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Personal tax

Year-End Planning - Income Tax (Lecture P1061 – 24.02 minutes)

Use Your Personal Allowances

The personal allowance (PA) offers £11,500 of tax free income and should not be wasted. You use it or you lose it.

Small family companies could consider salary / bonus payments to family members within the PA (with the added advantage that as long as the pay is commensurate with duties performed and made for the purposes of the business, a corporation tax deduction can be taken without creating a corresponding income tax liability).

Some care must be taken as to not trigger an NIC charge for either the company or the employee as the primary earnings threshold for NIC is lower than the PA (the earnings threshold for 2017/18 is £8,164). A payment of earnings between the lower earnings limit of £5,876 and £8,164 will therefore avoid an NIC charge while also creating an entitlement to retirement benefits (as earnings in this band will count toward the employee’s contribution record).

While this sounds quite straightforward, do remember that earnings must be properly reported to HMRC. This means complying with RTI procedures for payroll purposes (which can be onerous and time consuming) and perhaps even setting up an auto-enrolment pension scheme that could be very burdensome for a business with no other employees. Out-sourcing the payroll function is always an option (providing this is cost-effective).

Some small shareholder-run businesses therefore choose alternative methods of using family PAs such as paying dividends on different classes of shares. While this does not bring with it the corporate deduction, the process is much less onerous and can be made without payroll, NIC or pension considerations. Remember that the combined effect of the personal allowance, dividend allowance and basic rate band means that a spouse with no other income can receive £45,000 of dividend income in 2017/18 at an income tax cost of just £2,137 (an effective rate of just 4.75%).

At the other end, remember that the PA is restricted where total income exceeds £100,000 so deferring income until after 5 April may be in order where the threshold would otherwise be breached. Even larger companies may be open to waiting until after 5 April to pay a bonus if you ask nicely.

Alternatively diverting income to a spouse to keep both spouses’ income below the £100,000 abatement threshold should also be considered. This isn’t always straightforward but can be achieved by putting bank accounts into your spouse’s name, or transferring interests in assets such as shares and properties to your spouse in order that income from those assets is subsequently diverted. [Note that it is the asset that must be transferred and not just the income stream as the mere diversion of income alone could lead HMRC to argue that the arrangement is a settlement and that the income is therefore taxable in the hands of the original settlor being the donor spouse.]

Since the introduction of the finance cost restrictions for property businesses, it is even more important for rental profits to arise to the lower income spouse as basic rate tax-paying landowners will be unaffected by the restrictions. However whilst transferring a property to a spouse is relatively straightforward, transferring a mortgage with it is less so and usually requires either permission from the lender or the making of a fresh mortgage application (and as any new application will be based on the recipient spouse's income, one can't always expect the lender to offer the same terms). Transference of a property encumbered by mortgage may also bring with it a Stamp Duty Land Tax liability that is often overlooked.

Achieving the same result for unmarried couples is more difficult due to the CGT considerations. Transfers between non-spouses take place at market value so unless the asset being transferred is eligible for business gift relief (most commonly shares in unlisted trading companies or furnished holiday lets), the transfer will generate a chargeable gain. Assets subject to transfer should therefore be carefully selected with the objective of choosing assets which generate income (and therefore achieve the result of diverting that income to a lower-tax partner) but where no gains arise, either because of the value of the asset at the date of transfer or due the nature of the asset. For this reason bank accounts and gilts are popular candidates for transfer as they are not chargeable assets for CGT.

Using PAs of minor children is not always possible. Diverting income from a parent to a minor child will mean that any income above £100 will remain taxable on the parent under the parental settlement rules. However grandparents (or other relatives) are not parental settlors so any income diverted from non-parents to children can utilise PAs. In particular, if minor children are beneficiaries of a non-parental discretionary trust, the Trustees should be asked to consider income distributions to utilise PAs before the year end. As such distributions will carry a 45% tax credit, a net distribution of £6,325 will be covered by the PA. The 45% tax credit (£5,175) will subsequently be repaid. You will probably need the tax deduction certificate R185 so make sure you get one from the Trustees. Distributions need not be direct cash payments and can take the form of payments made for the benefit of the beneficiary such as meeting school fees.

Where one spouse has been unable to fully utilise his/her personal allowance, an election can be made to transfer some of the unused PA to their spouse. Only 10% of the PA can be transferred with relief given to the donee as a 20% tax reducer. The tax saving for 2017/18 is therefore £230. While this is a moderate amount, the claim to transfer the unused PA has a 4 year time limit and can therefore be backdated to 2015/16 (being the first tax year for which the relief applied). The claim will continue until it is withdrawn. The claim can only be made where neither spouse pays income tax at the higher rate.

Watch the child benefit clawback charge

Where child benefit is being claimed, care should be taken if possible to keep each parent's income below £50,000 to avoid the High Income Child Benefit Charge. This claws back child benefit at 1% of the benefit claimed for every £100 of income over £50,000. For a family with 3 children, this equates to a marginal tax rate of 65% on income between £50,000 and £60,000. Remember that 2 parents each with income of £50,000 will be able to claim full child benefit, whereas a family in which one spouse has £60,000 of income and the other spouse has none will be subject to a full clawback. This isn't necessarily fair but it is reality.

Make pension contributions

If income already exceeds £100,000, consideration could be given to making personal pension contributions by 5 April. The gross amount of such contributions are treated as reducing income when determining the PA abatement and this produces an effective rate of relief of 60% on pension contributions where income is between £100,000 and £123,000. Pension contributions can no longer be carried back to the previous tax year so the payment must be made on or before 5 April to reduce income for that tax year.

Care should be taken not to exceed the annual allowance (AA), or an annual allowance claw back charge could be triggered. The AA is currently £40,000, however it can be increased by any unused AA of the previous 3 tax years, thereby giving an opportunity to make substantial pension contributions without a corresponding claw back charge. Remember that the annual allowance is only £10,000 for those with income over £150,000 thereby narrowing the planning possibilities.

For those clients with spare cash to invest, the pertinent question is not how much could they contribute to a pension scheme but how much should they contribute. As a rule of thumb, pension contributions should ideally attract income tax relief at the highest possible rate that means making contributions such that there is still some taxable income - £1 will do - in the higher rate band. Taking taxable income below the basic rate threshold means that only basic rate relief is obtained on the pension contributions. In such case clients are normally better advised to defer contributions and spread them forward to obtain higher rate relief in later years. A “back of the envelope” approach to this is that pension contributions in 2017/18 should not exceed £(Total income – 45,000) x 80%.

Note that making charitable donations under Gift Aid also has the effect of reducing income when determining the PA abatement (and the child benefit clawback). In this case it is sensible for any such donations to be made by the spouse with income chargeable at the higher rates.

Employees could consider giving up salary and/or bonuses in return for employer pension contributions (salary sacrifice arrangements still work for a limited number of benefits including pension contributions). Employer contributions are tax free benefits thereby giving a tax and NI saving for the employee and an NI saving (and a corporate deduction) for the employer. Again the impact of annual allowance must be borne in mind.

Use your dividend allowance

This is £5,000 for 2017/18 but is reducing to £2,000 from 6 April 2018, so take advantage of the higher allowance while you still have time.

However do remember that although dividends will be taxed at zero percent within the £5,000 dividend allowance, they still count as income for the purpose of the child benefit charge and for abatement of personal allowances, so taking dividend income can sometimes inadvertently create a charge where one is not anticipated.

Similar comments can be made in respect of the Personal Savings Allowance (£1,000 for basic rate taxpayers, £500 for higher rate taxpayers) that should also be used if possible. This can be engineered by small family companies as director loan accounts can pay interest at a commercial rate to generate income within the allowance. In most cases the interest paid should be corporation tax deductible.

However income tax should be withheld at source by the company under the CT61 system so many practitioners may think that the compliance burden outweighs the (relatively moderate) tax benefits.

Family companies perhaps have more scope to take advantage of the interest rules in cases where a director has little or no income (for example director's fees or salary within the personal allowance). In addition to the Personal Savings Allowance, taxpayers have a 0% starting rate band for savings income (ie, interest) which applies where taxable non-savings income is less than £5,000. Therefore a director with a salary of £11,500 could then receive a further £6,000 in interest without any liability to income tax. Popping a further £5,000 in dividends on top means that £22,500 can potentially be paid before the year end without an income tax charge. If the interest is derived from a director's account credit then companies should ensure that the interest is actually paid to the director before 5 April (accruing for the payment is not sufficient). Again any payments would need to be made via the CT61 system with the tax withheld subsequently reclaimed.

No Personal Savings Allowance is available for additional rate taxpayers so any deposit accounts, gilts or other interest bearing products should, wherever feasible, be held by the spouse not paying tax at this rate. An inter-spouse transfer before 31 March in respect of a product paying interest on 31 March would therefore be effective.

Use your annual ISA allowance

This is £20,000 in 2017/18. This is perhaps less important than it used to be with low interest rates and the Personal Savings Allowance, but for investors with savings income in excess of the PSA, these remain useful vehicles. Again the ISA allowance is available for each family member.

One point to bear in mind here is that Lifetime ISAs were introduced in April 2017 to help investors save either for a first home or towards retirement. The government will add a 25% cash bonus on deposits up to £4,000 per year. This is "free money" of potentially £1,000 per annum and can be accessed even if you already have a home.

However only individuals aged between 18 and 40 can open a Lifetime ISA (the entry door closes on one's 40th birthday). Therefore anyone under 40 should be advised to take out a Lifetime ISA (even with a minimum deposit) as contributions can then be made a later date in order to attract the government bonus. For retirement savers, any funds in a Lifetime ISA can be withdrawn without penalty at aged 60. Unlike pensions, any withdrawals are tax-free. Practitioners should consider mentioning this to their under-40 clients.

Reduce tax liabilities by using EIS or VCT schemes

Schemes such as EIS remain very useful in reducing income tax liabilities and deferring gains. With a 30% tax reducer on offer, an EIS investment that eventually returns more than 70p in the pound (after at least 3 years) will be a profitable one.

Gains on EIS shares are exempt after 3 years. Even in the event that the investment is loss-making, income tax relief is available for the capital loss on an eventual disposal thereby further mitigating any liability.

EIS investments also permit the deferral of capital gains on any asset until such time as the EIS shares are disposed of. Retaining the investment until death is particularly attractive (if death can ever be described as such) as the deferred gain is washed-out without charge and any value left in the shares after 2 years will almost inevitably qualify for 100% business property relief.

The Seed EIS offers an even larger carrot in the form of a 50% tax reducer on investments up to £100,000 in smaller early-stage companies. A further CGT relief is given when gains are reinvested into SEIS shares with 50% of those gains qualifying for full CGT exemption (capped at £50,000). Once again gains are exempt after 3 years and losses are eligible to be offset against income.

VCT's also offer a way of reducing the income tax liability by 30% of the investment and the collective-investment nature of VCTs tend to make them (in theory) more predictable. In addition dividends are tax-free (and unaffected by the dividend allowance) and any capital gains are also exempt from CGT.

However one of the drawbacks of VCTs can be the difficulty in selling them since, although they are a listed stock market investment, no income tax relief is available for the buyer of a second-hand VCT therefore the price is driven down.

EIS and SEIS investments can be deferred until after 5 April as the subscription can be carried back and treated as made in the previous year. There is no such carry back facility with VCTs.

Contributed by Steve Sanders

Scottish income tax higher rate threshold lowered

The Scottish government has updated its draft Budget proposals, lowering the income tax higher rate threshold to £43,430 (announced originally at £44,273). Earnings above this figure will attract income tax at 41% in Scotland from 6 April 2018. The new threshold represents a 1% increase on the level for 2017/18.

The updated income tax proposals for 2018/19 are:

Income Bands	Rate	-
Starter Rate	£11,850* - £13,850	19%
Basic Rate	Over £13,851 - £24,000	20%
Intermediate Rate	Over £24,001 - £43,430	21%
Higher rate	Over £43,431 - £150,000*	41%
Top Rate	Above £150,000 **	46%

* Assumes individuals receive the standard UK Personal Allowance.

** Those earning more than £100,000 will see their Personal Allowance reduced by £1 for every £2 earned over £100,000

news.gov.scot/news/budget-stage-1

Devolved Welsh taxes

Welsh rates of income tax

From 6 April 2019, Welsh rates of income tax will be introduced. The income tax will continue to be collected by HMRC but the revenue from the Welsh rates of income tax will go to the Welsh Government.

Land Transaction Tax

From 1 April 2018 Land Transaction Tax will replace Stamp Duty Land Tax in Wales and the Welsh Revenue Authority will collect the Land Transaction Tax due.

HMRC will not accept SDLT returns for land transactions in Wales with an effective date of transaction on or after 1 April 2018.

Landfill Disposals Tax

From 1 April 2018, Landfill Disposals Tax will replace Landfill Tax in Wales and will be payable by landfill operators in Wales. The Welsh Revenue Authority will collect the tax due.

www.gov.uk/government/news/uk-and-welsh-governments-confirm-next-steps-in-welsh-tax-devolution

Employment matters **(Lecture B1061 – 15.23 minutes)**

Car benefits

Where a car is made available to an employee by reason of his employment, the income tax charge is based on a percentage of the car's list price, graduated according to the level of the car's CO_2 emissions measured in grams per kilometre (g/km).

For 2018/19, the table of percentages reads as follows:

CO_2 emissions in g/km	%
0 – 50	13%
51 – 75	16%
76 – 94	19%
95 – 99	20%
100 – 104	21%
105 – 109	22%
110 – 114	23%
115 – 119	24%
120 – 124	25%
125 – 129	26%
130 – 134	27%
135 – 139	28%

140 – 144	29%
145 – 149	30%
150 – 154	31%
155 – 159	32%
160 – 164	33%
165 – 169	34%
170 – 174	35%
175 – 179	36%
180 or over	37%

Diesel cars

The 3% diesel supplement is being increased to 4% with effect from 6 April 2018 by Cl 9 F(No2)B 2017. However, following the introduction of a new standard (RDE2) for nitrogen oxide emissions, diesel cars registered on or after 1 September 2017, which are certified to meet the relevant RDE2 criteria, are not subject to any diesel supplement. It is still the case that the 4% supplement cannot take the overall charge for a diesel car beyond 37%.

Car fuel benefits

Under the car fuel regime introduced by FA 2002, where employees have private fuel paid for by their employer, the same percentage which applies to the car's list price for car benefit purposes is also applied to a statutory fuel figure known as a 'multiplier'. For 2018/19, this figure has risen by £800 to £23,400 (SI 2017/1176).

Deductions from seafarers' earnings

By virtue of Ss378 – 385 ITEPA 2003, a 100% deduction is available against the relevant part of the earnings from a seafarer's employment where his duties are performed wholly or partly outside the UK during the course of an 'eligible period'. The term 'eligible period' means a period of at least 365 days which is either a period of consecutive days of absence from the UK or a 'combined period'. A 'combined period' is a period:

- in which at least half of the days are days of absence from the UK; and
- which consists of three consecutive periods (A, B and C) where:

  A is a period of consecutive days of absence from the UK;

  B is a period of not more than 183 days; and

  C is a period of consecutive days of absence from the UK.

A seafarer's duties are treated as performed outside the UK if they are performed on a voyage which begins or ends outside the UK (but excluding any part of the voyage starting or finishing within the UK).

Cl 7 F(No2)B 2017, which will have effect from the date of Royal Assent, extends this 100% relief to employees of the Royal Fleet Auxiliary. The Royal Fleet Auxiliary is a civilian-manned fleet owned by the Ministry of Defence that provides logistical support to the Royal Navy. Employment in the Royal Fleet Auxiliary counts as Crown employment and Crown employees are specifically precluded from obtaining the seafarers' earnings deduction (SED).

Hitherto, employees of the Royal Fleet Auxiliary have been permitted to claim the SED on a concessionary basis, but the Government have sensibly decided to put the relief onto a proper statutory footing in order to give certainty to employees of the Royal Fleet Auxiliary.

