

On whether the companies would be prejudiced if the ground of appeal were to be admitted, the judge was not persuaded this would be the case. She said the ground raised issues of law, and so granted permission to appeal. In so far as it raised issues of fact, the prejudice of not having called witnesses to give evidence on their subjective purpose would be mitigated by the court assuming that purpose in the taxpayers' favour. The court granted HMRC permission to raise its new ground of appeal.

Altrad Services Ltd; Robert Wiseman and Sons Ltd v HMRC, Court of Appeal

Adapted from the case summary in taxation (18th May 2023)

Hive downs (Lecture B1379 – 19.07 minutes)

Introduction

Sometimes a group may need to move trades around between companies in order to be able to deal with a transaction, such as a reorganisation or moving the trade into a new company prior to sale.

The legislation enables transfers to be done on fairly benign basis for tax purposes but there are several issues than need to be considered, such as:

- Trade losses;
- Chargeable gains;
- Intangible assets;
- Inventory;
- Capital allowances.

Trade losses – s940A CTA 2010

The transfer of trade from one company to another is a cessation for the transferor. Normally any trade losses not able to be relieved by terminal loss relief would be forfeited.

However, when transferred between companies under common ownership, the losses can be transferred to the transferee company.

Common ownership means that least 75% ownership by same persons at any time within two years after the transfer. This is not an onerous condition.

This does not just apply in group situations. It would apply, for example, where an individual owns 75%+ of Company A and Company B. If the trade is transferred from A to B, losses carried forward can be preserved within B.

Succession

The transferee must be a successor to the business activities of the predecessor.

This may seem quite straightforward but there can be issues as illustrated by three leading cases.

In Rolls Royce Motors Ltd (RRML) v Bamford [1976] 51 TC 319, the company succeeded to the activities of two out of six divisions of Rolls Royce Ltd which collapsed in 1971.

The other four divisions of Rolls Royce Ltd including the Aero Engine (Derby) Division, by far the largest of the six, had been transferred to Rolls Royce (1971) Ltd, a government-owned company.

The special commissioners held that the relative scales of the activities carried on by RRML and by Rolls Royce Ltd were decisive in determining that they carried on different trades.

The trade of Rolls Royce Ltd consisted of all the activities of its six divisions, which supported the commissioners' decision.

In Falmer Jeans Ltd (FJ) v Rodin (HMIT) [1990] BTC 193, a marketing company taking over the manufacturing activities of another member of the same group, which had previously made-up garments using cloth provided by the marketing company for a fee, succeeded to the trade of the manufacturing company.

FJ was a subsidiary of Falmer International Ltd (FIL). It sold clothing through a mix of wholesale and retail outlets.

Before 1984 all the clothing sold by FJ was manufactured by others, either bought in from unconnected sources or manufactured by FMS another subsidiary of FIL. The sole function of FMS was the manufacture of garments. FMS was FJ's principal supplier.

FMS bought the sewing cotton, buttons, etc. which it required from third parties but the cloth was supplied by FJ. FMS's services were charged to FJ on the basis of cost plus a commercial margin.

FMS had made losses over a number of years and ceased trading on 31 December 1983. On 1 January 1984, FJ took over FMS's assets and carried on the manufacturing activities in its own name, thus carrying on a single trade of manufacturing and selling clothing but the costs attributable to the manufacturing trade previously carried on by FMS were separately identified in FJ's accounts.

To carry forward losses, the successor is required to carry on the same trade as the predecessor, not just its activities. It is not a requirement that the successor carry on the whole trade of the predecessor, but it must carry on enough of its activities so that it could be said that the same trade was carried on. There is no requirement that the successor carry on the predecessor's trade as a separate trade but if that trade was carried on as a single trade with that of the successor, the successor was to be treated as carrying on a single trade.

Where the successor only carries on part of the predecessor's trade or the successor inheriting the predecessor's trade and running it alongside its own trade, revenue and expenses need to be apportioned.

This demonstrates that the 'succession to trade' can be satisfied even though the trading activities in question are no longer generating revenue directly or are charged for separately but are absorbed into a single trade in which the profits were earned without distinguishing which part of the trade made them.

