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Personal tax

Sky Sports football pundit and IR35 (Lecture P1421 – 17.23 minutes)

Summary – Services provided by a former footballer to Sky through their personal service company fell within IR35 and were taxable as employment income.

Between 1994 and 1998, Phil Thompson appeared on Soccer Saturday as a panel member providing live match analysis and punditry. Having moved into football management, he took a break from punditry, returning to his role at Soccer Saturday in 2004.

From 2013, Phil Thompson contracted his work through his personal service company, PD & MJ Limited. The company contracted with Sky to:

- provide Phil Thompson's services on any programme they required; and
- prevent him from his providing services to anyone else in the UK;
- permit him to work elsewhere but not to provide similar services to other television, radio or media organisations.

HMRC argued that IR35 applied and sought to assess PD & MJ Limited for PAYE and NIC totalling £294,000 covering the years 2013/14 to 2017/18. PD & MJ Limited disagreed and appealed, arguing that the Intermediaries Legislation did not apply.

Key terms of the contract stated that:

- PD & MJ Limited was required to provide Phil Thompson's services "as a commentator, presenter, interviewer, guest … in a studio or on location, live or recorded."
- Phil Thompson was required to travel on dates, times and to venues specified by Sky.
- Sky agreed to pay the company for the services supplied, monthly in arrears.
- If Phil Thompson was unable to provide his personal services, a substitute could be suggested, but Sky had the right to reject that person.

Two cases in particular were referred to, one by PD & MJ Limited and the other by HMRC:

- PD & MJ Limited argued that the First Tier Tribunal should follow the decision in S&L Barnes Limited v HMRC, where Stuart Barnes had worked for Sky, under similar contracts, but was found to be working outside the intermediary rules;
- HMRC argued that the Barnes case was not binding and had been incorrectly decided. Instead, Alan Parry Productions Ltd v HMRC should be followed, arguing the contracts in that case were very similar to the current case where the First Tier Tribunal had found that the Intermediaries Legislation applied.

Decision

The First Tier Tribunal found that it was bound by neither S&L Barnes Limited v HMRC nor Alan Parry Productions Ltd v HMRC, stating:

> 'whilst the underlying contracts were similar, the factual differences as to how those contracts operated when compared to the present case require their own analysis'.

The First Tier Tribunal reviewed the actual contractual arrangements, identified the terms of the hypothetical direct contract between Phil Thompson and Sky and moved on to consider if the hypothetical contract would be a contract of employment under the three-stage test in the Ready Mixed Concrete case.

The Tribunal found that:

- there would be mutuality of obligation, as the company was required to provide Phil Thompson's services and in exchange Sky was required to pay for those services;
- there was a high degree of control, with Phil Thompson severely restricted in the activities he could undertake for competitors. Sky determined when and where services were provided, with Phil Thompson having no option to refuse work;
- the company generated some 80% of its income from the Sky contract. This was the main element of Phil Thompson's professional income.

The Tribunal concluded that:

> "the terms of the hypothetical contract and the circumstances in which the professional relationship was performed were consistent with an employment contract."

The Tribunal did not take into account the facts that from 2020, Phil Thompson became a formal employee of Sky and that he confirmed during his oral evidence that he performed his work in the same way after he became an employee.

PD & MJ Limited (in Members' Voluntary Liquidation) v HMRC (TC09029)

IR35 - Atholl House decision final **(Lecture P1421 – 17.23 minutes)**

HMRC will not appeal the First Tier Tribunal's decision in Atholl House (TC9026) involving presenter Kaye Adams. (Details of the hearing can be found in our January 2024 notes).

An HMRC spokesperson said:

> 'Given this litigation has been ongoing for a number of years and the First Tier Tribunal does not set binding legal precedents, we don't think it would be proportionate to appeal in this case.'

Kaye Adams said she was 'extremely pleased that HMRC has decided not to roll the dice on a fifth time lucky shot on my case'. However, on HMRC's comment that it would not be proportionate to appeal, she said 'it was never proportionate'.

Dave Chaplin, chief executive officer of IR35 Shield, who has been assisting Kaye Adams with her case for six years was also perplexed by HMRC's claim about proportionality:

> 'The net tax at stake was £70,000 – so if proportionality was an issue, why did HMRC even bother with the first hearing, let alone the second, the third and the fourth?'