Termination payments – foreign service relief

In the past, employees who received termination payments where they have spent all or a substantial part of their employment overseas have been eligible to qualify for what is known as 'foreign service relief'. This could potentially give them income tax relief of an amount greater than the standard £30,000 deduction. Indeed, in some cases, the payment would be completely exempt from income tax.

The Government believe that foreign service relief has now become, as they put it, 'outdated and unnecessary'. They have therefore decided that those who have worked abroad but are resident in the UK in the tax year in which their employment is terminated should be subject to exactly the same rules as those who have not been abroad (Cl 10 F(No2)B 2017). Such individuals will benefit from the existing £30,000 exemption, but nothing further.

The measure will apply to those who have their employment contract terminated on or after 6 April 2018. This is the case even if the payment is received from 14 September 2017 onwards in advance of the termination of the employment.

Those who are non-UK resident when their employment is terminated are not liable to income tax on any termination payments which they receive.

Contributed by Robert Jamieson

Television journalist caught by intermediaries legislation

Summary – BBC TV journalist, who was paid through a personal services company, should be treated as an employee rather than a self-employed contractor under the intermediaries legislation.

Christa Ackroyd, a television journalist, has been engaged in a variety of media roles since the 1970's. In 2001 she moved to present "Look North" on BBC1 and continued to do so until 2013. She worked under two fixed term contracts between the BBC and Christa Ackroyd Media Ltd, her personal service company. The first contract was dated 29 May 2001 and was followed by a later contract dated 4 May 2006 ("the Contract") that was erminated by the BBC in 2013.

HMRC made the determinations covering the second contract (2006 to 2013) reaching their decisions on the basis that the hypothetical contract between the BBC and Christa Ackroyd, would have been a contract of service rather than a contract for services. Under the intermediaries legislation she was an employee and her company should have accounted for tax and national insurance totalling just short of £420,000.

By contrast, Christa Ackroyd contends that she was a self- employed contractor, with nothing payable her personal service company.

Decision

The First Tier Tribunal said that they understood that this appeal was one of a number of appeals involving television presenters and personal service companies but stated that this was not a lead case as such.

They decided that the most significant factor to be taken into account when reaching their decision included the fact that the BBC could control what work Christa Ackroyd did under the hypothetical seven year contract. They said that she effectively performed a full time job, as under the contract she was providing her services for up to 225 days per year. She was said to be 'economically dependent on the hypothetical contract with the BBC'.

Other indicative factors of her employment status were that:

- The BBC had the right to specify what services her company would provide with the BBC's editor having ultimate control over programme content;

- Christa Ackroyd Media Ltd was not allowed to send a substitute for Christa Ackroyd;

- Christa Ackroyd was restricted from providing services to other UK organisations without consent.

The First Tier Tribunal found in favour of HMRC.

NOTE: Historically contractors were often unable to control the way in which they were hired with the client insisting on paying the contractor through a personal service company. However, from 6 April 2017 the IR35 rules in respect of payments made by public body clients to intermediaries were changed. These days the public body must decide whether the IR35 rules apply and, if so, deduct income tax and NICs rather than the intermediary.

Christa Ackroyd Media Ltd v HMRC (TC06334)

Deemed domicile rule changes – an overview

HMRC have issued a brief overview of the new rules on deemed domicile, introduced by Finance (No 2) Act 2017, affecting the remittance basis for income tax and CGT with effect from 6 April 2017.

Leaving the UK before 6 April 2017

Prior to 6 April 2017 those resident but not domiciled in the UK:

- were liable to UK tax on all income and capital gains arising in the UK;

- could claim the remittance basis and only pay UK tax on foreign income and capital gains when remitted to the UK;

- could claim tax relief on overseas workdays for the first 3 years they were UK resident;

Changes from April 2017

Under the new deemed domicile rules effective from 6 April 2017, taxpayers will no longer be able to claim the remittance basis and will be assessed on your worldwide income and gains on the arising basis. A taxpayer is domiciled in the UK if they meet either Condition A or Condition B.

Condition A

To meet this condition they must:

- be born in the UK;
- have the UK as your domicile of origin;
- be resident in the UK for 2017 to 2018, or later years.

Condition B

Taxpayers are deemed domiciled in the UK if they have been UK resident for at least 15 of the 20 tax years immediately before the relevant tax year.

Counting years

All UK tax years of residence must be counted including:

- tax years under the age of 18
- any tax year split into a UK and overseas part is counted as a year of UK residence

Losing deemed domicile status

A taxpayer can lose deemed domiciled status B, if they leave the UK and there are at least 6 tax years as a non UK resident in the 20 tax years before the relevant tax year.

Domicile of choice outside of the UK

If a taxpayer was born in the UK and has a UK domicile of origin, they can acquire a domicile of choice outside the UK under common law, if they have resided in another country or law territory with the intention of staying there permanently.

If they then return to the UK on or after 6 April 2017 and become UK resident for that year, they will automatically be deemed domiciled in the UK for tax purposes, under Condition A.

Leaving the UK before 6 April 2017

Condition B will not be met if:

- The taxpayer is not UK resident for the relevant tax year
- There is no tax year beginning after the 5 April 2017 and before the relevant tax year in which they were UK resident

www.gov.uk/guidance/deemed-domicile-rules

Remittance basis charge

From 6 April 2017 the remittance basis charge changed to 2 levels of charge:

1. £30,000 for non-domiciled individuals who have been resident in the UK for at least 7 of the previous 9 tax years immediately before the relevant tax year

2. £60,000 for non-domiciled individuals who have been resident in the UK for at least 12 of the previous 14 tax years immediately before the relevant tax year

The £90,000 charge still applies for the years 2015 to 2016 and 2016 to 2017 if you're UK resident in at least 17 of the preceding 20 UK tax years for either year.

Remittances of foreign income or gains

If a taxpayer used the remittance basis before 6 April 2017 is now deemed domiciled for tax, they must continue to tell HMRC when they remit any foreign income or gains to the UK that arose in a year when they claimed the remittance basis. Any remittances from funds that arose in an earlier year when the taxpayer claimed the remittance basis are still taxable in the year they are remitted to the UK.

Less than £2,000 unremitted foreign income or gains

The new deemed domicile legislation does not apply if the taxpayer used the remittance basis under s.809D ITA 2007. However, they must ensure that unremitted foreign income and gains are under £2,000 for the relevant tax year before deciding if they are not deemed domicile in the UK for Income Tax and Capital Gains Tax.

www.gov.uk/guidance/remittance-basis-changes

Cleansing mixed funds

A mixed fund is an overseas fund of money, which contains:

- more than one type of income, gains and capital, or

- income, gains or capital from more than one tax year.

Taxpayers can cleanse mixed funds by transferring money from one offshore account to another if they:

- are non-UK domiciled

- can identify the make-up of your mixed funds

- have been taxed on the remittance basis in any year from 6 April 2008 to 5 April 2017

- meet the conditions in s.809B ITA 2007

- meet the conditions in s.809D ITA 2007 (unremitted foreign income/gains < £2,000)

- meet the conditions in s.809E ITA 2007

Taxpayers cannot cleanse mixed funds if they were born with a UK domicile of origin. From 6 April 2017 to cleanse mixed fund accounts a taxpayer must:

- nominate the transfer
- make the transfer between 6 April 2017 and 5 April 2019
- only cleanse money
- transfer from one overseas account to another
- specify the amount for each category
- not have nominated a transfer from account A to account B before
- be a qualifying individual at the time of transfer
- make sure the transfer is for income, gains and capital, can be the whole or part of what is in the account and doesn't exceed the amounts in the account immediately before the transfer
- be able to identify the source of the funds

www.gov.uk/guidance/cleansing-mixed-funds

Amendments to the main venture capital reliefs (Lecture B1062 – 23.37 minutes)

Following the consultation issued by the Government in response to the Patient Capital Review, it was acknowledged that high-growth innovative businesses require significant levels of upfront capital and come with the downside that the risk of loss to the investor is proportionately greater than it is for most other investments.

Knowledge-intensive companies

Legislation has been introduced by Cl 16 and Sch 4 F(No2)B 2017 further to encourage investment in knowledge-intensive companies (see S331A ITA 2007 for a detailed definition of this term) via the EIS and VCT regimes. With effect from 6 April 2018:

- the maximum amount which an individual may invest under the EIS in any tax year is being doubled from £1,000,000 to £2,000,000 as long as at least £1,000,000 is invested in one or more knowledge-intensive companies (if less than £1,000,000 is invested in knowledge-intensive companies, the EIS limit for that year becomes £1,000,000 plus the actual amount invested in knowledge-intensive companies);

- the annual limit for knowledge-intensive companies receiving money under the EIS and from VCTs will be raised from £5,000,000 to £10,000,000 (note, however, that the lifetime limit is unchanged at £20,000,000); and

- if knowledge-intensive companies so elect, they are to be allowed to use the date when their annual turnover first exceeds £200,000 – this will normally be the last day of the relevant accounting period – in determining the start of the initial investing period under the 10-year maximum age test instead of the date of their first commercial sale.

These add to the incentives already available for knowledge-intensive companies.

Risk-to-capital condition

Encouraging more investment in knowledge-intensive companies seeks to redirect capital away from low-risk qualifying investments. The Government intend to legislate to ensure that all the main venture capital reliefs are targeted at growth companies. In the words of HMRC:

> 'Relief under the schemes will be focused on companies where there is a real risk to the capital being invested and will exclude companies and arrangements intended to provide "capital preservation".'

For investments made on or after 6 April 2018, a new condition set out in Cl 14 F(No2)B 2017 will become part of the EIS, SEIS and VCT rules (the 'risk-to-capital condition'). Tax-motivated investments will henceforth be excluded where the tax relief provides most of the return for an investor and where there is only a limited risk to his original investment. This risk-to-capital condition has two parts:

1. whether the company has objectives to grow and develop over the long term (which broadly mirrors an existing test); and

2. whether there is a significant possibility that the investor could suffer a loss of capital of an amount greater than his net investment return.

As already mentioned, the Government want the main venture capital schemes to be focused on support for companies with high growth potential. There is clear evidence that a significant subset of recent EIS investments concentrated on capital preservation. The risk-to-capital condition is described as 'a principled approach that enables the Government to avoid excluding certain specific types of activity, which (could) risk excluding genuine entrepreneurial businesses, whilst reducing the opportunity to use the schemes for tax-motivated investment'.

On 4 December 2017, HMRC published draft guidance in connection with the risk-to-capital condition. This can be found in Paras VCM8500 – VCM8560 of the Venture Capital Schemes Manual. When considering whether both parts of the condition above are met, HMRC will take into account all factors which are relevant to the company at the time when the investment is made. The following is a non-exhaustive list of such factors:

- the extent to which the company's objectives include increasing the number of its employees or the turnover of its trade;

- the nature of the company's sources of income, including the extent to which there is a significant risk of the company not receiving some or all of the income;

- the extent to which the company has, or is likely to have, assets which could be used to secure financing from any person;

- the extent to which the activities of the company are subcontracted to persons who are not connected with it;

- the nature of the company's ownership structure or management structure, including the extent to which others participate in or devise the structure;

- how any opportunity for investment in the company is marketed; and

- the extent to which arrangements are in place under which opportunities for investments in the company are, or may be, marketed alongside opportunities for investments in other companies or entities.

The guidance includes various practical illustrations of how HMRC will apply the new risk-to-capital rules.

Illustration

Pembroke Research Ltd is a company set up by Cambridge postgraduate students to exploit their research which they expect will eventually have wide commercial value. They have hitherto been using university facilities, but they now need their own laboratory. The directors prepare a business plan, but, as the project is high-risk and long-term and as Pembroke Research Ltd has no track record, the company is unable to attract investment from the market. Fortunately, the company manages to secure initial investment under the EIS from members of an angel syndicate and a fund manager acting as nominee for a number of individual investors. A schedule of follow-up funding is agreed for the next five years. The directors maintain a majority interest in the company. The company uses the money to build and equip a small laboratory and to employ a technician. It expects to expand the laboratory and employ more technical and administrative staff over the course of the next five years.

How the risk-to-capital condition might apply:

- Taking the above information into account, it looks as though Pembroke Research Ltd will meet the risk-to-capital condition provided that all other eligibility requirements are satisfied.

- The directors are entrepreneurs who have established a company to carry on their own business. The angel syndicate, fund manager and any other promoters have not been involved in setting up the company – they have merely been approached by the entrepreneurs to consider putting money in as independent minority investors.

- The company intends to increase its employee numbers and in due course to launch a product on the market. This suggests long-term plans to grow and develop the company's business.

- There is significant risk for the EIS investors as, at the time of their investment, there is no certainty that a commercial product can be developed or will be successful.

- When making a decision about whether the investment meets the risk-to-capital condition, other relevant factors may have to be considered along with those above.

HMRC have stated that they will decline to provide any advance assurance in connection with investments which, taking into account all the facts available to them, appear likely to fail the risk-to-capital condition.

Further VCT measures

Additional measures specific to VCTs have been introduced by Cl 17 and Sch 5 F(No2)B 2017, to include the following:

VCTs will be required to invest 30% of funds raised in an accounting period beginning on or after 6 April 2018 in qualifying holdings within 12 months from the end of the relevant accounting period.

With effect from 6 April 2019, the time limit for VCTs to reinvest their investment gains will double from six months to 12 months.

With effect from 6 April 2019, the proportion of VCT funds that must be held in qualifying holdings will increase from 70% to 80%.

Contributed by Robert Jamieson

Capital Taxes

Year-End Tax Planning -Capital taxes (Lecture P1062 – 10.15 minutes)

Use your annual CGT exemption

The annual CGT exemption offers £11,300 of tax free gains and should be used wherever possible.

The share matching rules make it more difficult nowadays to bed & breakfast holdings, but if you have shares standing at a small gain that you do not wish to retain, consider selling these before 5 April to use the exemption. You can always buy them back after 31 days (if the price is right) and this will rebase your holding to current value.

Alternatively for shares you wish to retain, bed & breakfasting is effectively possible by one spouse or unmarried partner selling and the other buying them back (or by repurchasing the shares via an ISA or through your pension fund). Again this uplifts the CGT base cost for a future disposal.

Remember that spouses each have an annual exemption so this equates to £22,600 of tax-free gains. Also remember that assets can be swapped between spouses free of both CGT and IHT, thereby enabling gains to arise in the hands of whichever spouse either has an unused exemption or has capital losses to utilise.

Transfers between non-spousal partners do not have exemption with disposals taking place at market value. Whilst this could be prohibitive in terms of making transfers of assets standing at a gain, it does open up planning possibilities where one partner has assets standing at a loss. In this case a transfer to their unmarried partner could release that loss for use against any capital gains in the year without the asset leaving the family unit. There is no ring-fencing of the loss as unmarried couples are not “connected persons” for CGT purposes (unlike relatives and descendants).

Transfers between spouses take place on a no gain / no loss basis until the end of the tax year in which the couple separates. Once 5 April has passed, any transactions between the separated couple will take place at market value (resulting in capital gains which may not qualify for deferral relief). Therefore a planning window will close on 5 April in the year of separation. Couples who have separated in the tax year and who will be looking to transfer assets between them at some point as part of a financial settlement should therefore be advised to consider doing so before the tax year ends (if this is practical in the circumstances - sometimes it simply isn’t).

Review your non-dom client base

Non-dom clients who became UK resident in the tax year 2003/04 and have been continuously UK resident since then will become deemed domiciled in the UK on 6 April 2018 (being UK resident in at least 15 of the preceding 20 tax years).

This will mean that:

- All income and gains will thereafter be taxed on an arising basis (use of the remittance basis will be denied); and

- All assets will be exposed to IHT (excluded property status for foreign assets will cease).

CGT rebasing of foreign assets will not be available (this being reserved only for those who became deemed dom in April 2017). However rebasing can be effectively achieved by selling foreign assets and buying back replacements before triggering deemed domicile (with the resulting gains sheltered by a remittance basis claim).

Alternatively gifting foreign assets to a trust before triggering deemed domicile would also rebase them for CGT (the resulting gains cannot then be remitted to the UK as no proceeds exist). Although the donor would continue to benefit from the trust, the new trust protection rules would shield the settlor from being taxed on trust income and gains until benefits are received.