When FJ succeeded to FMS' trade, FMS no longer made-up FJ's material to specification and no separate charge was made for manufacturing services. However, the manufacturing activities were still conducted for reward and profit was earned by selling the finished articles. Both changes were a direct consequence of the acquisition of FMS's trade by FJ.

The legislation focuses on the trading activities rather than the trade, by treating those activities as if they were a separate trade and apportioning part of the successor's revenues and expenses to those activities.

FJ began to carry on all the activities carried on by FMS. The only difference after the succession was that no separate charge was made for the manufacturing services (because the activities all took place within a single company).

FJ's appeal against the refusal of the Inspector to allow FMS' trading losses to be carried forward was allowed.

In Barkers of Malton Ltd (BOML) v R & C Commrs (2008) SpC689, the special commissioners found that ownership of the assets of the trade was not of itself enough to constitute carrying on the trade, there has to be evidence that the successor actually carried on the trade transferred.

The trade of Haws Garage Limited (HGL) was transferred to its subsidiary, Haws of York Ltd (HYL), as part of a larger reorganisation, to enable the trade, and the land and buildings from which the trade was carried on, to be sold to different third parties.

HYL only owned the trade for 90 minutes, but BOML argued that HYL carried on the trade during this time on the basis that the legislation did not require the trading to take any particular form, or to be of specific duration, and that HGL had acted as the agents of HYL in carrying on the trade on its behalf.

The special commissioners decided that the very short period of ownership, the lack of evidence to demonstrate that HGL had acted as an agent for HYL, and the fact that HYL undertook no trading activity itself meant that HYL did not carry on the trade. As such, the trading losses of HGL could not be transferred to HYL when the assets and trade of HGL were transferred. This would mean that the buyer of HYL would not be able to indirectly benefit from the losses.

Loss carry forward in successor company

If loss arose before pre-1 April 2017 it can only be offset against future profits of the trade that was transferred. This issue can be avoided by transferring a profitable trade to a loss-making company with the same trade in the same 75% group, where this is commercially possible.

To the extent that they are post-1 April 2017 losses, there is no restriction on use against the total future profits of the successor.

Relevant liabilities restriction

If the liabilities retained by the transferor company exceeds the assets retained plus any consideration for the transfer, losses have to be restricted.

Losses available = R - (L – A)

R = unutilised loss

A = assets not transferred to successor + consideration for transfer

L = liabilities not transferred to successor

Example - Transfer of trade from Pink Ltd to Orange Ltd

Pink transfers assets of £500,000 and liabilities of £400,000 but retains assets of £600,000 and liabilities of £1,000,000.

Orange pays Pink £100,000 for the net assets transferred.

Pink had accumulated losses of £750,000.

How much trading loss can Orange receive from Pink on the transfer of the trade?

R = 750,000

A = (600+100) £700,000

L = £1,000,000

Losses transferred with trade (750,000 – [1,000,000 – 700,000]) = £450,000

Capital allowances

Where the predecessor and successor are connected with each other and both are within the charge to UK tax, can jointly elect to transfer pooled assets at tax WDV., thus avoiding a balancing adjustment for the transferor.

Connected means one controls the other, or both controlled by the same person. This is not a 75% test unlike for losses.

If the transfer takes place part way through accounting period then simply pro-rate the WDA for the transferor and transferee.

Stock/inventory

Normally inventory on hand at cessation of trade is valued at market value. This can give rise to a trading profit on cessation if the market value is higher than carrying value.

An election can be made (s.167 CTA 2009) if transferred to a connected person for a different value to be used.

S.167 CTA 2009: Where the market value exceeds both:

- the actual price agreed between the parties and
- the original cost,

the parties can elect to value the inventory at the greater of these two values.

Example

A Ltd owns 100% of B Ltd and wishes to hive down the trade to Newco, pending a sale to a third party.

B Ltd owns inventory which cost £240,600 and has a market value of £300,000.

It will be transferred to Newco at an agreed value of £200,000.

What is the value of the inventory transferred for tax purposes?

If no election is made, the inventory is transferred at its market value of £300,000. This would give rise to a trading profit in B Ltd of (300,000 – 240,600) £59,400.