First Tier Tribunal rulings do not set binding precedents, Mr Chaplin stated:

> 'The importance of *Atholl House* cannot be underestimated and has set considerable legal precedents at both the Upper Tribunal and Court of Appeal, which HMRC's litigation teams are currently relying on in other cases being litigated. To ignore *Atholl House* is to deliberately ignore the law.'

Adapted from the article in Taxation (1 February 2024)

Salary in lieu of dividends not allowed **(Lecture P1421 – 17.23 minutes)**

Summary – Coronavirus Job Retention Scheme (CJRS) payments should have been based on salary shown on an RTI return made on or before 19 March 2020.

Graham Smith was a director and shareholder of Bandstream Media and Corporate Communications Limited. Up until 31 March 2020 he was paid a salary of £600 per month and dividends of £2,500.

The company's accountant:

- watched a televised parliamentary debate where Rishi Sunak, the then Chancellor of the Exchequer, suggested directors receiving a small salary and dividends could take advantage of the CJRS;

- recommended that, from April 2020, Graham Smith replace some of his dividends with additional salary, enabling the company to claim CJRS grants based on the maximum earnings figure of £2,500.

CJRS claims were submitted for the period from 1 April 2020 to 30 September 2021 based on the increased salary.

Later, having checked the company's CJRS claims, HMRC concluded that the claims should have been based on a salary of £600 per month and issued assessments accordingly.

Following a statutory review, the company appealed to the First Tier Tribunal.

Decision

The Tribunal confirmed that they must look at the words appearing in the legislation and could not take into account any parliamentary debates that had taken place prior to enactment.

The First Tier Tribunal confirmed that CJRS claims should have been based on the salary shown on an RTI return made on or before 19 March 2020, which was £600. Employers were not permitted to inflate an employee's wages after the introduction of the scheme.

Bandstream Media and Corporate Communications Limited v HMRC (TC09016)

Employee travel expenses relief denied (Lecture P1421 – 17.23 minutes)

Summary – Each assignment under an overarching contract of employment was treated as a separate employment, meaning that reimbursed home to work travel expenses were not deductible.

Exchequer Solutions Limited was an umbrella company that contracted with construction sector employment agencies, to match individuals to specific construction work assignments with end user clients.

Under the contracts, the parties agreed that Exchequer Solutions Limited took on the role of employer for the individuals undertaking the assignments.

The issue in this case concerned the treatment of reimbursed travel expenses and whether they were taxable on the employees:

- If there was an overarching contract of employment which also covered the gaps in between the assignments, each assignment location would be a temporary work location, with no PAYE and NICs on reimbursement of home to work employee travel;

- If Exchequer Solutions Limited was only the employer during the period(s) of assignment, each assignment location was a permanent workplace, with the reimbursed sums covering ordinary home to work commuting.

The First Tier Tribunal agreed with HMRC that there was no overarching contract of employment and that the required mutuality of obligation was missing. Under the contracts there was no obligation:

- for Exchequer Solutions Limited to provide any work at all; and

- on the individual to accept work.

Indeed, there was no commercial reason for the company to retain employees as employees were referred to Exchequer Solutions Limited once the employment agencies had matched the employee to specific assignments.

The First Tier Tribunal had agreed with HMRC and so the expense payments were taxable.

The company appealed on five grounds:

1. continuation of the contract;

2. lack of obligation to provide, or endeavour to provide work;

3. obligation to procure future work;

4. lack of benefit to employees; and

5. obligation on employees to carry out or accept work from ESL.

Decision

The Upper Tribunal stated that to be able to set aside the First Tier Tribunal's findings, the company needed to show its findings either lacked supporting evidence or that the First Tier Tribunal's decision was not reasonable.

The Upper Tribunal found that the First Tier Tribunal had not erred in law and had correctly interpreted the contract of employment. Each assignment was a separate employment, with workers free to work for others during any periods when not contracted to work for Exchequer Solutions Ltd

Exchequer Solutions Ltd v HMRC [2024] UKUT 00025 (TCC)

NOTE:

The Upper Tribunal noted that at the time of release of this decision, the judgment on mutuality in the Supreme Court case Professional Game Match Officials Ltd (PGMOL) v HMRC was still awaited. HMRC's view on the matter was that the PGMOL case was "concerned with a different topic and that its likely impact was not such that we ought to stay the hearing or defer handing down judgement."