Foreign assets can also be protected from IHT by transferring them to an excluded property trust before deemed domicile is triggered. Even if the settlor becomes deemed domiciled in the UK, the trust will retain its non-dom status and the foreign assets in the trust will remain excluded property. These assets can continue to be used and enjoyed by the settlor without being exposed to IHT. [With regard to the previous points, specialist advice should be sought before creating offshore trusts as care should be taken as to which legal jurisdiction should host the trust.]

Use your inheritance tax exemptions

These commonly go to waste but if you are interested in basic planning to reduce the value of your chargeable estate for IHT, there are some simple exemptions that can help.

Each individual has an annual exemption of £3,000 per tax year and any transfers within that limit are exempt from IHT. Any used exemption can be carried forward for one tax year giving potential for a couple to reduce their combined estates in 2017/18 by £12,000 without this being a transfer of value. The carry forward also means that this planning can be undertaken every other year. Regular use of this annual exemption can significantly reduce your estate over a prolonged period.

Small gifts are exempt up to £250 per donee per tax year, so cash gifts to any number of children or grandchildren can be made without IHT consequence. This can be effectively increased to £500 per donee by making the gift from a joint bank account. The donee must be an individual (and not a trust). A little care must be taken here as once the £250 limit is exceeded, the whole value of the gift is then treated as a transfer of value (not just the excess).

Perhaps the most valuable exemption in terms of significantly reducing the value of one's estate is the exemption for 'normal expenditure out of income'. This enables donors to make regular and habitual gifts out of their income completely free of IHT without monetary limit provided that the donor retains sufficient annual income to maintain his 'normal' standard of living.

'Normal' naturally varies from person to person, hence the potential for this exemption to be relatively open-ended. 'Habitual' means that some pattern of giving must be established. A one-off gift can qualify as long as this was intended to be the first in an on-going series.

This is an extremely valuable exemption for those with annual income in excess of their annual spend. This is a good time of year to assess that situation and plan accordingly.

Transferring excess income into a pension fund for one's minor children (or grandchildren) is particularly popular as not only is the gift outside the scope of IHT but the government will top up the contribution by 25%. Contributions are limited to £2,880 per annum (£3,600 gross) but small contributions at an early age allow the pension fund to grow exponentially over the beneficiary's lifetime.

Alternatively for those who prefer their children or grandchildren to be able to enjoy benefits before the ripe old age of 55, excess income could be deposited into a Junior ISA for a child. The annual donation limit is £4,128 and the money is locked in until age 18.

Finally…Review the time limits for claims

Many claims - particularly for CGT reliefs - have a 4 year time limit pegged by reference to the end of the tax year. Some claims for 2013/14 will therefore expire on 5 April 2018. Practitioners should therefore review their clients' tax returns for 2013/14 to make sure any claims made for that year are not outstanding.

Contributed by Steve Sanders

CGT changes announced in the Budget (Lecture P1063 – 16.56 minutes)

Annual CGT exemption

The annual CGT exemption for individuals and personal representatives has been increased in line with inflation to £11,700 for 2018/19. The exempt amount for most trusts is £5,850.

There are no changes to any of the CGT rates, nor to the maximum entrepreneurs' relief limit that therefore remains at £10,000,000 for 2018/19.

CGT payment window

The introduction of the 30-day window between a capital gain arising on a disposal of residential property and the payment of CGT is to be deferred until 6 April 2020.

In his Autumn Statement on 25 November 2015, the then Chancellor announced that, from 6 April 2019, a payment on account of any CGT due on the disposal of residential property would be required within 30 days of the transaction's completion date. CGT is currently due on 31 January following the end of the tax year in which the disposal takes place – this results in the tax being payable between 10 and 22 months after the actual disposal. The curtailment of the normal payment window is being postponed by one year.

This will then mirror the 30-day deadline for the submission of NRCGT returns and the payment of any related tax. It is presumably intended to correct the anomaly under which most non-UK residents are required to pay their tax within 30 days, although some – if they are already within the self-assessment regime – do not have to settle their liability until the usual 31 January date.

It will be interesting to see whether this change means that the solicitor handling the disposal transaction will in future have to deduct the estimated CGT from the sale proceeds and hand this sum over to HMRC.

Taxing non-UK residents' gains on immovable property

The Government have stated that, from April 2019, UK tax will be chargeable on gains made by non-UK residents on a direct or indirect disposal of immovable property in the UK. In addition, the existing NRCGT regime will be extended so that 'widely held' companies, ie. those which are not 'closely-held' (see Sch C1 TCGA 1992 for a definition of this term), will be subject to tax on a sale of UK residential property.

Currently, where a non-UK resident disposes of non-residential property which has been held for long-term investment purposes, that person falls outside the scope of a UK tax charge on any gain which arises. However, non-UK residents who acquire UK property with a view to sale have been subject to a UK tax charge on their profits since July 2016 – see Ss76 – 82 FA 2016. Furthermore, non-UK residents holding UK residential property for long-term investment purposes have been caught by an NRCGT charge since April 2015, unless they are diversely owned companies or widely marketed entities.

With effect from 1 (or 6) April 2019, tax will be chargeable on gains made by non-UK residents on the direct or indirect disposal of all types of immovable property in the UK. This will be the case, regardless of the nature of the property or the residence status of the disponor.

The NRCGT regime is to be broadened so that 'widely held' companies will be liable to tax on a sale of UK residential property from 1 April 2019 onwards.

Gains will arise in respect of indirect disposals where the:

- entity being disposed of derives 75% or more of its value from UK land (this is referred to as a 'property rich' entity); and
- non-UK resident owner of this 'property rich' entity holds, or has held, an interest of 25% or more in that entity at any time within the five years prior to that disposal.

For direct disposals, there will be a rebasing to April 2019 so that only the uplift in value from that date will be liable to UK tax. However, where the seller would be subject to tax under this rule but has in fact made a loss, that person will have the option of using original cost as the deductible amount. The rebasing date will be April 2019 in all cases involving indirect disposals.

This reform represents a fundamental change to how gains made by non-UK residents are taxed in the UK and will bring parity to the tax treatment of onshore and offshore structures. Although the legislation will not come into force until 1 (or 6) April 2019, an anti-forestalling measure to support these changes will have effect for arrangements entered into on or after 22 November 2017.

Entrepreneurs' relief

The Government have confirmed that they intend to hold a consultation in early 2018 on how access to entrepreneurs' relief might be given to businessmen whose holding in their company is reduced below the normal 5% qualifying level as a result of raising funds for commercial purposes by means of an issue of new shares. In the words of HMRC:

> 'Allowing relief in these circumstances would incentivise entrepreneurs to remain involved in their businesses after receiving external investment.'

One wonders whether this proposal has come about, at least partly, because of the recent Upper Tribunal decision in HMRC v McQuillan (2017).

Contributed by Robert Jamieson

Shareholder but not employee

Summary – The taxpayer was not an employee and so business asset taper relief was not available.

John Shannon was director and shareholder of Supercuts UK Ltd. On 31 October 1999 he sold his entire shareholding, a small part for cash, but the majority was sold to Regis, a US company listed on the New York stock exchange, in exchange for shares in Regis. He sold his Regis shares in 2002/03 and 2003/04.

It is common ground that the shares that were sold were business assets for taper relief between 6 April 1998 and 31 October 1999 but non-business assets for the period 1 November 1999 to 5 April 2000.

What was in dispute was whether John Shannon was eligible for business asset taper relief between 6 April 2000 and 11 July 2003. To qualify for such relief from 6 April 2000, Regis needed to be a 'qualifying company', which meant that John Shannon needed to be an employee of the company.

The share purchase agreement stated that payments to John Shannon were a 'change of control' payments. John Shannon stated that he remembered exchanging letters with Regis confirming that the Change of Control Payment would be cancelled and the payments of £100,000 a year would be employment income.

Decision

The First Tier Tribunal noted that the only relevant document that was available was the share purchase agreement. This stated that the payments to John Shannon were 'change of control' payments. Although John Shannon argued that subsequent letters had amended the agreement, there was no evidence of any changes that were made. There was no evidence that Regis had agreed to replace the change of control payments with genuine employment payments.

John Shannon v HMRC (TC 06297)

Qualifying corporate bonds

Summary - Bonds denominated in sterling but that could be converted into euros in the event that the UK joined the monetary union, were qualifying corporate bonds.

This case was the lead case for nine joint references made by partners in Tonnant LLP, an investment partnership. It was common ground that this appeal would be determinative of all the joint references.

Nicholas Trigg had purchased sterling denominated bonds at what was perceived to be an undervalue with a view to retaining them until maturity or eventual disposal at a profit. The bonds in question were all disposed of and the gains were as exempt from CGT on the ground that they were qualifying corporate bonds (``QCBs'') within the meaning of s.117 TCGA 1992.

Two types of clause identified a number of risk factors associated with the bonds' purchase including the possibility that the UK might replace sterling with the euro prior to the redemption date of the bonds. To deal with the risk of monetary union during this period, the bonds contained specific provisions which would operate in that event to convert the currency of the bonds into the new unit of currency and to facilitate repayment in that currency. Otherwise the bonds contained no terms enabling them to be converted into or repaid in a different currency from sterling.

HMRC and the taxpayer made a joint reference to the First Tier Tribunal to determine whether these clauses prevented the bonds being Qualifying Corporate Bonds (QCB) under s.117(1)b TCGA 1992 and so exempt from CGT under s115 TCGA 1992. The purpose of s117 was to encourage investment in British sterling-based securities. Under s.117 a QCB is a security expressed in sterling with no provision for conversion into, or redemption in, a currency other than sterling. S117(2)(b) TCGA 1992 provided that a provision for redemption in a currency other than sterling but at the rate of exchange prevailing at redemption was to be disregarded.

The First Tier Tribunal found in favour of the taxpayer but the Upper Tribunal reversed that decision.

The taxpayer appealed.

Decision

The Court of Appeal found that, in the event that the UK joined the monetary union, the conversion of the bonds into euros would happen by law, and not under the terms of the bonds. They said that the terms providing for redemption in another currency would only be triggered once the UK had adopted monetary union, so that no conversion would actually take place under the terms.

Trigg (a partner in Tonnant LLP) v HMRC [2018] EWCA Civ 17

Stamp Duty Land Tax Return filing

Summary – The late filing penalty was invalid but in any case the taxpayer had a reasonable excuse.

The LLP was incorporated on 15 February 2017. Its members were Hill Residential Ltd and Latimer Developments Ltd.

On 22 February 2017 thet acquired land in Surrey at a cost of £15,000,000. The SDLT chargeable on the transaction was £739,500 and the latest date for filing the Land Transaction return in respect of this purchase and for paying the tax was 24 March 2017.

On 15 February 2017, they applied to HMRC for a VAT registration number and a UTR, a Unique Taxpayer Reference number. Despite chasing, it took until 26 April 2017 for the VAT number to be received. On this date, form SDLT1 was completed and submitted to HMRC online.

On 2 May 2017 a determination of a penalty of £100 was issued by HMRC for failure to make a land transaction return by the due date but within 3 months of that date.

Decision

In Khan Properties Ltd v HMRC [2017] UKFTT 830 (TC) the First Tier Tribunal judge had held that a determination that was admittedly made by a computer was invalid. That same judge said here that since HMRC had not shown that any authorised officer had made the determination, he also held that this penalty was invalid

Although not necessary, the judge went on to consider whether the appellant had a reasonable excuse for later filing. The First Tier Tribunal were in no doubt that the actions of the appellant and its agent were the actions of a prudent person, exercising reasonable foresight and due diligence and having proper regard for their responsibilities. They sought a VAT number and UTR on the day of incorporation and before the transaction – that showed foresight. They chased HMRC on several occasions – that was due diligence. They spoke to the Helpline – that was due diligence. All of this was done because the appellant and its agent were fully aware of their responsibilities to make the return at the right time. They concluded that there was a reasonable excuse for the failure, and it was corrected within a reasonable time of the excuse ceasing, ie immediately.

The appeal was allowed and the penalty cancelled.

Hill Residential Ltd and Latimer Developments Ltd as responsible partners of Latimer Hill LLP v HMRC (TC06317)

SDLT relief for first-time buyers **(Lecture P1064 – 13.50 minutes)**

For residential property acquisitions in England, Wales and Northern Ireland made on or after 22 November 2017, a new SDLT relief has been introduced for first-time buyers in respect of purchases up to £500,000 (Cl 41 F(No2)B 2017).

By virtue of new Sch 6ZA FA 2003 (as inserted by Cl 41(3) F(No2)B 2017), first-time buyers paying £300,000 or less will pay no SDLT. For purchases between £300,000 and £500,000, it is only the price in excess of £300,000 that is chargeable to tax.

This is subject to a rate of 5%, giving a maximum SDLT reduction of £5,000 compared to what would previously have been payable. There is no relief where the purchase price exceeds £500,000.

Conditions to satisfy

Para 1 Sch 6ZA FA 2003 sets out the eligibility criteria for this important SDLT relief:

- the subject-matter of the transaction must consist of a ‘major interest’ (ie. a freehold interest or a leasehold interest which has a term of 21 years or more) in a single dwelling;

- the relief is restricted to instances where the relevant consideration does not exceed £500,000;

- the first-time buyer must intend to occupy the property as an only or main residence; and

- the transaction must not be linked to any other land transaction, unless that other linked transaction essentially consists of an interest in land which forms part of the garden or grounds of the dwelling.

First time buyer

The first-time buyer in this context means an individual who has not previously acquired a ‘major interest’ in another residential property (Para 6 Sch 6ZA FA 2003). Because the ‘no previous property’ requirement applies to residential property anywhere in the world, the phrase ‘major interest’ is taken to include equivalent interests in other jurisdictions.

If the property is acquired jointly, all individuals must all meet the definition of being a first-time buyer.

Scotland

The relief, which must be claimed in the buyer’s SDLT return, does not apply to purchases of Scottish residential property, given that they are covered by a separate land and buildings transaction tax regime.

Wales

The relief will be in point for pre-1 April 2018 purchases of residential property located in Wales. From that date onwards, SDLT is to be replaced in Wales by a special Welsh land transaction tax.

Withdrawal of relief

Para 5 Sch 6ZA FA 2003 provides that relief will be withdrawn where a later linked transaction has the effect of making the earlier transaction ineligible for relief. Two examples of this are where the later transaction:

1. takes the aggregate consideration above the £500,000 limit; and

2. includes the acquisition of another dwelling.

In these circumstances, additional tax becomes payable on the earlier transaction as if the original claim had not been made and a further SDLT return must be delivered.

Definition of a dwelling

The definition of what counts as a dwelling is detailed in Para 9 Sch 6ZA FA 2003.

Effect on property prices

This measure is part of the Government's commitment to support home ownership and first-time buyers. Introducing this SDLT relief will, they say, 'reduce the upfront costs for first-time buyers'. However, concern has been expressed that the exemption will simply have the effect of inflating property prices by the amount of the relief given. In reality, this seems somewhat unlikely. More importantly, since the new relief will not apply to acquisitions above £500,000, it effectively reintroduces the old slab rate distortion at prices around £500,000 in view of the fact that a price increase of £1 above that level will add £5,000 to the SDLT cost for a first-time buyer.

Parents helping children

Where parents are helping children to start climbing the property ladder, the first-time buyer relief makes it more likely that fathers and mothers will make a direct gift of money to their offspring rather than buying the house or flat in their own name – not only will this avoid the 3% supplementary charge but it may also qualify for the new SDLT relief.

Contributed by Robert Jamieson

Note: The Scottish government is consulting until 23 March 2018 on the proposed introduction of a land and buildings transaction tax threshold of £175,000 for first-time buyers in Scotland. The change is to be implemented through secondary legislation, intended to come into force in June 2018.