B Ltd and Newco can jointly elect under s.167 CTA 2009 for the inventory to have a tax value of the higher of:

Original cost £240,600, or

Agreed transaction price £200,000.

i.e. £240,600

This avoids a profit arising on the transfer, and Newco is treated as having paid £240,600 for the inventory when it sells it.

Chargeable assets and intangible assets

Chargeable assets transferred between 75% group companies take place for tax purposes at a price that gives no gain/no loss.

The successor takes over the base cost of the predecessor (with indexation to December 2017 if the asset was acquired before this date by the predecessor).

If successor company leaves the group within 6 years of receiving the asset there may be a de-grouping gain chargeable (covered in session on selling companies out of a group following a hive down).

Intangible assets are transferred between 75% group companies at tax written down value so that no profit or loss arises for the transferor. The successor may be subject to a de-grouping profit or loss if it leaves the group within 6 years of receiving the intangible asset (covered in session on selling companies out of a group following a hive down)

Contributed by Malcolm Greenbaum

VAT and indirect taxes

Turmeric shots – food or beverage? (Lecture B1376 – 21.05 minutes)

Summary – Turmeric shots used for personal health and wellness were found to be food and not a beverage, which made them zero-rated.

The Turmeric Co was launched in 2018 by Thomas Robson-Kanu (a former professional footballer) and his father. They had been using the home-made shots for the past decade to support their personal health and wellness and decided to make a business from selling these shots to others. Customer reviews on the company's website state that they consume the shots for the following reasons: energy boost, support immunity, pain relief, performance boost, recovery and general wellbeing. These reviews confirmed that the shots were consumed on a daily, long-term basis to help variously with knee pain, arthritis, joint pain, provide immune support, general wellbeing, exercise recovery and inflammation from physical activity.

The turmeric, sourced from farms in Peru, is hand prepared, crushed and the pulp sieved to extract the liquid. No apple juice, orange juice or water are added during the production process. However, small quantities of crushed, whole fresh watermelon and lemons are added as a natural preservative and fresh pineapple juice is added as it contains a digestive enzyme called bromelain which aids digestion. The shots come in special packaging and require refrigeration due to the short shelf life. The shots are sold in 60ml bottles (costing £1.99 each if a subscription is taken for 28 shots per month).

The Turmeric Co had originally treated the supplies as standard-rated but later sought to correct the VAT returns 06/2017 to 12/2019 inclusive, treating the supplies as zero-rated food, (Group 1 Sch 8 VATA 1994) and not an excepted standard rated beverage.

HMRC rejected the claim and the company appealed to the First Tier Tribunal.

Decision

The First Tier Tribunal adopted the multi-factorial approach taken in The Core (Swindon) Ltd v HMRC (2018) by considering:

- the four factors originally identified in Bioconcepts Limited v HMRC [1993] that a beverage is consumed to:

    1. increase bodily fluid levels;
    2. slake thirst;
    3. fortify;
    4. give pleasure.

- A fifth factor identified in HMRC's Internal Manual VFOOD7520 that requires it to be a drinkable liquid that is commonly consumed. It was commonly agreed that it was a drinkable fluid.

The Tribunal concluded that although it was a drinkable fluid, the small, 60ml shot size meant that it was not consumed to either increase bodily fluids or to slake thirst. Further, the shot did not fortify the body with an immediate, short-term boost. To benefit from its use, the user needed to consume the shots over a number of months. it was agreed that the shots had a strong and unpleasant taste. It seemed unlikely that anyone would consume these for pleasure.

The Tribunal went on to consider some further factors and concluded that:

- This would not be offered as a drink to an 'unexpected guest';
- The shots were not marketed like other beverages as it had a high price and strict storage requirements;
- The shots were more medicinal than ordinary beverages; and
- the shots would not be substituted at a meal to replace something else normally drank as a beverage.

The First Tier Tribunal concluded that the shots were consumed to maximise daily ingestion of curcumin and should be zero-rated as a food, rather than a beverage.

The appeal was allowed.

Innate-Essence Limited (T/A The Turmeric Co) v HMRC (TC08792)

Football transfer fee (Lecture B1376 – 21.05 minutes)

Summary – Commission received by the taxpayer was for the supply of services to Inter Milan, with no VAT due as the place of supply was Italy and not the UK.