Company Car Benefit for tax year 2024/25 (Lecture B1242 – 24.26 minutes)

Definition of Car and Van

A car is any mechanically propelled road vehicle except:

- A goods vehicle suited for the conveyance of goods or burden – e.g. a lorry - estate cars and off-road recreational vehicles are cars;
- A motor cycle;
- An invalid carriage;
- A vehicle of a type not commonly used as a private vehicle and unsuitable so to be used, such as a grand prix racing car.

A van is a vehicle of a construction primarily suited for the conveyance of goods or burdens, not people, with a design weight not exceeding 3,500 kilograms.

Double Cab Pick Ups (DCPUs) – all change or not!!

From 6 April 2002, vehicles known as "double cab pick ups" have been classified as cars or vans in line with their VAT treatment.

However, on Monday 12 February 2024, HMRC updated its guidance on the tax treatment of DCPUs following a 2020 Court of Appeal judgment. The guidance confirmed that from 1 July 2024 DCPUs with a payload of one tonne or more would be treated as cars rather than goods vehicles for BIK and capital allowance purposes.

BUT on 19 February 2024 HMRC announced that this guidance would be withdrawn during the "afternoon of Monday 19 February 2024". The government had listened to the views of farmers and the motor industry on the potential impacts of the change in tax treatment. They acknowledged the new guidance was not "consistent with the government's wider aims to support businesses including vital motoring and farming industries".

As a result, DCPUs, with a payload of one tonne or more, will continue to be treated as goods vehicles (company vans) rather than cars and the tax treatment remains the same as before the announcement. DCPUs with a payload of less than 1 tonne continue to be treated as cars.

Expenses of a chauffeur

The expenses incurred by an employer in the provision of a chauffeur whether for a company vehicle or the employee's own car is a separate benefit assessed on the employee. The cash equivalent is calculated in the same way as other benefits in kind – the cost to the employer of providing that benefit less any payments made by the employee.

Cars and vans in the motor industry

Where, as part of their normal duties, sales staff or demonstrators have to take a vehicle home for the purpose of calling on a prospective customer that alone will not be regarded as private use. If the vehicle is otherwise available for private use, at weekends or holidays, then a taxable benefit arises.

Calculation of the taxable benefit

Section F of the P11D will have:

- a box for employers to provide the date the car is first registered – this is mandatory;
- a box to show zero emission mileage where CO_2 emissions of 1-50 g/km – the distance it can travel on a single charge.

The taxable benefit of a company car available for private use is calculated by multiplying the car's list price by a certain percentage.

The steps to calculate the taxable benefit are:

1. Find out the full list price of car and accessories;
2. Add the price of non business related accessories, excluding mobile phone;
3. Deduct any capital contribution made by employee, up to a maximum £5,000;
4. Find relevant percentage for car based on CO_2 emissions;
5. Multiply figure in step 3 by the percentage in step 4;
6. Make deduction for periods of unavailability;
7. Make deduction for contributions to private use, if any;

8. Make adjustment if car is shared between employees.

List price

The list price of the car is “the inclusive price published by the manufacturer, importer or distributor of the case if sold singly in a retail sale in the open market in the UK on the day before the car’s first registration”.

The list price can be reduced by any one-off contribution the employee makes towards the capital cost, up to a maximum of £5,000.

List price means the manufacturers UK price, for a single purchase, not a dealers advertised price or price paid which may incorporate discounts and cashbacks from list price

PLUS

- standard accessories;
- extra non business essential accessories added, i.e. non standard, at their list price including fitting and VAT (excludes business related accessories, mobile phone, equipment for disabled drivers);
- delivery charges plus VAT; and
- VAT, car tax, duty but not road fund licence or new car registration fee.

For classic cars over 15 years old at the end of the tax year with a market value for the year of at least £15,000 the "list price" is taken as the market value. Market value is the price on the open market on the last day of the tax year the car was available to the employee.

Accessories

A qualifying accessory is one which is:

- made available for use with the car without transfer of the property in the accessory, so excludes accessories the employee buys & owns for use in the car;
- made available by reason of the employee’s employment;
- attached to the car, whether permanently or not - e.g. roof rack but not loose tools or maps.