Trust Registration Service –March 5th Looming! (Lecture P1065 – 14.04 minutes)

Trusts liable to pay UK income tax or CGT must be registered on HMRC's new trust register, which has been introduced to help comply with the new Anti-Money Laundering regulations introduced in 2017. This new service replaces the 41G (Trust) paper form, which was withdrawn at the end of April 2017.

Trustees must provide details of the trust's "beneficial owners", being the settlors, trustees and beneficiaries of the trust, together with anyone else with control over the trust assets, such as a trust protector.

For trusts already within self-assessment (SA), no penalties will be charged where registrations are completed no later than **5 March 2018**.

TRS is now the only mechanism for a trust to acquire a UTR, so trusts new to self-assessment will normally be expected to register with the Trust Registration Service (TRS) by 5 October following the end of the tax year. For 2016-17 only, this was extended to 5 January 2018, since agent access to the service was delayed.

The regulations provide for both civil and criminal sanctions for late registration or failure to register with the TRS. HMRC have not yet indicated how they will be applied.

The information needed about each relevant person or organisation includes:

- name
- date of birth
- NINO if they're UK resident, unless a minor
- an address and passport or ID number for non-UK residents, if there is no NINO
- Unique Tax Reference (UTR) (if an organisation).

If all reasonable steps to obtain the information are unsuccessful (e.g. if a beneficiary's whereabouts is unknown, or a settlor is deceased), the HMRC guidance explains how trustees should enter identity information in the system. For example, if the address is not known, use either the trustees' or agent's address, but replace the post code with NK1 1NK. This will indicate to HMRC that the address is either not known or no longer exists.

Where a beneficiary is un-named, being only part of a class of persons (e.g. "my grandchildren"), you will only need to disclose the identity of the beneficiary when they receive a financial or non-financial benefit from the trust. Where there are contingent beneficiaries (e.g. arising on the death of a named beneficiary), they can be listed as a class of beneficiaries, until the contingent event occurs, when the individual potentially stands to benefit and must be named.

The same registration rules apply for personal representatives of 'complex estates', including estates that have already registered with HMRC and are still being administered.

The majority of agents have now set up an ASA (Agent Services Account), but there have been problems for those with no previous 'digital footprint' with HMRC. If an agent tried to register before 8 January 2018 and was unsuccessful, they should try again, as most of the glitches in the process have now been addressed.

If you have tried after 8 January 2018, have you obtained an agent code from HMRC and, if so, have you already acted on behalf of a client for SA or PAYE? If so, you should now be able to register using your existing UTR and agent code.

In other circumstances, you currently cannot access agent services. You need to:

- apply for an agent code in writing, then
- be appointed for an existing SA or PAYE client.

As with most HMRC IT projects, the introduction of the TRS has undoubtedly had some hiccups, but once fully up and running it should provide an easy mechanism for trustees to provide updated information to HMRC and also help in the goal of achieving greater transparency in trusts.

Contributed by Kevin Read

Administration

Low income is no excuse

Summary – The Tribunal could find nothing in what the taxpayer claimed that might constitute a reasonable excuse for the late filing of his returns.

HMRC's notice to file a tax return for 2014/15 was issued to Timothy Abbey on 6 April 2015. Exactly a year later, they issued a notice to file a tax return for 2015/16.

Timothy Abbey was self-employed but worked little in the period after his mother's death on 20 June 2015. He stated that he did not think that he needed to file a return because his income was below the personal allowance and therefore no income tax was due.

He appealed to the First tier Tribunal against both notices.

He said that because he had moved house a number of times, did not receive the various statements and penalty and warning notices from HMRC. He claimed that the first indication he had about an overdue tax return was the text message sent to his mobile phone on 14 June 2017 to which he replied straight away and submitted his accounts as soon as he could. He argued that by submitting his returns within 3 weeks of receiving a text message from HMRC on 14 June, he had proven that he was ready and willing to rectify his late submission and give proof of his earnings as soon as the message reached him.

Decision

The First Tier Tribunal said that the real reason that Timothy Abbey failed to file his tax returns was either that he simply forgot to file the returns or that he, wrongly, believed that one was not necessary because of the low level of his income. They confirmed that this is a common misunderstanding but, if HMRC decide to require someone to complete and file a tax return then they are legally obliged to do so, whatever the level of their income. In this case, HMRC decided that Timothy Abbey was required to file a tax return simply because he is self-employed.

The Tribunal said that his belief that he did not need to fie a return was not a reasonable excuse. His belief was simply his personal view that it did not make sense for him to file a return when his income was below the personal allowance threshold.

Timothy Abbey did not say that he did not receive the notices to file a return for the years in question and although HMRC records on this point were not totally persuasive, it seemed highly likely that notices to file were sent to the addresses on HMRC records at the time and they are therefore deemed to have been properly served.

The Tribunal concluded that Timothy Abbey either made a mistake as to his requirement to file a tax return or simply forgot that he was required to file a return. They stated that the law does not provide relief for mistakes, but only for what is deemed to be a reasonable excuse.

The appeal was dismissed.

Timothy Michael Abbey v HMRC (TC06303)

Failure to file non resident CGT (NRCGT) returns on time

Summary – Ignorance of the law was not a reasonable excuse for late filing but the need to file three NRCGT returns in one tax year amounted to special circumstances and the penalties were reduced.

Robert Welland was non UK resident and owned three UK properties that he let out. He sold them all in 2015/16. He started to complete his 2015/16 self-assessment return in August 2016 and on reading the paperwork, he became aware that he ought to have completed NRCGT returns within 30 days of completion of each sale. He completed and submitted the NRCGT returns at that point. It meant that the first two returns were more than a year late; the third return was more than six months late. The returns showed that in each case the disposal date was the same date as completion.

As the returns showed, Mr Welland owed nothing in capital gains tax as although he made a small profit on each of the three sales, the total profit was within his annual allowance.

HMRC levied late filing penalties in respect of the returns on all three properties.

Both parties agreed that HMRC had made clear the new 30 day reporting requirement on their website but Robert Welland's point was that he did not consult the website and considered that HMRC should have done more to publicise the change. Robert Welland appealed against the penalties arguing that he was not aware of the requirement to file NRCGT returns, HMRC failed to make him aware of the requirement to file NRCGT returns;, the penalties were disproportionate because he owed no tax on the sales and up until these penalties were imposed, he had a good tax compliance record.

Decision

The Tribunal confirmed that HMRC had the burden of proving that the penalty was properly imposed. The Tribunal did not consider that HMRC needed to prove every pre-condition for liability to file an NRCGT return as Robert Welland impliedly accepted that he was 'required' to file the NRCGT returns. Therefore, HMRC's failure to prove that the properties were residential, and that the disposal was not 'no gain/no loss' did not matter. They found that Robert Welland was liable to make the NRCGT returns that he did make, but late.

So the question for the appeal was whether or not the penalties imposed should be discharged because he had a reasonable excuse or special circumstances?

Robert Welland's ignorance that his property sales had to be declared 30 days after completion rather than in his self-assessment return was not a reasonable excuse; compliance with a filing obligation is basic law and his ignorance arose from his failure to investigate the matter rather than because the law was difficult or uncertain.

HMRC could have done more to alert potential defaulters to the need to file NRCGT returns but their failure to do so did not justify being a reasonable excuse; it did not cause the failure to file on time.

When considering whether there were ‘special circumstances’, the Tribunal said that:

- returns often have to be made where the tax due is nil; if Parliament had intended that this would be an excuse for not filing a return where the tax was nil, it would have required that returns did not have to be made unless there was a tax liability.
- an exemplary tax compliance record should not be unusual or special: on the contrary, it should be the norm.

However, Robert Welland, selling three properties in one tax year was fell foul of the reporting requirements three times in one year. It was clear that he did learn from his mistakes: he filed as soon as he realised his mistake. The Tribunal concluded that this was a special circumstance, particularly in circumstances where the taxpayer has previously had a good compliance record. The Tribunal said that the penalties should be reduced so that only the penalty on the first sale in 2015/16 should be payable.

Robert Clive Welland v HMRC (TC06265)

Employee benefit trusts – insufficient warnings

Summary – The Court of Appeal overturned the High Courts decision by finding that the solicitors were negligent in not warning their clients that the scheme could fail.

In 1998, Mr Barker, advised by his solicitors, had transferred his company shares into an Employee Benefit Trust .The trust provided that, on the death of Mr Barker and his wife, trust funds could be applied for the benefit of the Barkers’ children. Under this scheme, Mr Barker hoped to pass on his shares to his children, avoiding the payment of inheritance tax and capital gains tax.

To be effective, s.28(4) IHTA 1984 states that the Employee Benefit Trust cannot be used to benefit individuals who are ‘connected’ with a ‘participator’ in the underlying company. There was a dispute over how this should be interpreted. Did this mean connected with the participator at the time the original transfer into the trust was made so that the family could never benefit or, did it mean that they were connected when a benefit was provided? The trust was set up on the basis that the second interpretation applied with the family members being able to benefit after the transferor’s death.

The taxpayer ultimately settled with HMRC on the basis that the first interpretation was correct, hence the trust did not qualify for the exemption.

A professional negligence claim was issued against the solicitor and his firm claiming that they should have specifically warned Mr Barker before he transferred his shares to the trust, that there was a significant risk that the trust would fail because it did not exclude as beneficiaries after his death his family members who were connected with him in his capacity as a 'participator' in the company.

Decision

The Court of Appeal agreed with HMRC's interpretation that the inheritance tax exemption did not apply and found that the advisers, Baxendale Walker should have <u>specifically</u> advised their client of the risk of this.

The judge said:

> 'It would have been obvious to any reasonably competent solicitor practising in this area that there was a real risk that HMRC would take the post-death exclusion construction point at some stage and, if necessary, would pursue it through the tribunal and court system, especially as the EBT arrangement was founded on the ability of Mr B's family to benefit after his death which was its purpose and there was a considerable amount of tax at stake.'

The judge said there was a significant risk that the trust arrangement would not work due to the post-death exclusion construction, which was central to its structure. By not advising that the planning might not work in the way intended, the solicitor was negligent.

The appeal was allowed.

Barker v Baxendale Walker Solicitors (a firm) & Ors [2017] EWCA Civ 2056

HMRC factsheet: Requirement to correct

From 1 October 2018, new, substantially higher penalties will apply for those who have failed to correct their tax position and pay all the tax due on foreign income and assets. This includes income from or an asset in the Channel Islands, Isle of Man, the Republic of Ireland, the EU or anywhere else in the world.

'Requirement to Correct' (Finance (No 2) Act 2017, Sch 18) requires UK taxpayers to make sure that all foreign income and assets, where there might be tax to pay, have been declared to HMRC before the 30th September 2018.

The main route to let HMRC know about previously undeclared income or assets is the Worldwide Disclosure Facility through the Digital Disclosure Service. This is the final opportunity to make a disclosure before the penalties rise.

To make a disclosure, or for further information on the Worldwide Disclosure Facility, visit www.gov.uk/guidance/worldwide-disclosure-facility-make-a-disclosure.

Technical guidance on the Requirement to Correct for agents and advisors can be found at www.gov.uk/guidance/requirement-to-correct-tax-due-on-offshore-assets.

Sufficient information for discovery

Summary - A hypothetical officer had enough information, at the time the enquiry window closed, to establish an insufficiency of tax. HMRC had not established that, on the balance of probabilities, the condition in s 29(5) was satisfied.

HMRC raised discovery assessments for trading losses that John Hicks claimed had resulted from arrangements devised by Montpelier. John Hicks appealed.

The HMRC officer who issued the assessments became involved in the case in 2014. At this stage HMRC was gathering information on the scheme in relation to three representative members but not John Hicks. The officer had to spend time understanding the facts and HMRC's arguments.

In November 2014, having concluded the scheme did not work, he wrote to John Hicks setting out his conclusions and seeking a settlement. In March 2015, he issued the assessments.

John Hick’s return had included the scheme reference number as well as a large tax loss and equivalent non-taxable receipt. These led HMRC to open an enquiry.

The information provided before the closure of the enquiry window included:

- details of the dividend trades claimed to give rise to the loss;
- 'reasonably extensive' information on transactions implemented under the scheme;
- information on the activities undertaken by John Hicks in his regular financial trade.

Decision

HMRC discovered the liability in summer 2014 and the First Tribunal Judge said that 'a delay of at most nine months between discovery and assessment' was not exceptional.

S29(5) TMA 1970 requires that, when the enquiry window closed, a hypothetical HMRC officer could not reasonably have been expected, on the information made available before that time, to be aware of the insufficiency of tax.

The First Tier Tribunal concluded that the hypothetical officer had enough information, at the time the enquiry window closed, to establish an insufficiency of tax. HMRC had not established that, on the balance of probabilities, the condition in s 29(5) was satisfied.

Finally, the judge said it was not necessarily careless for the taxpayer 'to enter into a packaged tax avoidance scheme, even in the knowledge that HMRC might well challenge the promoter's interpretation of the legislation'. In the circumstances, it would not have been necessary for him to have sought a second or third opinion on the scheme to avoid carelessness. It was 'important not to judge carelessness within s 29(4) with the benefit of hindsight'.

Further, the taxpayer had not been careless to claim a loss in his 2010-11 return when that for 2009-10 was under enquiry. This was a 'typical HMRC enquiry into a marketed tax scheme' and did not produce results until long after the 2010-11 return was submitted.

The taxpayer's appeal was allowed.

Andrew Hubbard said:

'This is an important decision on two counts.

First, it makes clear that carelessness in responding to an HMRC enquiry is not relevant to the test in s 29(4). For a discovery assessment to be issued HMRC must show that a failure to take reasonable care must have brought about the insufficiency in the return itself: what may have happened during the course of an enquiry has no bearing on the matter.

Second, the judge's analysis of s 29(5) interprets the “available information” test in a way that reflects the original intention of the legislation.

His statement “However the 'awareness' threshold is set, I do not consider that subsection (5) allows or is intended to allow HMRC to issue assessments which ignore the normal time limits while they spend further time in polishing a justifiable assessment as at the closure of the enquiry window into a knockout case” brings a clarity to the test that I hope will set the benchmark for future discovery cases.'

John Hicks v HMRC (TC6301)

Adapted from Taxation (8 February 2018)

Simplifying PAYE settlement agreements

HMRC is consulting until 21 February 2018 on amendments to the PAYE regulations. From April 2018 they are proposing that employers will no longer need to renew PAYE settlement agreements annually, providing instead for an 'enduring agreement'.

The draft regulations set out the form of the revised PSA, which will continue to have effect for each subsequent tax year until varied or cancelled, either by the employer, or HMRC. The regulations will also allow applications to be processed electronically, should digitised processes become available in the future. There is no intention to amend the benefits in kind or expenses which can be covered by a PSA.

HMRC intends to publish new guidance in the PAYE manual in due course.

NICs amendments

The Social Security (Contributions) (Amendment) Regulations, SI 2018/120, which come into force on 6 April, amend the treatment of the following payments to align with income tax changes:

- valuation of non-cash vouchers and certain motoring expenses provided under optional remuneration arrangements (salary sacrifice);
- restriction to 'eligible employees' of the NICs disregard for qualifying childcare vouchers; and
- exemption from employer class 1A NICs on certain sporting testimonial payments for 2018/19 and subsequent years.

Discovery? Employment loss shown on partnership pages

Summary – The taxpayer had not submitted an inaccurate return and in any case, no discovery had been made.

The taxpayer participated in the Romangate scheme that was designed to produce an income tax loss in 2008/09. The intention was to carry the loss back to 2007/08 and claim tax of £475,498.20.

HMRC-approved software provided by IRIS Software Limited did not cater for employment losses incurred in a later year to be carried back as there was a technical issue with box 3 on page Ai3 that was confirmed by a technical engineer at IRIS.

As a result Raymond Tooth entered the loss on the partnership pages of his return and made a white space disclosure informing HMRC of what he had done, pointing out that it was an employment loss and not a partnership loss that was being claimed.