Sports Invest UK Limited was a football agent. When dealing with a player transfer, the company could be acting for one or more of the old clubs, the new club and/or the player.

This case involved a Portuguese International, Joao Mario, who was playing for Sporting Clube de Portugal (Sporting). Sports Invest UK Limited was approached by Inter Milan who were interested in signing Joao Mario.

The transfer went ahead:

- The transfer price between the clubs was agreed at €40 million, with Joao Mario receiving a salary of €30 million a year.
- In a representation agreement between Sports Invest UK Limited and Inter Milan, Inter Milan were to pay Sports Invest UK Limited €4 million in quarterly instalments of €500,000 from September 2016 to June 2018.
- Under the Player's Representation Agreement with Sports Invest UK Limited, the company was entitled to receive 10% of the agreed salary, so €3 million. However, at the same time, Sports Invest UK Limited signed a waiver agreement, waiving their right to the 10%.

HMRC argued that supplies had been made to both the player (€3 million) and Inter Milan (€1 million). €3 million of the fee paid by Inter Milan was to cover the 10% included in Joao Mario's representation agreement. This was third-party consideration paid for services supplied to the player, who was a non-taxable person. With supplies taking place where the supplier was established, VAT was due on the sum as Sports Invest UK Limited was a UK company. HMRC issued assessments accordingly.

Sports Invest UK Limited disagreed, arguing that the full €4 million was consideration for services supplied by it to Inter Milan. Consequently, the place of supply of the services was Italy and no VAT was due on the payment.

Decision

For there to be a taxable transaction, the First Tier Tribunal stated that there must be a legal relationship between the supplier and the recipient. This should be determined by looking at the commercial and economic position of the arrangement.

It was clear from the Inter Milan agreement that payment by Inter Milan to Sports Invest UK Limited was for the supply of the company's services to the football club. Even without the Waiver Agreement, there was no contractual indication that the payment by Inter Milan was consideration for services supplied by the agent to the player.

The Tribunal considered the Waiver Agreement in some detail and concluded that this agreement meant that Sports Invest UK Limited had no right to recover the 10% commission theoretically payable. The football agent had a policy that it would not normally enforce its rights to commission, nor would it seek to recover that commission from the new club. This gave Sports Invest UK Limited a competitive advantage over other agents who insisted on being paid commission either by the player or by the club. The only time that the 10% commission would be enforced was if, at a later stage, the player chose to use a different agent, meaning the player was in breach of their contract. Then, and only then, the 10% market rate would become payable. The Tribunal found that the services provided to the player were provided for no consideration, meaning there was no taxable supply.

The €4 million paid by Inter Milan related solely to services supplied to the club and was not partially third-party consideration for services supplied to the player. No UK VAT was payable.

Sports Invest UK Limited v HMRC (TC08797)

Valid option to tax **(Lecture B1376 – 21.05 minutes)**

Summary – HMRC's decision to treat an option to tax as validly exercised could not be appealed by the taxpayer.

On 28 January 2008, Rolldeen Estates Limited opted to tax two properties that the company had bought, sending HMRC copies of Form VAT1614A as required. The Forms included confirmation that the company had made no exempt supplies in relation to either property.

In March 2008, HMRC issued a letter acknowledging that the properties had been opted to tax with an effective date of 10 January 2008. The company reclaimed VAT on repairs and other related property costs from that date and charged VAT on invoices issued to its tenants.

The two properties were sold in 2015 and 2017 respectively but in neither case was VAT added to the sale price. In August 2017 HMRC issued the company with VAT assessments which included £50,000 relating to the failure to charge VAT on the sale of property one and £4,710 relating to the failure to charge VAT on the sale of property two. The assessments were not appealed and applications for late appeals were not made.

Later, the company's new representative provided evidence showing that Rolldeen Estates Limited had made exempt supplies before the date of the option to tax. As a result, HMRC's permission to opt should have been obtained before the properties could be opted. This had not happened and so the options to tax were not valid.

Sch 10, Para 30, VATA 1994 is a rarely used provision that allows HMRC to retrospectively dispense with the requirement for prior permission to opt to tax and to treat a 'purported option as if it had instead been validly exercised'. HMRC issued a decision stating that they were exercising this discretion meaning that the properties were validly opted with effect from 10 January 2008.