Accessories added to the car will exclude any equipment which is necessarily provided for the employee to use in the performance of their duties – such as roof box to carry samples or a tow bar or tool rack in boot.

Where accessories are added at a later date, after delivery, the list price is increased by the cost of those items - unless the price is less than £100.

However, replacement items do not increase the list price assuming it is a “like for like” replacement.

But if the replacement is superior to the original the list price must be changed by removing old and adding replacement.

Percentage for calculation

This is set out in Appendix 2 of HMRC 480 Guide.

The percentage to be applied to the list price to calculate the taxable benefit figure is based on the CO_2 emissions of the car.

The exact CO_2 figure is rounded down to the nearest 5g/km for the purposes of the calculation of the taxable benefit.

Once the CO_2 emission is set it applies for the life of the car.

2025-26 and future

On 24 November 2022, the new CO_2 emissions tables of rates for calculating company car benefits were published for tax years 2025/26 to 2027/28.

These are subject to change in the Budget or post election.

For zero emission and ultra-low emission vehicles emitting less than 75g of CO2 per kilometre:

- 2025/26 increase by 1%
- 2026/27 increase by further 1%
- 2027/28 of increase by a further 1% up to a maximum appropriate percentage 5% for zero emissions electric cars and 21% for ultra-low emission cars (75g of CO_2)

Rates for all other vehicles will increase by 1% for 2025/26 tax year up to maximum 37% and then be frozen for 2026/27 and 2027-28.

2023/24 and 2024/25 tax years HMRC 480 Appendix 2

CO2	Electric range	NEDC% 23/24 & 24/25	WLTP% 23/24 & 24/25
0	N/A	2%	2%
1 - 50	over 130	2%	2%
1-50	70-129	5%	5%
1-50	40-69	8%	8%
1-50	30-39	12%	12%
1-50	under 30	14%	14%
51-54		15%	15%
55-59		16%	16%
60-64		17%	17%
65-69		18%	18%
AND 1% increments for each 5 g/km up to			
150-154		35%	35%
155-159		36%	36%
160-164		37%	37%
165 -169		37%	37%
170 and over		37%	37%

Diesel cars - For both NEDC and WLTP add 4% for diesel cars up to maximum of 37%, unless Real Driving Emissions Step 2 (RDE2) compliant. The 4% diesel supplement does not apply to diesel plug in hybrids, regardless of RDE2 compliance.

Reduction in benefit where "unavailable" for private use

The taxable benefit will only be charged where the car is ***available for private use***, whether or not the employee actually uses it. The tax charge is reduced if the car is unavailable for use by the employee, e.g. it is in the garage for repairs over a long period of time. To be effective any period of unavailability must be at least 30 consecutive days. If a replacement car is provided there may well be no reduction in the benefit unless the replacement is of a lower standard. Where the employee has only had the use of a company car for part of the tax year the benefit is charged for that period on a pro rata basis.

Reduction in benefit where employee pays for private use

Where an employee is required to make a payment for the private use of the car the taxable benefit will be reduced accordingly, pound for pound. Such payments made by the employee must be disclosed on form P46(car). The payment must be made as a condition of the car being available for private use, be paid in the tax year and specifically for the private use.

Fuel Scale charge for company car available for private use

Where the employer pays all the fuel costs for an employee with a company car, whether the fuel is used on business travel or private mileage, a fuel scale charge arises. This must be reported to HMRC on forms P46(car) and P11D.

The taxable benefit for fuel is calculated by multiplying a fixed figure by a percentage. The percentage figure is the same used to calculate the car benefit charge for the year. **The fixed figure remains at £27,800 for 2024/25 and 2023/24** (2022/23 - £25,300).

To reduce the fuel benefit to NIL the employee must either "make good" the cost of private motoring, including home to work travel, or the fuel must only be supplied for business journeys. When "making good" the cost of private mileage the employee can replace the fuel used for private purposes by buying fuel from their own pocket or by direct payment to the employer. The employee must keep accurate mileage records to identify both business and private journeys.

The **advisory fuel rates** for company car mileage can be used to "make good" the private mileage to ensure the fuel scale benefit does not arise. Any making good must be completed by 6 July following the end of the tax year, if this is not the case it will not be taken into account.