HMRC enquired into the claim but did not raise an enquiry into the 2007/08 return: it took no action because of the continuing uncertainty about the interaction between enquiries into claims and returns exposed by CRC v Cotter [2013 STC 2480. When the Supreme Court found in favour of HMRC in that case, the department wrote to Raymond Tooth stating that, as a result, the tax was due for collection. Raymond Tooth argued that Cotter required HMRC to enquire into the return rather than the claim. HMRC accepted this. It then issued a discovery assessment for 2007/08.

Raymond Tooth appealed on two grounds:

1. HMRC had not made a discovery;
2. The assessment was out of time because it could be issued only if there was a deliberate inaccuracy in a document and this did not apply in this case.

The First-tier Tribunal held that a discovery had been made but HMRC had not established that there was a deliberate inaccuracy. HMRC appealed to the Upper Tribunal.

Decision

The return was based on a bona fide, albeit controversial interpretation of tax. The fact that the interpretation was later found to be wrong did not necessarily render the return inaccurate when it was made. In addition, the taxpayer had clearly stated the position he was taking in his return — there was a full white space disclosure. The inclusion of an employment loss on the partnership pages was inaccurate but, in the overall context, the approach taken by the taxpayer due to the technical issue with the software did not constitute an inaccuracy. The Upper Tribunal decided that there was no inaccuracy and this was enough to conclude the matter.

However, the tribunal went on to consider that if it was wrong on that point, would the inaccuracy have been classed as deliberate? Again the Tribunal looked at the return as a whole and decided that, because the taxpayer had alerted HMRC to the potential inaccuracy, he had not acted deliberately.

The tribunal also looked at whether a discovery had been made. It took the view that if any discovery had been made, it was made in 2009 when HMRC first challenged the employment loss.

HMRC's appeal was dismissed.

Andrew Hubbard said: 'This is an important decision. The finding that an entry on a return is not inaccurate if it is based on a bona fide interpretation of tax law will be useful in many contexts. …..The tribunal clearly did not approve of HMRC attempting to use the discovery rules to have a second bite of the cherry where it had not opened the right enquiries at the right time.'

HMRC v Raymond Tooth [2018] UKUT 0038 (TCC)

Adapted form the case summary in Taxation Magazine (14 February 2018)

Tax assessments and Confiscation orders

Summary – The First Tier Tribunal had been wrong to set off a tax assessment against a confiscation order.

Malachy Higgins had been convicted by the Crown Court for keeping, treating and disposing of controlled waste in a matter likely to cause environmental pollution or harm to human health, and for breach of a discharge consent issued by the Department of the Environment. He had been sentenced to four months imprisonment and issued a confiscation order for £400,000, which was silent as to whether this amount represented a gross payment less the landfill tax. The National Crime Agency (NCA) had then served notice to Malachy Higgins that it was taking over the general revenue functions of HMRC in respect of his tax returns for the years 1996/97 to 2003/04 under the Proceeds of Crime Act 2002 s 317.

Malachy Higgins appealed against a 'best judgment' tax assessment under s29 TMA 1970. He contended that the confiscation order had been paid on the basis that £400,000 reflected his criminal benefit; and that any income tax payable on the gross receipts had been discharged when he had paid the full amount. The NCA considered that the proceedings were solely concerned with Malachy Higgins' liability to tax and to the recovery of tax. The confiscation order was therefore irrelevant and there was no issue of double recovery.

Decision

The Upper Tribunal observed that the criminal or ‘relevant’ benefit and taxable profits with related income tax liability are different:

- Tax liability is assessed on the profits made by the operator;
- Relevant benefit is assessed on the amount of the avoidance of landfill tax and/or the receipt of income from permitting the illegal dumping.

Mr Higgins had produced no evidence to challenge the assessment of the taxable profits made by the NCA, and had assumed that the payment of the confiscation order must have extinguished his tax liability.

The Upper Tribunal added that the First Tier Tribunal had been wrong 'in principle' to attempt to settle the double discovery issue by setting off part of the tax assessments against the confiscation order. The issue of double recovery should have been left for the enforcement stage.

The appeal was dismissed.

Malachy Higgins v National Crime Agency: [2018] UKUT 0014 (TCC)

Adapted from case summary in Tax Journal (9 February 2018)

Deadlines

1 March 2018

- Corporation tax due for periods ended 31 May 2017 for small and medium-sized companies.

7 March 2018

- VAT return and payment due date for 31 January 2018 quarter (electronic payment).

13 March 2018

- Spring Statement

14 March 2018

- EC sales list deadline for monthly paper return.

21 March 2018

- File online monthly EC sales list;
- Submit supplementary intrastat declarations for February 2018.

22 March 2018

- PAYE, NI and student loan liabilities should have cleared HMRC's bank account.

31 March 2018

- Employed supported childcare and childcare vouchers closed to new entrants who can now access tax-free childcare;
- Disincorporation relief no longer available;
- Private company 30 June 2017 year end accounts to Companies House ;
- Public limited company 30 September 2017 year end as well;
- Final date to reclaim tax paid by a close company on a loan to a participator under CTA 2010, s 455 if loan repaid during the year ended 31 March 2014;
- CTSA returns for companies with periods ended 31 March 2017 submitted;
- End of chargeable period for annual tax on enveloped dwellings (ATED).

News

Review of inheritance tax

The Chancellor has asked the OTS to carry out a review of IHT. He has asked that the review should look to identify opportunities and develop recommendations for simplifying IHT from both a technical and an administrative standpoint.

The OTS will publish a report in the autumn of 2018 that:

- Provides an initial evaluation of aspects of the current IHT regime, and what they mean for taxpayers, HMRC and the Exchequer;
- Identifies opportunities for simplification of IHT supported by analysis and evidence;
- Offers specific simplification recommendations for government to consider.

The OTS will provide a call for evidence early in 2018.

Scope

The review will consider a combination of administrative and technical areas such as:

- The process around submitting IHT returns and paying any tax, including cases where it is clear from the outset that there will be no tax to pay;
- The various gifts rules including the annual threshold for gifts, small gifts and normal expenditure out of income as well as their interaction with each other and the wider IHT framework;
- Other administrative and practical issues around routine estate planning, compliance and disclosure, including relevant aspects of probate procedure, in particular in relation to situations which commonly arise;
- Complexities arising from the reliefs and their interaction with the wider tax framework;
- The scale and impact of any distortions to taxpayers' decisions, investments, asset prices or the timing of transactions because of the IHT rules, relevant aspects of the taxation of trusts, or interactions with other taxes such as capital gains tax; and
- The perception of the complexity of the IHT rules amongst taxpayers, practitioners and industry bodies.

https://www.lexisnexis.com/tolley/guidance/ihttrustsandestates/linkAlertDoc.faces?csi=281957&lni=5RN7-V5S1-DYJV-30JY-00000-00&pqid=27728510&view=GLPCALIST&bhcp=1

Eight jurisdictions removed from tax havens blacklist

The EU has agreed to move Barbados, Grenada, the Republic of Korea, Macao SAR, Mongolia, Panama, Tunisia and the UAE from its list of non-cooperative jurisdictions. On 23 January 2018, the European Council agreed that a delisting was justified in the light of an expert assessment of the commitments made by these jurisdictions to address deficiencies identified by the EU.

These countries are now included in the lower-risk category of ‘subject to close monitoring’.

Of the 17 countries announced on 5 December 2017, 9 jurisdictions remain on the list of non-cooperative jurisdictions out (American Samoa, Bahrain, Guam, Marshall Islands, Namibia, Palau, Saint Lucia, Samoa and Trinidad and Tobago).

www.consilium.europa.eu/en/press/press-releases/2018/01/23/taxation-eight-jurisdictions-removed-from-eu-list/

Corporation tax guidance on losses

HMRC has updated its guidance on corporation tax losses to:

- take account of the new rules when carrying losses forward from April 2017;
- split losses into two sets:
    1. Terminal losses, capital losses and property income losses;
    2. Trading losses

www.gov.uk/guidance/corporation-tax-terminal-capital-and-property-income-losses

www.gov.uk/guidance/corporation-tax-calculating-and-claiming-a-loss

Employment status consultation

HMRC, HMT and BEIS are consulting jointly until 1 June 2018 on how to define more clearly the employment status rules within the current three-tier system (employee, worker and self-employed), which the government, in its response to the Taylor review of modern working practices, agreed should be retained.

The consultation considers the tests that define the boundary between those currently taxed as employees and those who are taxed on a self-employed basis. It does not consider the proposition that there should be no boundary at all for tax. The government is not proposing to make changes to tax or NICs rates or reliefs.

The document stresses that no decisions about whether or how to reform employment status, or to aim for alignment between the tests for tax and rights, have been made. It seeks views on whether the approach suggested by the review, of setting out the 'key principles' of the employment status tests developed by the courts into primary legislation (codification), is the right approach and what the 'key principles' would be.

The document asks whether codification:

- would strike the right balance between certainty and flexibility for individuals and businesses;
- should cover all applicable case law, or only selected points; and
- is relevant for both employment rights and/or tax.

It asks whether the 'irreducible minimum' of key factors identified in tax cases (mutuality of obligation, personal service, and control) should be the main principles codified into primary legislation and raises issues in relation to each of these three factors:

- mutuality of obligation can be difficult to determine for both tax and rights in the modern labour market, given the prevalence of atypical or casual working arrangements in which there is no obligation to accept work or to have work offered;
- whether personal service should still be relevant to determine an employee's entitlement to full employment rights, given evidence that some businesses deliberately add in substitution clauses in individuals' contracts to make it seem as if personal service is not present, even though in reality the clauses cannot be exercised; and
- the meaning of control, and whether it is present in working arrangements, is increasingly shifting away from day to day supervision, towards the right to control, even if that right is not exercised.

Other questions considered for inclusion in legislation for determining if someone is an employee are:

- the absence of financial risk;
- whether a person is 'part and parcel of the organisation' or an 'integral part of the business';
- provision of equipment; and
- the 'intention' of the parties.

In looking for a better employment status test, the document considers options for a more precise test, and a less complex test. For a more precise test, the document suggests a range of possible criteria, including:

- the length of time an individual works for a specific engager;
- the percentage of an individual's income that comes from one engager; and
- where the individual carries out the work.

Commentary so far

While welcoming the government's aim of making it easier for both individuals and businesses to understand which rights and tax obligations apply to them, the CIOT is concerned that maintaining three categories of worker for employment law, but just two for tax, means continued 'confusion and inconsistency among taxpayers and their employers, and exploitation of workers in too weak an economic position to resist entering into work arrangements that HMRC might be expected to challenge'.

Steve Wade, chair of the ICAEW tax faculty employment taxes and NICs committee, welcomed the government's positive response on employment law aspects, 'but the absence of other than cursory reference to the reform of employment/self-employment tax, or more precisely NICs, as part of such an overarching review into the world of work is disappointing. This is, however, perhaps not surprising given the government's earlier manifesto commitments'.

Michael Steed, co-chair of ATT's technical steering group, said the government should avoid any clash with MTD and ensure that 'changes which could alter whether or not somebody is classed as self-employed should not be made to coincide with the major changes involved in the introduction of MTD'.

The government has also published consultations covering: agency workers recommendation; enforcement of employment rights recommendations; and increasing transparency in the labour market.

Adapted from Tax Journal (16 February 2018)

Spotlight 42: Contractor loan schemes: misleading advertising

HMRC added Spotlight 42 in February 2018, concerning an Advertising Standards Authority ruling that claims made about contractor loan schemes by their promoter, Williams Gordon, were misleading.

Most umbrella companies deduct the correct amount of tax and National Insurance from the full salary paid to the contractor.

HMRC’s understanding of the contractor loan scheme is that:

- contractors in this scheme are employed by an umbrella company which supplies the contractor’s services to their end-client;
- the umbrella company invoices the end-client and retains 10% as a fee;
- the umbrella company pays the contractor a salary at, or just above, the National Living Wage but below the limits for tax and National Insurance;
- the balance of the invoice is paid to the contractor in the form of a loan with terms that mean it is unlikely to ever be repaid

Loans like this are no different to normal income and should be taxed in the same way as any other employment income.

The Williams Gordon website claimed that you could “take home up to 92% of your pay” and that they are “fully compliant with the necessary HMRC legislation and with all current IR35 policies”.

The ASA ruling

The ASA ruled that claims made by Williams Gordon are misleading and must be withdrawn.

It also ruled that the Williams Gordon website “misled by omission” - by failing to mention the many government tools and policies aimed at the avoidance they were promoting.

This includes the General Anti-Abuse Rule and the loan charge on disguised remuneration loans outstanding on 5 April 2019.

The Williams Gordon website also fails to highlight that the contractor loan scheme offered is a form of tax avoidance which HMRC believes does not work.

Williams Gordon and other promoters of similar schemes must now remove these claims from their advertising or risk facing ASA sanctions for failing to comply with its rulings.

www.gov.uk/guidance/contractor-loan-schemes-misleading-advertising-spotlight-42

Business Taxation

Payment to son

Summary – Payments were not incurred wholly and exclusively for the purposes of the taxpayer's trade and so were correctly disallowed by HMRC.

Alan Nicholson submitted his 2013/14 SA Return on 13 June 2014. The return included a claim for expenses of £23,511.

Of £9,785 expenditure disallowed by HMRC, this appeal concerned an amount of £7,400 paid to Alan Nicholson's son, Mark. This amount had been claimed for wages to his son based on 15 hours per week at £10.00 per hour for the "promotion of the business through internet and leaflet distribution and computer work". Alan Nicholson advised that this was paid through the provision of goods and also cash totalling £1,850. Alan Nicholson said that his son was studying at Leeds University and he happened to be working in Leeds. He would buy his son food/drinks whenever he visited him. As a father he had a vested interest in his son's progress in life and wanted to make sure that he was giving him the best chance to succeed in his education. He asked him not to work for someone else so that it did not interfere with his studies. Paying his son by way of buying him his food on top of the cash payments had left him with a lot of credit card debt. Also without the wages his son would not have been able to maintain his University studies.

HMRC argued that Section 34(1) TMA 1970 requires expenditure to be incurred "wholly and exclusively for the purpose of the trade". This means that the rule is only satisfied if the sole purpose for incurring the expense is for the purpose of the trade. If any non-trade purpose is identified then the expenditure is not allowable. Helping his son through university was a non-trade purpose.

Decision

The First Tier Tribunal said that they could understand why Alan Nicholson felt that he should be able to pay his son 'wages' as he would have to have done if anyone else had been doing the same work for him. Had he paid his son on a more time recorded basis or had there been some form of methodology in calculating the amount payable and an accurate record maintained of the number of hours his son worked, then as with any family member on the pay roll of a business, it is unlikely that the expense would have not satisfied the provisions of s 34 TMA 1970.

The Tribunal agreed with HMRC by concluding that the payments had a dual purpose. The payments were not incurred wholly and exclusively for the purposes of the taxpayer's trade. He was helping to support his son whilst at University.

The appeal was dismissed.

Alan Nicholson v HMRC (TC06293)

Under-declaration of profits

Summary – Both turnover and expenses were understated and the appeal was allowed in part.

In November 2014 Derek Montague was convicted of charging a pensioner £41,000 for work valued at only £15,500 and of taking another customer to a cash point to obtain payment. This triggered an HMRC investigation into his tax affairs.

Derek Montague was trading as a home improvements building contractor. His tax return for 2011/12 was submitted by his accountants and was based on invoices and receipts that he had provided. It was clear from the HMRC investigation that this return was inaccurate.

The original return had shown turnover of £18,455 and allowable expenses of £12,211. When HMRC examined the bank statements that Derek Montague had provided they discovered deposits totalling £36,660 and business expenses paid out of £5,319.

HMRC assessed him on the basis of a turnover of £36,660, in line with the deposits into his bank account, and expenses of £12,211, as claimed in his tax return.

Derek Montague disputed the figure for expenses and had put together an estimate of his business expenses for the year with the assistance of someone he had met in prison. This estimate totalled £31,600. There were however no underlying documents which might support these estimates and no other written evidence.

In his evidence Derek Montague acknowledged that he had on occasions been paid in cash and that not all of that cash would have been paid into his bank account. Some would have been used to pay for materials and fuel, some for casual labour to assist him, such as clearing waste, and some for personal expenditure such as drink and gambling. None of this cash income or cash expenditure had been taken into account by HMRC.