Rolldeen Estates Limited appealed.

Decision

By the time of the hearing the company had conceded the case against property two as no exempt supplies had been made in relation to that property before the effective date of the option to tax.

From 1 June 2008, the option to tax legislation was rewritten introducing HMRC's power in Para 30 to retrospectively validate the option to tax in relation to supplies made. Both the company and HMRC had acted on the basis that the option to tax was valid and so HMRC invoked Para 30 to make this so. This power applied to the sale of the property (even though the original option to tax had an effective date before Para 30 was introduced). HMRC acted reasonably in issuing their decision.

S.83(1)(wb) VATA 1994 gives a right of appeal against "any *refusal* of the Commissioners to grant any permission under, or otherwise to exercise *in favour of a particular person* any power conferred by, any provision of Part 1 of Schedule 10". However, HMRC did not refuse to exercise a power in Rolldeen's favour but instead exercised the para 30 powers of its own motion to Rolldeen's detriment.

The appeal was dismissed.

Rolldeen Estates Limited v HMRC (TC08783)

Admission to agricultural show **(Lecture B1376 – 21.05 minutes)**

Summary – Admission fees to an annual agricultural show were for exempt fundraising and HMRC had raised an out of time VAT assessment.

The Yorkshire Agricultural Society organises and runs The Great Yorkshire Show. The issue in this case was whether in 2016 and 2017 the supply of admission to that show fell within the fundraising exemption in Schedule 9 Group 12 Item 1 VATA 1994.

This exemption applies for the supply of goods and services by a charity in connection with an event:

a) That is organised for charitable purposes by a charity or jointly by more than one charity;

b) whose primary purpose is the raising of money; and

c) that is promoted as being primarily for the raising of money.

In 2016, The Yorkshire Agricultural Society treated admission to the show as a standard rated supply but by 2017, the same income was treated as exempt, with no VAT charged.

The Yorkshire Agricultural Society argued that admission to the show was covered by the fundraising exemption and sought a net VAT repayment of £202,000, which HMRC rejected.

In December 2021, HMRC raised an assessment for the VAT period ending December 2017.

The Yorkshire Agricultural Society appealed against the:

- assessment raised relating to the 2017 show which they argued was out of time;
- refusal by HMRC to allow a claim for overpaid tax in 2016.

Decision

The First Tier Tribunal found the 2017 assessment to be out of time, as it needed to have been made within one year after evidence of facts, sufficient to justify the making of an assessment. HMRC argued this clock started running in May 2021, the date on a letter received from the society's advisers. However, the assessing officer had not given evidence, and so the Tribunal could not assess what evidence had come to be known at that time and concluded that the letter provided no new information entitling HMRC to start the clock in 2021.

Moving to the second ground of appeal, the First tier Tribunal considered the fundraising exemption. Both parties agreed that the supply met condition a). The Tribunal found that b) fundraising was a main purpose of the show and c) the show was promoted as being for the raising of money.

Both grounds of appeal were allowed.

Yorkshire Agricultural Society v HMRC (TC08803)

Builders, hairdressers and taxi firms **(Lecture B1380 – 15.06 minutes)**

Who is making the supply is critical in many smaller businesses.

Builders

Consider a builder using self-employed tradesmen on a home extension for a customer – he is not VAT registered. He has quoted the customer £70,000 for the extension but he is not intending to charge VAT. And he does around three similar jobs each year!

How does he do this without falling foul of VAT?

Many operate on the assumption that they are acting as agent i.e., they will arrange for unregistered tradesman to perform work for the homeowner. So, when the footings need digging the builder will call in two unregistered labourers and maintain that they are contracting with the homeowner. He will do the same with bricklayers, plumbers, electricians, plasterers etc. Most of the tradesmen will not be VAT registered. The builder will have their own skill set e.g., carpentry, and they will charge the customer for their carpentry work plus a small agency fee for arranging the job on the customers behalf. In most cases the homeowner will be asked to open an account with the local builders' merchants so materials can be ordered on the homeowner's account. This will keep the tradesmen's invoices to labour only and this is how they manage to remain below the VAT registration limit.