HMRC Advisory Fuel Rates – used where employee is provided with a company car but no fuel and claims back business miles

Fully electric company cars

The advisory rate for a fully electric car remains at **9p per mile from 1st December 2023** previously 10p from 1/9/23 to 30/11/23, 9p from 1/3/23 to 1/9/23, previously 8p from 1 December 2022 and 5p to 30 November 2022.

Hybrid company cars are treated as either petrol or diesel cars for advisory fuel rates.

Company cars other than electric cars

Engine Size	Petrol	LPG	Diesel
Fuel price	£1.406	96.5p	£1.494
From 1 March 2024			
1,400cc or less	13p	11p	
1,401 to 2,000	15p	13p	
Over 2,000	24p	21p	
1,600cc or less			12p
1,601 to 2,000			14p
Over 2,000			19p
From 1 December 2023 to 28 February 2024			
1,400cc or less	14p	10p	
1,401 to 2,000	16p	12p	
Over 2,000	26p	18p	
1,600cc or less			13p
1,601 to 2,000			15p
Over 2,000			20p

Hybrid cars are treated as either petrol or diesel cars for advisory fuel rates. Electricity is not a fuel for car fuel benefit purposes.

Employees can opt out of free fuel at any time during the tax year and enjoy a proportional reduction in their fuel scale charge benefit. The employees are not permitted to opt back into the benefit later in the same tax year.

Contributed by Alexandra Durrant

Changes to the National minimum wage **(Lecture P1422 – 10.39 minutes)**

Background

Businesses are generally obliged to pay at least the national minimum wage (NMW) to their workers. Most workers in the UK who are over compulsory school age and who ordinarily work in the UK are entitled to be paid at least the NMW. If an employer should have paid the NMW but has failed to do so, HMRC can take various action, including issuing a notice to pay arrears for up to six years previously, fines of up to £20,000 per worker, legal action including criminal legal proceedings, and 'naming and shaming' offenders.

Definitions for NMW purposes

The general definition of 'worker' is an individual who has entered into a contract of employment, or who works under a contract of employment. That also extends to any other

contract, which can be an express written or oral contract, or even an implied contract, whereby the individual personally performs work or provides services for the other party to the agreement, and that other party is not a client or customer of any business or profession carried on by the individual (NMWA 1998, s 54(3)).

This general definition of 'worker' is modified when it comes to home workers. In determining whether a home worker is a worker for NMW purposes, it is not necessary for the individual to do the work or perform the services personally; so for example, the worker could pass some of their work to a family member.

The meaning of 'home worker' in this context is an individual who contracts for the purposes of another person's business for the work to be done somewhere not under that person's control or management (NMWA 1998, s 35). The work is often done in the individual's own home, but it could also be done elsewhere.

Family households

The rules on work relating to family households (SI 2015/621, reg 57) broadly provide that 'work' for NMW purposes does not include work done by a worker in relation to an employer's family household if certain conditions are all met:

- the worker is a member of the employer's family;
- the worker resides in the employer's family home; and
- the worker shares the tasks and activities of the family.

For periods prior to 1 April 2024, there is another exclusion from the NMW in household situations, where certain conditions are all met. Those conditions are:

- the worker lives in their employer's family home;
- the worker is not a member of that family, but is treated as such in terms of being provided with living accommodation and meals and sharing in family tasks and leisure activities;
- there are no deductions or payments for the worker's living accommodation or meals; and
- if the work had been done by a family member of the employer, it would not be treated as work or performed under a contract where the requirements for the family member exclusion (see above) would be met.

However, following a change in the NMW rules from 1 April 2024 (in SI 2024/75, reg 2), this latter exclusion is removed from the NMW rules. Hence, any work that meets those requirements will be included in 'work' and the worker must be paid at least the NMW in respect of it. This will potentially benefit workers such as nannies or au pairs who live with the families they work for.

Family businesses

A 'family business' in this context can be operated through a company, or by a sole trader or partnership. The NMW rules state that work does not include any work done by a worker in

relation to an employer's family business if the worker is a member of the employer's family, lives in the employer's family home, and participates in the running of the family business (SI 2015/621, reg 58).

(a) Directors

As a limited company is a separate legal entity a company isn't considered to have a family, or to be a family member, or to own a family home in the context of the NMW.