Decision

The Tribunal said that they were in no doubt that HMRC had been quite generous to Derek Montague in some respects in that they had not assessed any additional income to take into account the cash receipts which Derek Montague acknowledged he had received but had not paid into his bank account. In addition they dropped the assessments into other years and the penalties that they had originally raised.

In the Tribunal's view, considering the gross and net profit margins, Derek Montague had succeeded in demonstrating that the figure of £12,211 understated his allowable expenditure, and said that the amount should be increased to £20,000, even though it was clear that his figures were only estimates and were unsupported by any documentary evidence. They said that it would be wrong to deduct expenses paid out of cash income which had not been banked from a turnover figure which only includes cash which has been banked.

They decided that the original assessment overcharged Derek Montague and that the assessment should be reduced to reflect profits of £16,600.

The appeal was allowed in part.

Derek Montague v HMRC (TC06304)

Was a payment made by a partner deductible?

Summary - The Court of Appeal upheld the Upper Tribunal's decision that a payment made by a partner in a law firm to a bank, in order to avoid bankruptcy, was not deductible.

Mr Vaines was a partner in the law firm of Squire Sanders & Dempsey LLP. His share of profits from the firm was his only source of professional income for the year 2007/08. He claimed a deduction for an expense that related to when he had worked in the London offices of a German law firm. He had been a member of that partnership until it was dissolved, and ceased trading, on 31st December 2005. At the time the partnership owed approximately €17 million to Bayerische Landesbank and two other German banks. In 2007, Bayerische Landesbank sought repayment of this sum from Mr Vaines, claiming that he was personally liable for the debts, either in his capacity as a former partner in that firm or in his capacity as a partner in Squire Sanders & Dempsey (which had apparently succeeded to part of the business). Similar claims were made against a number of Mr Vaines' former colleagues.

Following negotiations with Bayerische Landesbank, an agreement was reached in October 2007 whereby Mr Vaines would be released from all personal claims against him by the German banks upon payment of the sum of €300,000. Payment of this sum was funded by Squire Sanders & Dempsey, which agreed to make a loan for that purpose to Mr Vaines (and certain other colleagues who settled the claims against them on a similar basis). The payment was made in January 2008. Mr Vaines subsequently repaid the full amount of the loan over an agreed period.

The issue to be decided was whether the payment was deductible for tax by Mr Vaines.

Decision

The Court of Appeal concluded that Mr Vaines' only income in 2007/08 came from his trade in the law firm, Squire Sanders & Dempsey. This was not a separate trade operated by him alone, but one carried on collectively by the LLP.

They found that the payment to settle the claim, avoid bankruptcy, and so enable him to continue in his career was not incurred wholly and exclusively for the purposes of Squire Sanders & Dempsey's trade. The firm had simply lent Mr Vaines the necessary money for Mr Vaines to be able to clear his name. No deduction could be allowed for expenditure that the firm had deliberately decided not to incur in computing its profits.

P Vaines v HMRC [2018] EWCA Civ 45
Adapted from Tax Journal (2 February 2018)

Carry-back loss relief struck out

Summary - The High Court found that claims for carry-back loss relief should be struck out.

Each of the claimants sought to carry back losses incurred as partners in various film partnerships or as a result of participation in other arrangements. The claims had been made in self-assessment tax returns or in letters to HMRC. The claimants contended that the claims could only have been challenged following an enquiry under TMA 1970 Sch 1A; and, as HMRC was now out of time to do so, the claims should be given effect. HMRC considered that the De Silva decision ([2017] UKSC 74) was conclusive of the case against the claimants.

HMRC had applied to strike out the claimants' claims for declarations requiring HMRC to give immediate effect to various tax claims.

Decision

The High Court observed that if an enquiry by HMRC under s.9A TMA 1970, or a deemed enquiry in the context of a s 12AC partnership enquiry, into a partner's individual tax return for Year 2 results in the elimination of a loss asserted by the partner, this has the result that the partner cannot rely on a carry-back claim in relation to the loss asserted which is made in his Year 1 return form or any other document, whether or not the claim is also made in the Year 2 tax return. Applying this principle, the court identified five main categories of claimants (with additional nuances).

1. These claimants had made their claims by letter or in their Year 1 return but not in their Year 2 return. They could not succeed in their carry-back claims, simply on the basis that their claims were not included in their Year 2 tax returns.

2. These claimants had received repayments and closure notices. They could only succeed in their carry-back claims if the relevant closure notices failed to effect amendments to the Year 2 tax returns so as to increase the amount chargeable to income tax.

3. These claimants not received repayments but had received closure notices. They could not succeed in their carry-back claims, assuming that all relevant closure notices amended the Year 2 tax returns to disallow (in whole or in part) the losses for Year 2 on which the carry-back claims were based.

4. These claimants had incurred their losses in 2007/08 or later and fell to be treated in the same way as claimants whose losses arose in a year to which ITA 2007 did not apply.

5. These claimants had Year 2 tax returns subject to a s 9A enquiry but where the enquiry had not been completed so that no closure notices had been issued. These claimants could not succeed in their carry-back claims. It was inconceivable that HMRC would not draft the closure notices to disallow the carry-back claims.

B Knibbs and others v HMRC [2018] EWHC 136

Adapted from the case summary in Tax Journal (16 February 2018)

Corporate capital gains and the Finance Bill (Lecture B1063 – 22.11 minutes)

Freezing of the indexation allowance

The long-standing indexation allowance which has been available to companies to reduce gains following the disposal of chargeable assets is to be frozen with effect from 1 January 2018 (Cl 26 F(No2)B 2018). Accordingly, when a company makes a gain on or after 1 January 2018, the indexation which is applied to that gain will be calculated up to December 2017 – in other words, the allowance will be worked out using the RPI figure for December 2017, even though the disposal takes place at a later date.

Assets acquired on or after 1 January 2018 will not attract any indexation allowance when they are disposed of.

HM Treasury say that this measure will align the treatment of chargeable gains made by companies with that for individuals and unincorporated businesses for whom the indexation allowance was abolished 10 years ago. It will also tie in the treatment of such disposals with disposals of other company assets that are not classified as chargeable (eg. intangible fixed assets).

This freezing of the indexation allowance represents a fundamental change to how corporation tax on gains is computed and is likely, over time, significantly to increase the tax charge arising to companies on their gains. Where reliefs are available to mitigate or eliminate a taxable gain (eg. rollover relief), the impact of the freeze may be negligible. However, particularly in the case of real estate holding entities where the substantial shareholding exemption (SSE) will not normally apply, the provision will further increase the chargeable gains arising on their disposals.

Depreciatory transactions within a group

The depreciatory transaction rules in S176 TCGA 1992 restrict any capital loss arising on the disposal of a subsidiary that has been created by what might be described as artificial means. Remember that capital losses are invariably computed ignoring any indexation relief.

A typical depreciatory transaction would be an intra-group disposal of a chargeable asset out of a subsidiary at an undervalue. Note that, if a company surrenders losses by way of group relief to a fellow group member but without asking for any compensating payment, this would, strictly speaking, be a depreciatory transaction but, in practice, HMRC never seek an adjustment in this situation (see letter dated 3 February 1981).

Any capital loss following a depreciatory transaction is reduced on a 'just and reasonable' basis that generally reflects the prior diminution in value of that subsidiary. It is important to stress that S176 TCGA 1992 can only be used to reduce or eliminate a capital loss – it cannot produce a gain. If the relevant disposal falls under the SSE rules, it is not necessary to identify prior depreciatory transactions given that any capital loss is disallowed under the SSE regime.

Since the enactment of FA 2011 on 19 July 2011, it has only been necessary to take account of depreciatory transactions occurring within six years before the relevant disposal. Depreciatory transactions that took place more than six years earlier are ignored.

Illustration

In December 2014, Christian Holdings plc acquired the entire share capital of Nicholas Properties Ltd (a property investment company) at a cost of £3,500,000.

In October 2016, Nicholas Properties Ltd transferred a freehold property to Christian Holdings plc for £710,000 when it was in fact worth £1,400,000.

Later, in August 2017, Christian Holdings plc sold its shares in Nicholas Properties Ltd for £2,700,000.

Since Nicholas Properties Ltd is not a trading company, this disposal falls outside the SSE. The allowable loss on the share disposal would be restricted as follows:

		£
Sale proceeds		2,700,000
Less:	Cost	3,500,000
		(800,000)
Less:	Depreciatory transaction adjustment (see below)	690,000
Allowable loss		£(110,000)

HMRC are likely to propose the following adjustment:

		£
Value of freehold property transferred		1,400,000
Less:	Actual transfer value	710,000
S176(4) TCGA 1992 adjustment		£690,000

The Chancellor has decided that, for disposals of shares in a subsidiary made on or after 22 November 2017, the six-year time limit should be removed (Cl 28 F(No2)B 2017). This means that, from now onwards, companies will have to consider the full history of the shares and will be required to make adjustments for any depreciatory transactions when calculating an allowable loss. In the case of a negligible value claim, the new rule will take effect where the negligible value claim is made on or after 22 November 2017 – this is the position even if the negligible value claim has been backdated to an earlier date.

Cl 28 F(No2)B 2017, which reverses the FA 2011 relaxation, ensures that companies cannot prevent the depreciatory transaction legislation from applying simply by retaining a subsidiary until after the six-year time limit has expired.

The need to consider depreciatory transactions has been a considerable compliance burden when calculating a capital loss on a disposal of shares or following a negligible value claim, given that there was originally a need to examine every asset transfer involving the company or group being sold. The FA 2011 introduction of a six-year restriction provided a welcome relief in this area and so, while the present Government's intention to tackle potential tax avoidance can be understood, in the vast majority of cases this latest amendment simply makes an already onerous compliance situation more difficult.

Postponed gains on foreign branch incorporations

Where the trade and assets of a UK company's foreign branch are transferred to an overseas company in exchange for shares in that company, existing legislation in S140 TCGA 1992 allows tax on any capital gains on such a disposal to be postponed. This postponement is, however, only temporary and lasts until:

- the overseas company sells the assets; or

- the UK company disposes of its shares in the overseas company other than in exchange for further shares during a corporate reorganisation.

An unintended consequence of these rules is that, if the shares exchanged during the reorganisation referred to above fall within the SSE regime, the postponed tax can become payable even though the UK group still owns the shares in the overseas company. The way in which the law is currently drafted means that such a transaction is viewed as a disposal – given that the SSE provisions take precedence over the reorganisation rules – and this has hitherto resulted in the crystallisation of the deferred gains.

For disposals of shares made from 22 November 2017, the Chancellor has amended the legislation so that such a reorganisation does not trigger the deferred gains (Cl 27 F(No2)B 2017).

The interaction of the SSE and the reorganisation rules has until now created a potential tax cost in what are essentially internal restructuring transactions and so the correction of this technical anomaly is to be welcomed. It had a particular impact on financial sector businesses which have traditionally operated through a network of foreign branches and which may subsequently need to restructure, for example, in order to meet changing regulatory requirements in the territories where they conduct their business.

Contributed by Robert Jamieson

Managed service companies

Summary – The companies were all managed service companies (MSCs) for the purpose of ITEPA 2003 s 61B(1).

Costelloe Business Services Limited assisted a number of individuals to set up and offer their services through limited companies:

1. Dr. Osamwonyi was a forensic medical examiner. Originally employed by the NHS but from 2003 by a medical agency. In 2007 he was told that the agency would only engage his services if he operated through a limited company. He became the sole shareholder and director of the First Appellant company, Christianuyi Limited.

2. Ms. Fanning was a social worker, originally employed by Calderdale Metropolitan Council but later through the Second Appellant company, Fanning Social Care Limited.

3. Ms. Ayodele was the sole shareholder and director of the Third Appellant, Haddassah Limited. She was a social worker, who had provided services through a number of intermediary companies. On 8 November 2007, Haddassah Limited was established on her behalf.

4. Dr. Trzaski was a doctor. In around 2008, he approached a recruitment agency to find new employment and was given a choice to be paid through the ordinary payroll or through a limited company. Dr. Trzaski chose to be paid through a limited company and so the Fourth Appellant company, Dr. Jacek Trzaski Limited was set up.

5. Mr. Tooze was a physiotherapist. He had worked as an employee and then through a company. He approached a recruitment agency, who informed him that he had to provide his services through a limited company. Costelloe Business Services Limited established the Fifth Appellant company, Jonny Tooze Physiotherapy Services Limited,

The First Tier Tribunal had found that the companies were Managed Service Companies, with the effect that they were liable to income tax and NICs in respect to payments received by the individuals whose services were provided by the Managed Service Companies.

The companies appealed to the Upper Tribunal.

The main issue to decide was whether the condition of s 61B(1)(d) ITEPA 2003 ('a person who carries on a business of promoting or facilitating the use of companies to provide the services of individuals ('an MSC provider') is involved with the company') was satisfied.

The second issue was whether Costelloe Business Services Limited benefited financially 'on an ongoing basis' from the services provided by the individuals (s 61B(2)(a)).

Decision

The Upper Tribunal rejected the taxpayers’ contention that s 61B(1)(d) is ambiguous. In particular, the provision does not require a putative MSC provider to promote or facilitate the provision of an individual's services. What is necessary is the promotion/ facilitation of the use of the MSC. The Upper Tribunal therefore accepted the First Tier Tribunal’s evidence that the taxpayers had all used the services of Costelloe Business Services Limited, an MSC provider.

The Upper Tribunal found that the condition included any financial benefit to the MSC provider arising out of the provision of the services of the individual. There was no requirement of proportionality or correlation between the amounts earned as a result of the provision of the services of the individual and the extent of the financial benefit to the MSC provider.

Finally, the Tribunal also found that Costelloe Business Services Limite ’control over the MSCs was established, as it determined how the individuals were remunerated (by way of minimum wage and dividends). The condition in s 61B(2) (d) was therefore satisfied.

Christianuyi Limited and others v HMRC [2018] UKUT 0010 (TCC)
Adapted from case summary in Tax Journal (26 January 2018)

Note: Following this decision, HMRC has now updated Spotlight 32 concerning managed service companies.

They say that when considering the definition of a MSC provider as ‘a person who carries on a business of promoting or facilitating the use of companies to provide the services of individuals’, a person is a MSC provider if the answer to both of the following questions is yes:

1. Does the person promote or facilitate the use of a company?

2. Does that company provide the services of individual?

Secondly, in this case, Costelloe Business Services Limited influenced how payments were made to workers through the use of a standard product, by causing the workers to receive wages and dividends instead of just wages. HMRC say that when workers buy into products allowing the MSC provider to determine the amount to be paid as a dividend and to carry out the administrative steps to affect this, it amounts to ‘control’.

www.gov.uk/government/publications/tax-avoidance-schemes-currently-in-the-spotlight

Apportionment on an actual basis - Does lumpiness matter?

Summary – The profit apportionment method adopted by the oil companies following an increased supplementary tax rate change was just and reasonable.

Maersk Oil North Sea UK Ltd & Maersk Oil UK Ltd operated oil fields in the North Sea and were subject to UK corporation tax on the trading profits of their ring fenced UK trade.

In addition to the normal 20% corporation tax charge there was a supplementary charge. On 23 March 2011 this was increased from 20% to 32%. Adopting the statutory approach to apportioning profits before and after the rate change would have meant time apportioning the results.

However, S.7(5) FA 2011 provides that after such a rate change, supplementary charge profits can be calculated on a just and reasonable basis. Both companies elected to apportion their profits on an actual basis.

HMRC accepted that both companies could make an election as a time apportioned method would be unjust or unreasonable, but it did not accept that the actual method of apportionment used by the companies was just and reasonable.

Decision

The First Tier Tribunal stated that the aim of s.7(5) FA 2011 was to provide relief for companies with profits that were not generated smoothly throughout the year. Such companies could be disadvantaged by a rate increase mid-year. It appeared that HMRC had accepted that the companies’ profits were irregular enough to give rise to such a disadvantage. So the question was 'how to deal with the lumpiness …'.