Whether this works or not depends on whether the builder is actually acting as agent i.e., not principal. The quote document is very important in this regard. The agency arrangement needs to be explicitly stated and expanded upon in the quote. Terms like "we are acting as your agent", "we are arranging the tradesmen on your behalf", "your contract is with the tradesmen", "any problems with their work during or after the work should be taken up with the tradesmen", "you are responsible for settling their invoice within one week of issue" etc. Often the builder will provide the homeowner with a few quotes for various elements of the work – the homeowner will then choose the tradesman they want to engage.

The quote document is often the only paperwork between the builder and the homeowner, so it needs to be very precise when it comes to principal v agent. The builder should also have documented arrangements with the tradesmen and must ensure all their invoices are made out to the homeowner. The homeowner will normally provide the builder with a cash float and the builder will pay the invoices on the homeowner's behalf – this is acceptable as it is part of their agency service. Spreadsheets are provided to the homeowner confirming where their money is being spent – supported by the invoices.

Getting these arrangements wrong is a disaster as it will always result in a late VAT registration for the builder (as principal).

We see similar arrangements in hairdressers and taxi firms. In these businesses we must also ensure that the stylists and taxi drivers are bona fide self-employed. The agent v principal structure will only work when the stylists/drivers are self-employed.

Hairdressers

Essentially the customers are paying the stylist for their haircut and the stylist pays an agency fee to the salon owner – the so called "chair rent". Salon owners are normally VAT registered as the chair rent they receive is taxable and will normally exceed £85,000. The VAT saving here is where a customer pays £50 to the unregistered stylist for their haircut and the stylist remits 30% (say) to the salon owner. VAT is accounted for on the £15 by the salon owner rather than the £50 paid by the customer.

Taxi firms

Taxi firms/taxi drivers have always operated a similar arrangement with VAT registered taxi firms and unregistered taxi drivers – quite often with a 40% agency fee.

Taxi firms will normally act as principal for their account customers as most of these would be VAT registered e.g., charging £300 plus VAT for their monthly fares before remitting £180 to the drivers. The VAT savings come on non-account customers where the drivers are acting as principal e.g., customer pays driver £30 and driver remits a £12 agency fee to the taxi firm for arranging the booking. The taxi firm will account for VAT on their £12 at 1/6. So, the customer has paid £30 but VAT only gets accounted for on £12.

Taxi firms have been under the spotlight recently following the UBER case. The case hinged on whether the drivers were employees for employment rights purposes – it was not a VAT case. UBER lost the case but have since amended their driver contracts to make it clear that the drivers are self-employed. This has however highlighted a VAT issue with their taxi licence.

In London for example, the licence stipulates that the taxi firm must be acting as principal for any booked fare. This would mean that they would need to account for VAT on the £30 fare before remitting £18 to the driver. UBER have therefore taken the decision to apply the Tour Operator Margin scheme (TOMS) to their arrangements. TOMS is mandatory where a business buys in and resells accommodation and/or transport. Applying TOMS they would only account for VAT on the £12 margin at 1/6 which essentially retains the same VAT advantage as before.

UBER have also taken a VAT case against Sefton Council which will test whether licences have the same impact outside of London. Most licences have a similar clause re principal on booked fares so TOMS might become the normal practice for taxi firms across the UK before too long.

Contributed by Dean Wootten

Revenue & Customs Brief 5 (2023)

This brief explains the changes in VAT treatment for medical services carried out by non-registered staff under the supervision of a pharmacist.

Under current VAT legislation, supplies of medical services made by certain registered health professionals are exempt from VAT.

The exemption extends to non-registered staff providing medical services directly supervised by registered health professionals.

Services provided by pharmacists are also exempt and now, from 1 May 2023, the supply of medical services carried out by non-registered staff directly supervised by pharmacists will be exempt.

Extending the VAT exemption in this way will bring the VAT treatment of pharmacists in line with other registered health professionals providing medical services to the public.

https://www.gov.uk/government/publications/revenue-and-customs-brief-5-2023-change-*to-the-vat-treatment-of-medical-services-carried-out-by-non-registered-staff-directly-supervised-by-pharmac*