In a family company, an individual may be an office holder, an employee, or both. Company directors who assume the rights and obligations of a director are office holders, but not necessarily workers. For a director to also be a worker for NMW purposes, there would generally need to be an extra arrangement between the parties to that effect. HMRC accepts that the NMW does not apply to company directors unless they have contracts that make them 'workers' (NMWM05140).

Payments to a company director normally arise by way of remuneration as an office holder in accordance with the company's articles of association. In that case, the director is an office holder and not a worker for NMW purposes. The difference between the rights and duties of an office holder and a worker are broadly that the office holder's rights and duties are defined by the office held and exist independently of the person who fills it. A director can be voted out of office by the company's shareholders. On the other hand, a worker's rights and duties are determined by the contract between them and the employer; that contractual relationship means that the worker can only be dismissed if the contract is terminated.

It follows that if a person is a director, but doesn't have an explicit employment contract, they are highly unlikely to be subject to the NMW legislation. Such activities can be done in their capacity as an office holder (director) rather than as a worker. However, if a director has an employment contract, they will be within the NMW in respect of earnings under that contract, as they and the company will then have chosen to create a worker and employer relationship, alongside the director and company one.

(b) Other workers

In relation to family members who are not office holders, a company employee will always be a worker and entitled to the NMW. A formal written contract is unlikely, particularly in small family companies; however, that does not necessarily mean that no contract exists. HMRC might contend that an implied contract exists, which could result in family members who work in the business needing to be paid the NMW.

For unincorporated businesses, family members of a sole trader or (say) a husband and wife partnership can be excluded from payment of the NMW in certain circumstances. As mentioned earlier, those conditions are broadly that the worker is a member of the employer's family, lives in the employer's family home, and participates in the running of the family business. HMRC's guidance (at NMWM05160) confirms that the work carried out by the family member in those circumstances falls outside the NMW provisions.

Contributed by Mark McLaughlin

Pension tax relief at the end of the tax year **(Lecture P1423 – 16.05 minutes)**

Towards the end of the tax year, high net worth individuals are bombarded with end of year tax advice. This often includes offers on investments in venture capital trusts, enterprise investment schemes and seed enterprise investment schemes.

I will deal with these in another article, but there are only two reliable methods of reducing one's taxable income towards the end of the tax year, charitable contributions, and pension contributions.

Charitable contributions allow for a carry back of contributions into the prior tax year up to the date when the taxpayer files the tax return or the 31st of January, whichever is earlier.

Pensions do not have the equivalent facility for carrying back contributions and treating them as paid in a prior tax year. Therefore, the only opportunity to make tax efficient pension contributions which reduce one's taxable income in the 2023/24 tax year ends on the 5th of April.

Pension contributions reduce taxable income if made by the individual and therefore are of particular interest to those who are in the £50k to£ 60k adjusted gross income (AGI) band and are in receipt of child benefit. The marginal tax rate of child benefit for someone with three children is approximately 67%. The other pinch point is where adjusted gross income exceeds £100k, at that point the personal allowances phase down. The taxpayer loses £1 of personal allowance for every £2 of additional taxable income until the personal allowance is exhausted at £125,140. This is an effective marginal rate of 60% and with national insurance effectively becomes a marginal rate of 62%.

Additionally, those with young children who might be looking to access various government child support schemes, existing and starting in April, they should be aware that no child support is given once the adjusted gross income of either parent exceeds £100k. It therefore makes sense to look at whether to reduce AGI by making additional pension contributions. This year, in particular, is of interest as the Government has abolished the lifetime allowance, increased the annual allowance to £60k and increased the threshold at which the annual allowance is phased down, from £240k to £260k.

The income threshold remains at £200k. This means that in the current year, if an individual has not made any pension contributions but has had a pension scheme for the previous three tax years, they could in theory pay as much as £180k in the current tax year by keeping their income below £200,000. This includes £40k of each of the prior three tax years in unused relief and £60k for the current tax year. Furthermore, it is likely that they will be able to put in another £60k in the next tax year.

If one has an Owner Managed Business (OMB) with a large amount of surplus cash sitting in the company, one needs to look at whether it is sensible for the company to make contributions or whether the individual should. The advantage of the company making the contributions is that there is no national insurance on the company contributions, either employer or employee. Whereas if the individual makes the contributions, they will have come out of income that has been subjected to both employer and employee NIC and this is not recoverable.