The Tribunal agreed that the companies’ solution to split the pre and post 24 March 2011 periods as separate accounting periods as valid stating that it provided a reasonable reflection of the financial results of the companies for the relevant periods.

They said:

> '…having accepted that [their] profits are sufficiently irregular to allow them to make the s 7(5) election, it does not seem … that degrees of lumpiness are relevant, as long as the alternative basis suggested … is just and reasonable.'

The appeals were allowed.

Maersk Oil North Sea UK Ltd & Maersk Oil UK Ltd v HMRC (TC06295)

Apple's IP licence has moved

The European Commission said that up to 2014, Apple owed tax on the profits from its "contract manufacturing" activity to Ireland. There was no evidence that the US board of directors were responsible for the 'Irish' profits so all the profits were attributed to the activities in Ireland. Both Apple and the Irish government are appealing but despite this, the Irish treasury has set up an escrow account to receive payment.

But what have Apple done since 2014? According to economist, Seamus Coffey, Apple's manufacturing activity is unchanged and the results are now recorded in Ireland. But apparently Apple made around €20 billion in profits in Ireland in 2015 so tax payable should have been around €2.5 billion. Seamus Coffey believes that the license to use Apple's intellectual property outside the US has been relocated to Ireland in return for a large payment. It seems that, in an attempt to mitigate its profits, the group structure has changed to allow capital allowances to be claimed against the taxable profits.

Will this be the case in future years? If profits exceed annual capital allowances, then clearly not. Additionally, over a long enough period, the capital allowances will become fully utilised and no further amounts will be available to deduct.

So does Apple's Irish company buying the right to use technology developed elsewhere present a problem for tax? I guess it all comes down to how much has been paid and whether it was deemed to be a fair price as well as whether it is considered to be part of a scheme or arrangement of which the main purpose or one of the main purposes is the avoidance of, or reduction in, liability to tax.

The European Commission is checking things out. Commissioner Vestager said:

> "I have been asking for an update on the arrangement made by Apple, the recent way they have been organized, in order to get the feeling whether or not this is in accordance with our European rules but that remains to be seen"
>
> "We are looking into this of course without any kind of prejudice, just to get the information."

http://economic-incentives.blogspot.co.uk

OECD pilots new international tax risk programme

Eight members of the OECD's forum on tax administration, Australia, Canada, Italy, Japan, the Netherlands, Spain, the UK and the US, have launched a pilot for a voluntary programme that will use CbC reports and other information to facilitate co-operation between multinational groups and tax administrations.

www.oecd.org/tax/eight-fta-members-kick-off-multilateral-tax-risk-assurance-programme-to-provide-early-certainty-for-tax-administrations-and-mnes.htm

Country-by-Country (CbC) reporting and preferential tax regimes

Further guidance on Country-by-Country reporting

The OECD has addressed 2 further issues in its guidance on CbC reporting (BEPS Action 13):

1. The definition of total consolidated group revenue; and

2. Does non-compliance with the confidentiality, appropriate use and consistency conditions constitutes systemic failure?

The OECD has also released a compilation of the approaches adopted by member jurisdictions of the Inclusive Framework with respect to issues where the guidance allows for alternative approaches.

Updated conclusions on preferential tax regimes

Two Barbados' regimes, the International financial services and the Credit for foreign currency earnings/Credit for overseas projects or services, were concluded as "potentially harmful" by the Inclusive Framework in the 2017 Progress Report on Preferential Regimes. Barbados has committed to amend these regimes within agreed timelines.

Canada's regime for international banking centres (IBCs) was determined to be "potentially but not actually harmful" in the 2004 Progress Report. Canada has abolished the IBC regime, with limited grandfathering and so the conclusion for this regime is updated to "abolished".

www.oecd.org/tax/oecd-announces-further-developments-in-beps-implementation-february-2018.htm

VAT

R&C Brief 2/2018: VAT treatment of advanced learner loans

Summary – This Brief confirms HMRC's view that educational providers who receive payment for tuition fees in the form of advanced learner loans from Student Finance England must account for VAT at the standard rate, unless they are 'eligible bodies' for the purposes of the education exemption.

Group 6 of Schedule 9 to the VATA 1994 exempts supplies of all education, and closely related goods or services, made by an eligible body (schools, universities, further education colleges and non-profit-making bodies that ring-fence any surpluses to supplies of education.

Other bodies may exempt certain supplies of education, vocational training and closely related goods and services where the supplies "are ultimately a charge to funds provided by the Secretary of State" for Education. (Section 13 of VAT Notice 701/30)

Advanced Learner Loans are provided under a contract between the student and the Secretary of State for Education, and are administered by Student Finance England. The loan is repayable by the student in accordance with the regulations in force at the time repayment falls due.

Receipt of the Advanced Learner Loan by the education provider is not exempt under Items 5 to 5C of Group 6 VATA 1994. VAT is due at the standard rate on the educational provider's full charge for the education it provides to the student.

The only exception is where the provider meets the criteria for being an eligible body for the purposes of the education exemption (paragraph 4.1 of VAT Notice 701/30: education and vocational training).

If businesses have adopted an incorrect treatment on the advice of HMRC, they should write to us quoting Revenue and Customs Brief 2 (2018) by 31 March 2018 at the latest, providing evidence if there are individual circumstances to be taken into account.

Businesses that do not do this will be expected to apply the correct treatment from the date of this brief.

www.gov.uk/government/publications/revenue-and-customs-brief-2-2018-vat-treatment-of-advanced-learner-loans

Stadium tour - Principal and ancillary components

Summary – When paying for a guided stadium tour that entitled visitors to visit the AFC Ajax museum, VAT should be charged on both elements as a single standard rated supply.

Stadion Amsterdam CV operated a multi-purpose building that housed a stadium with associated facilities as well as the museum of the football club AFC Ajax (AFC Ajax). The company hired out the stadium as a sports venue for competitions and for concerts by performing artists.

When there were no sports or music events taking place, in exchange for an admission fee, the company offered a guided tour of the stadium, visiting the stands, the football pitch, the press room and the control room of the stadium. At the end of the guided tour, the entrants were able to visit the AFC Ajax museum. During the period at issue between 1 January 2001 and 30 June 2005, it was not possible to visit the museum without participating in the guided tour of the stadium.

Stadion Amsterdam CV believed that the tour should be treated as either the supply of a cultural service (Heading b.14(c) of Table I of the Netherlands Law on turnover tax) or as recreation or entertainment (Heading b.14(g) of that table). Consequently, it applied the reduced rate of VAT provided for by that Law.

The Dutch tax authority took the view that the supply of that service should have been subject to VAT at the standard rate. The Regional Court of Appeal agreed, ruling that the tours constituted a single supply of services that could not be divided for the purposes of applying VAT at a special rate to one of the components of that supply.

The Supreme Court stated that it was clear that one price was paid for a single supply comprising two elements:

1. Guided tour of the stadium (principal component)

2. Visit to the AFC Ajax museum (ancillary component)

The referring court asked whether the fact that the guided tour of the stadium and the visit to the AFC Ajax museum were so closely connected to each other that they should be regarded as a single supply of services for VAT purposes meant that the same VAT rate should necessarily be applicable to that supply.

Decision

The CJEU held that there was a single supply where:

- two or more elements or acts supplied by the taxable person to the customer were so closely linked that they formed, objectively, a single, indivisible economic supply, which it would be artificial to split;

- one or more elements were to be regarded as constituting the principal supply, while other elements were to be regarded as ancillary supplies which shared the tax treatment of the principal supply. In particular, a service had to be regarded as ancillary to a principal supply if it did not constitute for customers an end in itself but a means of better enjoying the principal service supplied.

In this case, with a principal and ancillary supply both present, the CJEU gave a preliminary ruling that the Sixth Directive had to be interpreted as meaning that a single supply should be taxed solely at the rate of VAT applicable to the principal supply.

Stadion Amsterdam CV v Staatssecretaris van Financien (C-463/16)

Prefabricated reinforced concrete houses

Summary – Customers were paying for construction services resulting in new walls being built, rather than simply supplying and installing energy-saving materials. Standard rate VAT applied.

After Second World War, local authorities built prefabricated reinforced concrete houses, providing much needed low cost housing. The walls of these houses were constructed of steel reinforced concrete. Due to defects including the corrosion of the steel reinforcing bars the Housing Defects Act 1984 was passed to require remedial work to be carried on the houses. However, the remedial work in the 1980s simply replaced the old walls with no improvement to their thermal insulation quality. From the 1990s local authorities require through building controls any structural work to meet higher thermal insulation standards although cheaper repairs do not require building consent.

The taxpayer's business involved repairing these properties and, believing that the work fell within Group 2 Schedule 7A VATA 1994 (supply and installation of energy-saving materials) charged VAT at the reduced 5% rate.

HMRC disagreed, assessing the taxpayer at the full standard rate of VAT. The taxpayer appealed against the assessment under section 73(1) VATA 1994 for under declared VAT of £26,641.13. This VAT represented the difference between the output tax accounted for by the taxpayer at 5% on supplies made by him in the period 1 April 2014 to 28 February 2015 and the VAT due at the standard rate of 20% that HMRC believed was due.

Decision

Both parties agreed that the taxpayer's supplies go beyond the supply of energy- saving materials to the construction of new cavity walls with insulation. All the relevant documentation including contracts and invoices were consistent with that composite supply. However, the first Tier Tribunal said that the question is what is the nature of that supply.

There was no direct evidence from customers as to their purpose in engaging the taxpayer to do the works. However the Tribunal said that a customer's purpose must be viewed objectively. In this case that is the purchase of construction services resulting in new walls, rather than simply supplying and installing energy-saving materials. Applying *Pinevale*, Parliament has legislated for a reduced rate of VAT to apply to the supply and installation of energy-saving materials not the construction of energy efficient walls. The totality of a new cavity insulated wall undoubtedly improves the thermal efficiency of the PRC house but that is not the test in Note 1(a).

The appeal was dismissed.

Adam Charles Groves V HMRC (TC06260)

Mixed supply membership package

Summary – Members of the Harley Owners Group were interested in the package of benefits received when they joined rather than just the brand name.

Harley-Davidson Europe Ltd is a UK subsidiary of Harley-Davidson, Inc., a US corporation which is the holding company of the Harley-Davidson group. The UK subsidiary sells new Harley- Davidson motorcycles in Europe through a network of distributors and dealers.

These appeals relate to the Harley Owners Group whose activities in Europe, the Middle East and Africa are run as a business unit of Harley-Davidson Europe Ltd. Owners of Harley-Davidson motorcycles and individuals sponsored by them may subscribe to become members of the Harley Owners Group. Subscribers receive a package of benefits including a quarterly print magazine, patches and pins, a leather wallet, membership card, events guide and touring map, access to dedicated websites, and discounts at hotels and other third-party organisations.

HMRC considered the annual fee was standard rated as a supply of membership. Harley-Davidson Europe Ltd believed that it was making a number of distinct supplies to each member, the tax treatment of each of which must be determined separately. A proportion of the fee should be treated as paying for zero-rated supplies, such as the magazine.

Under HMRC's approach VAT is chargeable at the standard rate on all membership subscriptions, whether paid by members in or outside the EU. Harley-Davidson Europe Ltd contended that no VAT is chargeable on subscriptions by non-EU members, on the basis that those supplies should be treated as zero rated supplies of goods and/or supplies of services that are outside the scope of VAT (with a right of recovery of input tax). For EU members Harley-Davidson Europe Ltd claimed that a substantial proportion of the fee should be regarded as being paid for zero rated supplies, in the form of printed matter, with the remainder being consideration for standard rated supplies.

Decision

The Tribunal judge described membership of the Harley Owners Group as enabling members to better enjoy their motorcycles, rather than to simply enhance their membership of Harley Owners Group. Significant other benefits were provided which could clearly be, and obviously were, enjoyed by the majority of members. Members joined the group for the individual benefits rather than just for the status of membership. The typical would not join if these benefits were not provided, particularly the quarterly magazine.

The Tribunal ruled that Harley-Davidson Europe Ltd's made multiple supplies in return for membership subscriptions.

The appeal was allowed.

Harley-Davidson Europe Ltd v HMRC (TC06268)

Default surcharge and CIS overpaid

Design Rationale Ltd designs and manufactures interior fittings and was VAT registered. During the tax year 2016/17 it did not have "gross payment" status and so main contractors made labour payments to Design Rationale Ltd net of CIS deductions. Consequently significant amounts of tax were held by HMRC that was due for repayment and that amount was increasing.

The company entered the default surcharge regime for the three months ended 30 November 2016 and was issued with a Surcharge Liability Notice.

On 20 December 2016 the company wrote to HMRC CIS Deductions (NIC & EO) to inform them that they had completed the VAT return for 11/16 to show that there was a large bill to pay, and that they did not have the money in the bank to pay it because there was an amount of £384,186.12 overpaid "via CIS deductions" They completed an online form asking for an offset of some of the overpaid amount against the VAT due.

For the 11/16 period, the return was in time. VAT of £1,000 was paid by E- payment on 7 March 2017 but the remaining £123,821.20 of the amount shown on the return was unpaid until it was credited by HMRC to the company's VAT account with them on 24 May 2017 by way of offset of a repayment of amounts due to the company under the rules of the CIS. Accordingly the company was in default.

For 02/17 the return was in time. The VAT due of £67,254.40 shown on the return was unpaid until it was also credited by HMRC to the company's VAT account with them on 24 May 2017 again by way of offset of a repayment of amounts due under the rules of the CIS. HMRC imposed a surcharge of £1,345.08 being 2% of the VAT paid late.

HMRC said that any set-off by HMRC under s130 FA 2008 to set "the credit against the debit" is a discretionary action and not an obligation on HMRC. In their view, the company had not provided any grounds that can be considered a reasonable excuse for the late payment.

The company appealed arguing that the CIS overpayment was crippling their company, resulting in the late payment of VAT. They believed that they had a 'very' reasonable excuse and that they:

- were not asking for a repayment before the time permitted, just for HMRC to recognise the money they already had;
- were not "withholding" payment of VAT: they could not pay it;
- say that discretionary action under s 130 FA 2008 would "make sense here".

Decision

The Tribunal considered why Design Rationale Ltd was unable to pay the VAT due. Clearly it was due to the CIS deductions held by HMRC that were not yet repayable. The Tribunal did not find it at all difficult to conclude that the circumstance amounted to a reasonable excuse.

The surcharge liability notices for 11/16 and 02/17 were deemed not to have been served and the appeal against the assessment of the surcharge for 02/17 was allowed and the assessment reduced to nil.

Design Rationale Ltd v HMRC (TC06273)

Voucher for digital and/ or physical space

Summary –Vouchers entitling a backer to space in a time capsule were redeemable for one type of service and so were single purpose vouchers and the consideration was taxable at the time the vouchers were issued.

Kickstarter is a web-based crowdfunding platform. This platform was used by Lunar Missions Limited to find backers to pledge funds for their project which was planning to send an unmanned robotic landing module to the South Pole of the Moon, an area unexplored by previous missions. They proposed to place a time capsule inside a borehole that they would drill on the Moon. Essentially, backers would receive a voucher entitling them to 'space' in the time capsule - either digital space (for data) or physical space for a strand of hair or a combination of both. Lunar Missions Limited raised funds through Kickstarter amounting to £672,447 that were paid to them, less Kickstarter's fees, on 6 January 2015.

Lunar Missions Limited originally argued that the payments amounted to risk funding and were not consideration for a taxable supply. They later conceded that there was a taxable supply in the form of rewards to be provided to backers in the future. The argument was then when was the time of supply.

If the sums received were prepayments for supplies of services then it was common ground that the tax point was the date of receipt and the company would have been liable to be registered for VAT with effect from 16 December 2014.

If the sums received were for face value vouchers under Sch. 10A VATA 1994 then the tax point would be either the date:

- consideration was received (single purpose vouchers); or
- the vouchers were redeemed (other vouchers).

Decision

The First Tier Tribunal confirmed that the burden of proof was on Lunar Mission Limited to prove that the vouchers were single purpose vouchers and so not taxable on 16 December 2014 as contended by HMRC.