Furthermore, if the company sits in the marginal band of corporation tax, between £50k and £250k profits, the corporate tax saving by making a pension contribution would be at 26.5% of the marginal rate, rather than at 25% or 19%. So quite often, it makes sense for the company to make the pension contributions rather than the individual.

But there are occasions when the individual has a very high rate of marginal rate of tax, where they should make the contributions.

At this stage, the wealthy and organised taxpayer has a shrewd idea of their income for 2023/24 and should be able to make the appropriate calculations regarding the best way of making the contributions. This obviously does depend on the status of the individual and the company in terms of both their tax and their national insurance contributions.

The abolition of the lifetime allowance and the increase in the threshold, make pensions contributions more interesting. Although the Labour party has pledged to reverse the reforms. The question remains open as to whether they would reinstate the lifetime allowance for everyone or indeed would give protection to those who at the time of the lifetime allowance was reinstated were above the threshold. It is likely to avoid charges of retrospective taxation but would offer the opportunity of a further election to protect the existing pension contributions, although this is not clear at present.

In conclusion, pension contributions remain a tried and tested method of reducing tax liabilities. One should also remember that pensions grow tax free of capital gains tax and income tax and therefore remain the most tax efficient form of long-term saving.

Contributed by Jeremy Mindell

Capital taxes

PPR relief evidence lacking (Lecture P1421 – 17.23 minutes)

Summary – With little evidence to support the taxpayer's main residence claim over a three-year period, Principal Private Residence relief was denied.

Sabbir Patwary lived with his parents at their London address.

On 9 April 2010 he bought a property, where he lived with his girlfriend, whom he married in 2012 and later divorced, and a tenant friend who shared the entire property with them.

From October 2013, Sabbir Patwary moved back to live with his parents. The tenant remained living in the property until it was sold in February 2016, crystallising a £202,000 gain that Sabbir Patwary argued was covered by Principal Private Residence relief and Letting relief.

HMRC denied the relief, arguing that he did not live at the property as his only or main residence, and secondly, if at any time he had done, his occupation lacked any degree of permanence or continuity as he never changed his address with his bank, HMRC or for the electoral roll.

He was unable to provide supporting documentation for his claim but argued that:

- He did not change his address for correspondence as he accessed most information, online. He worked with his father, who was able to deliver any post on a daily basis.
- He did not register to vote at his new address, claiming that "he preferred to vote in the more marginal constituency of his parents' home where his vote would carry more weight."
- He did not need a parking permit at his property as he walked to work.
- He did not own a TV and so he did not have a TV licence.

Due to an administrative error, the details of which were not disclosed in the case summary, HMRC did not contest the lettings relief claim.

Decision

The First Tier Tribunal agreed that there was 'remarkably little' evidence to show a period of permanent residence over the three-year ownership period.

Indeed, the Tribunal noted that there was not even any supporting informal evidence from his tenant, his now ex-wife, or anyone else who knew his presence at the property.

The appeal was dismissed.

Mr Sabbir Patwary v HMRC (TC09035)

BADR and life interest trusts (Lecture P1424 – 19.51 minutes)

The First Tier Tribunal case of *The Peter Buckley Settlement v HMRC (2024)* highlights an important point about entrepreneurs' relief (now business asset disposal relief or BADR) and life interest trusts.

The 2015/16 Self Assessment tax return for The Peter Buckley Settlement contained a claim for entrepreneurs' relief in connection with the sale of a single share in an unquoted trading company called Peter Buckley Clitheroe Ltd (PBCL).

The trust had been created by Peter Buckley as an interest in possession settlement in March 1999, with the settlor as the principal beneficiary. Subsequently, the settlor replaced one of the original trustees when the latter retired. He was therefore:

i. the settlor of the trust;

ii. a trustee of the trust; and

iii. the sole life tenant of the trust.

PBCL only had one ordinary voting share which had been issued to Peter Buckley and which he later transferred to the trust in September 2012. The trustees sold this share to a company called Progrezion (UK) Ltd in November 2015 for just under £1,500,000, realising a substantial capital gain.

In addition, Peter Buckley had been a director of PBCL for several years up to the time of the share's disposal.