The Tribunal found that:

- Lunar Missions Limited were contractually bound to provide digital space and/or physical space in return for a pledge in the event that the project was completed;
- The sums received were not prepayments as, at the time pledges were paid it was unclear what if anything would be supplied;

- The backers were supplied with face value vouchers within Schedule 10A VATA 1994 as they represented the right to receive services “up to” the value stated. The vouchers were redeemable for a digital memory box of a value equivalent to the pledge. Alternatively they may be redeemed for physical space;

- The vouchers were redeemable for one type of service subject to a single VAT rate and so were single purpose vouchers, with the consideration taxable at the time the vouchers were issued.

In reaching this conclusion the First Tier Tribunal said that there was no relevant distinction for present purposes between physical space and digital space, unlike the distinction between a physical book and an e-book. The digital space would itself require a physical medium on which to be held.

The appeal was dismissed.

Lunar Missions Limited v HMRC (TC06286)

NOTE: On 1 December 2017, following the first EU wide set of rules relating to vouchers (Council Directive 2016/1065/EC) HMRC issued a consultation on its proposals for revising Sch 10A VATA 1994.

From 1 January 2019 it is proposed that there will be a wider definition of a single purpose voucher. New article 30a(2) Directive 2006/112 defines a single purpose voucher to be 'a voucher where the place of supply of the goods or services to which the voucher relates, and the VAT due on those goods or services, are known at the time of issue of the voucher'. So the 'one type' of goods or services requirement is removed from UK law, and the test becomes 'one rate' of VAT.

With the widening of the definition in this way, traders should review their product list to identify whether their current Muliti-Purpose Vouchers will become Single Purpose Vouchers, changing the timing for when such vouchers are accounted for. Currently they are accounted for ‘if and when’ they are redeemed, as the VAT rate and place of supply is not known until that point. If they are reclassified as Single Purpose Vouchers, they will be accounted for when the consideration is received, leading to a loss of the non-redemption benefit.

HMRC has indicated that further guidance will be made available in spring 2018 following the receipt of consultation responses.

Ski lift passes

Snow Factor Limited operates an indoor snow dome and conference facility. At reception lift passes, gift vouchers, lessons, sledging, ice climbing and ice slides and other products can be purchased, bookings made and enquiries for birthday and corporate parties are handled. The appeal relates to the treatment of the receipts from the lift passes for the main ski slope.

Snow Factor Limited argues that the sale of a lift pass does not supply a right of admission or a right to use the facilities in the Snow Dome. The cost of the lift pass simply entitles those who wish to use a ski lift on the main slope to access the lift. It is not mandatory to purchase a pass in order to access the main slope or indeed all of the rest of the Snow Dome. The supply is transport up the slope more quickly and easily.

HMRC said that output VAT on lift pass receipts is accountable at the standard rate, and not at the reduced rate of 5% under Schedule 7A Group 13, Item 1 VATA 1994. They argued that the company were charging customers for the use of the Snow Dome as a whole and not simply to access the lift. They said that the supply falls within the exception specified in Note 1 in Item 1, Schedule 7A 35 Group 13 VATA. They referred to the company's website and price plans as evidence of the lift pass providing a right to use facilities within the Snow Dome. They issued two Notices of Assessment' covering the periods from 1 June 2013 to 29 February 2016 for £294,715 plus interest.

Decision

The First Tier Tribunal said that the appeal turned on whether there was a supply for the purposes of VATA on the basis that the proviso to Item 1 was engaged, namely: "NOTES:

Supplies not within item 1

Item 1 does not include the transport of passengers to, from or within-

a place of entertainment, recreation or amusement; or

a place of cultural, scientific, historical or similar interest,

by the person, or a person connected with that person, who supplies a right of admission to, or a right to use facilities at, such a place."

The First Tier Tribunal said that the wording of Schedule 7A Group 13 is absolutely crucial. They said that there was no doubt that a customer purchasing a lift pass is entitled to transport on that lift, or lifts, within "a place of entertainment, recreation or amusement" but the crucial point was that transport was provided by the company. It was the company who, in the wording of the latter part of this provision "... supplies a right of admission to, or a right to use facilities at, such a place". It is the company who permits customers, whether paying or not, to enter the Snow Dome and who has the right to exclude any such customer or indeed passer-by. It is the company who extends the right to use the facilities, whether for payment or not, within the Snow Dome.

The appeal was dismissed.

Snow Factor Limited v HMRC (TC6308)

Step towards single EU VAT area

The EC has proposed allowing member states more flexibility in applying reduced VAT rates. As well as a minimum standard rate of 15%, and subject to each member state maintaining an overall average rate of at least 12%, the new rules would allow:

- two separate reduced rates of between 5% and the standard rate;
- one reduced rate between 0% and the reduced rates; and
- one zero rate.

The current list of goods and services to which reduced rates can be applied would be abolished and replaced by a new list of products (such as weapons, alcoholic beverages, gambling and tobacco) to which the standard rate would always apply.

The plan is that current national exemption thresholds would remain, subject to the introduction of:

- A €2m revenue threshold across the EU, below which small businesses would benefit from simplification measures, whether or not they have already been exempted from VAT;
- the option for member states to free small businesses that qualify for a VAT exemption from obligations relating to identification, invoicing, accounting or returns; and
- a turnover threshold of €100,000, which would allow companies operating in more than one member state to benefit from the VAT exemption.

Mixed and composite supplies **(Lecture B1064 – 21.30 minutes)**

Introduction

Questions often arise as to the VAT treatment of supplies that contain more than one element where each element would have a different VAT rating.

Should they be treated as a single supply of the main element (a 'composite' supply - with the other elements treated as part of that supply) or should a different rate be applied to each element ('mixed' supplies)?

There are no definitions in the VAT legislation of composite and mixed supplies so we need to consider the findings of relevant cases that have been decided.

Leading cases

There are two important cases which act as precedents for current issues arising.

Card Protection Plan

This case produced three key findings:

1. Supplies which are genuinely separate should not be artificially combined

2. A genuinely singe supply should not be artificially split

3. It is instructive to look at what the customer thinks they are receiving

In this case the supply of insurance against losses incurred on stolen cards card other documents was the main supply. Card and key replacement services were ancillary to the main supply so were included in the exempt supply of insurance.

Ancillary means 'something that does not constitute for customers an aim in itself but is a means of better enjoying the principal service supplied'.

Levob (Dutch case)

This case included the finding that there is a single supply where two or more elements are so closely linked as to form, from an objective point of view, 'a single, indivisible economic supply which it would be artificial to split'.

The case involved the supply of off-the-shelf software plus customisation services of that software that the court decided was a single supply.

Some cases relying on the leading cases

Purple Parking/Airparks

A courtesy bus service from an off-site car park to an airport is ancillary to the main supply of parking (so the whole supply is standard-rated).

The Honourable Society of Middle Temple

The lease of land together with a supply of water is a single, indivisible supply.

Courts Furniture Stores

Insurance sold on new goods against defects is ancillary to the sale of goods so single supply of standard-rated furniture. If the insurance was sold by another entity, this would be a separate supply unless HMRC could prove 'abuse'.

Goals Soccer Centres

The supply of league management services was found to be separate to the hire of the pitches.

EE

A credit charge for paying by card or cheque is ancillary to the supply of telephony so standard-rated. A customer does not think they are buying separate services when they receive their bill.

Factors where cases decided as multiple supplies

<u>There is more than one supplier</u>

But there are anti-avoidance rules for printed matter following Telewest case, even if supplied by another supplier where the printed matter is an integral part of the goods or services supplied

<u>View of a typical consumer is they are buying two or more distinct/ independent supplies</u>

- Leightons Opticians – dispensing services and sale of spectacles are separate;
- Natwest Bank – supply of personalised cheques were separate to banking services.

<u>The terms of the contract and 'economic reality' indicate more than one supply</u>

- Durham River Trips Limited - supply of zero-rated travel separate to meals which were optional;
- The Village Surgery Limited – the contract stated clearly chattels not included in sale of the building;
- Weight Watchers (UK) Limited – 'makes no sense from an economic point of view to pay (be charged) separately for the meetings and the publications' – single supply.

<u>The intention of the legislation</u>

Just because items are listed separately on an invoice does not mean it is a mixed supply.

Cases where decided there was a single supply

<u>British Airways</u>

- In-flight catering included in the ticket price was ancillary to main supply of air travel
- If sold separately, meals would be standard-rated

<u>British Telecommunications plc</u>

- Supply of delivery services by a car manufacturer ancillary to supply of a car, so input VAT blocked
- BT could have gone to the factory and collected the car but chose to have the manufacturer deliver it

<u>Dr Beynon</u>

- Injection of a zero-rated drug into a patient is a single supply of exempt healthcare

<u>College of Estate Management</u>

- Supply of printed manuals as part of an exempt supply of education was not a separate supply from an economic point of view – single supply of education

Supplies involving exempt, zero-rated and reduced-rated supplies

Exempt, zero-rated and reduced-rated supplies are derogations from the EU. Member states cannot extend them and so it is not possible to compound what would otherwise be a standard-rated supply into a zero-rated, exempt or reduced-rated supply if this has the effect of extending the reduced rating to items not permitted by the derogation.

The leading UK case on this is Talacre Beach Caravans. Talacre supplied non-mobile residential caravans including contents. It treated this as single supply of zero-rated accommodation to its customers.

HMRC argued that there were separate supplies of accommodation (zero) and contents (standard) as the items were physically and economically separable.

The ECJ effectively ruled that it was a single supply by Talacre but because the UK cannot extend zero-rating of new dwellings to contents, that element had to be standard-rated.

Linked goods concession

HMRC operates a concession where minor promotional items are supplied in a linked supplies scheme.

Where the minor article costs the supplier no more than 20% of total cost of the combined supply and the cost to the supplier is not more than £1 if included with goods intended for retail sale or £5 otherwise, the supply is treated as a single supply of the main goods or service.

Examples include a book with an accompanying DVD which can be used independently of the book, and a children's colouring book issued with felt tip pens, where the pens are not restricted in use to the book they are sold with.

Two-part tariff

A two-part tariff arises where two or more payments involving apparently different transactions are made at different times but amount to the purchase of a single supply.

An example is a Student Railcard. The student pays for the railcard first then later pays for tickets at a reduced price. This is treated as single supply of rail travel so the supply of the Railcard is zero-rated.

Contributed by Malcolm Greenbaum

VAT number in another EU country? (Lecture B1065 – 12.19 minutes)

In most situations, sales of goods and services by a UK business to a customer based in an EU country outside the UK will not require the UK business to get a VAT registration number in that country. In many situations, UK VAT will be charged, even though the sale is to a customer outside the UK – for example, this is the default situation for a B2C supply of services. It is also the default position for a sale of goods to a customer who is not VAT registered in the other country, subject to the distance selling thresholds which I will consider in this session.

In relation to B2B transactions, most VAT on services will be accounted for in the customer's country because the customer must do a 'reverse charge' entry on his own VAT returns. And in the case of goods sold to a VAT registered business, the customer will account for acquisition tax on his return (and claim input tax as a separate entry, assuming the goods are used for his taxable business).

But there are situations when a UK business might need to get a VAT number in another EU country, which I will consider in this session.

Distance selling

Example 1

A UK based business sells men's shoes to a variety of customers throughout the UK and EU as a result of online orders, both to retailers and wholesalers, and also directly to private individuals. What are the VAT issues?

The good news is that any sales made to customers outside the UK in another EU country will be zero-rated if the goods leave the UK and the customer is VAT registered in his own country. Our UK supplier will need to keep evidence of the goods being shipped to that country, and also show the customer's VAT number on his sales invoice. The customer will account for acquisition tax on his own VAT returns.

In relation to sales to non-registered customers, the distance selling thresholds become relevant. Each EU country can choose one of two annual distance selling thresholds – either 35,000 or 100,000 Euros. In general terms, the countries with the higher rates of VAT opt for the lower threshold eg Denmark and Sweden. So a UK business selling goods into an EU country must keep a record of all sales made on a calendar year basis to customers in that country without a VAT number. Once the relevant distance selling threshold has been exceeded on sales made since 1 January, the UK business stops charging UK VAT on its sales and obtains a VAT number in the customer's country. It will charge the rate of VAT that applies in that country to the goods in question and complete VAT returns in that country. So the end result is that sales of shoes to private individuals in Denmark will be subject to Danish VAT of 25%.

Land services – an exception to the general rule

In most situations involving services, the place of supply is where the customer is based for a B2B sale and where the supplier is based for B2C sales. These outcomes are known as the general place of supply rules. So if the place of supply is outside the UK, then no UK VAT is charged. There are important exceptions – for example, many B2C services are based on the customer's location if the customer is outside the EU – see VAT Notice 741A, section 12. But a very important exception relates to land services, where the key issue is where the land or building is based.

Example 2

John is a builder in Manchester and VAT registered in the UK. He has secured two labour only jobs in other EU countries, carrying out bricklaying services.

A private house in France, working for the home owner ie B2C.

A restaurant in Italy is building an extension to its premises ie B2B.

In the first scenario, John will need to obtain a French VAT number and charge French VAT on his services. This is a bit of a nuisance but the good news is that he will be able to claim input tax on expenses he incurs in France, subject to the domestic French rules about input tax deduction.

In the case of the work for the restaurant, many EU countries apply legislation that avoids the need for an overseas builder providing B2B services having to register for VAT in that country.

This outcome is known as a 'reverse charge extension to land services' and means that output tax is accounted for on the VAT return of the customer ie a reverse charge calculation. The customer must be VAT registered in the country where the work is being carried out. However, Italy does not apply the reverse charge land extension (we apply it in the UK for overseas builders – see HMRC Notice 741A, para 7.6), so John will need to get an Italian VAT number and charge Italian VAT to the restaurant owner.

Zero registration threshold

You might be wondering why I said that John had to get Italian and French VAT numbers without thinking about the total fees he will earn and whether these will exceed the domestic registration thresholds in those two countries. The reason is because a business only gets a threshold in its own country. So John can earn £85,000 in any rolling twelve-month period in the UK before needing to worry about UK VAT but a zero threshold applies to work he does in the other 27 Member states. So even if the bricklaying work in France was for 25 Euros, he would still need a French VAT number to do things correctly ie because 25 exceeds zero.

Professional land services

A land service relates to all direct construction work eg services provided by electricians, plumbers, bricklayers and decorators. But it also extends to professional services that relate to a specific building or piece of land.

Example 3

Mary the accountant is confused and is not sure whether either of the following UK clients will need to become VAT registered in France:

Bill is a solicitor and has been asked to do the conveyancing work for a property that his UK client is buying in France

Ben is a property expert and is advising his UK client (private individual) about the best region in France to buy a property to obtain long term capital growth

Bill is supplying a land service in France and will need a French VAT number. Ben is providing a consultancy service rather than a land service so his services follow the general B2C rule ie he will charge UK VAT based on where he has his business.

Exhibition services and conferences

This is a confusing part of the legislation and a good reference if you have any clients involved with organising exhibitions, conferences and events is HMRC VAT Notice 741A, section 9.

A key challenge for the EU legislators is to try and ensure that businesses in different countries trade on a level playing field, and one outcome of this strategy is that the VAT liability of admissions to events is based on where the event is held.

Example 4

Janet is organising a conference in Spain on the benefits of a healthy lifestyle. She will charge an admission fee of £20 per delegate – the delegates will be a combination of business people and private individuals.

Janet must register for VAT in Spain and account for Spanish VAT on the admission fees. It is irrelevant that some of the customers are in business. The Spanish VAT registration will mean she can claim input tax on costs incurred in Spain (subject to the input tax rules in Spain).

Another important point is that many other sources of income linked to an event or conference will follow the general B2B and B2C rules. For example, if a German based pharmaceutical company sponsored our conference in Spain, the place of supply would be Germany and the German company would deal with the VAT on its own return by doing the reverse charge calculation based on the sponsorship fee charged by Janet.

Contributed by Neil Warren