It should be noted that Peter Buckley did not own any shares in PBCL in a personal capacity.

In order for shares to qualify for entrepreneurs' relief (and business asset disposal relief) on a sale by trustees, the following conditions, which are set out in S169J TCGA 1992, must be satisfied:

i. the shares must be held by a life interest trust;

ii. the company to which the shares relate must have been a trading company;

iii. the life tenant must have been an officer or employee of the company; and

iv. the life tenant must have personally met the various 5% tests (in 2015/16, the relevant tests were owning at least 5% of the company's ordinary share capital and holding at least 5% of the company's voting rights).

These requirements had to be met – for pre-6 April 2019 disposals – throughout a period of one year ended in the three years up to the date of the share sale.

Where all these conditions are satisfied and where the life tenant is willing to assign the relevant part of his lifetime limit to the trustees, the trustees can claim relief of up to the appropriate limit (£10,000,000 in 2015/16) so that their gain would only be chargeable at 10%.

Unfortunately, although the conditions in (i) – (iii) above were satisfied, the (iv) requirement was not met, given that Peter Buckley held no shares personally, and so the trustees' disposal did not attract relief.

The trust's tax adviser tried hard to argue that Peter Buckley's role as one of the trustees of the interest in possession settlement gave him the necessary level of ownership (particularly as he was also the sole director of PBCL). And he even invoked the celebrated *dictum* of Lord Tomlin in *Duke of Westminster v CIR (1935)* to the effect that everyone is entitled to order their affairs so that the tax payable is less than it otherwise would be, in an effort to prove that the First Tier Tribunal was allowed to 'ignore the legal position and regard what is the substance of the matter'. But all in vain. The judges found that the legislation was clear and unambiguous and the conditions for the CGT relief were simply not satisfied. The trustees lost their case.

Interestingly, one commentator added this remark in conclusion:

> 'One wonders whether something went wrong when this trust arrangement was set up and that the conditions for relief were inadvertently overlooked. If it was an error, it was an expensive one because the additional tax payable as a result of the relief being unavailable was in excess of £250,000.'

It should be pointed out that, if the trust share had been appointed to Peter Buckley absolutely and held by him for the required amount of time, relief could have been claimed. However, this was not the case.

Contributed by Robert Jamieson

Residential use despite ventilation shaft **(Lecture P1421 – 17.23 minutes)**

Summary – Potential access to a tunnel ventilation shaft by Network Rail did not make the property mixed use.

On 18 May 2018, the company bought 39 Fitzjohn's Avenue, Hampstead, London NW3 for approximately £20 million and paid SDLT on the basis that the property was wholly residential.

Nearly three years later, the company's agent submitted an overpayment relief claim for £1,899,250.

A railway tunnel operated by National Rail and Thameslink passed under the grounds and house at the property, with a ventilation shaft for the tunnel situated at the rear of the property. With Network Rail having the right to come onto the land, the company argued that the property was therefore mixed use and non-residential SDLT rates applied.

Subsequently, the agent also argued that there was a commercial tenancy allowing a carpenter to use a workshop inside the house at the time of completion.

HMRC refused the claim, with the decision upheld by a review conclusion letter dated 15 July 2022.

The company appealed.

Decision

The First Tier Tribunal found that:

- the ventilation shaft was excluded from the lease title deeds, but the surrounding land and the fence were part of the title;
- No specific obligations were imposed on the lessee other than the obligation to allow access;
- Considering the overgrown state of the track and the whole area surrounding the shaft, there had been no recent access;
- Network Rail had the right to come on to the land to carry out works, but were required to restore the surface to its original condition.

The Tribunal concluded that the shaft and potential access by Network Rail did not prevent the land constituting the grounds of the dwelling.

The First Tier Tribunal accepted that there was some evidence of a small workshop in the building that a carpenter had been using but there was no formal lease for this occupation. The contract for sale stated that:

> "The Property is sold with vacant possession (here meaning vacant of persons and free from any occupational interests) on completion… ."

There was no evidence supporting a commercial lease being in place on completion of the purchase.

The company's appeal on both grounds was dismissed.

39 Fitzjohns Avenue Limited v HMRC (TC09021)

Sub-sale scheme failed

Summary - The scheme involving the distribution in specie of a house by a company, with the intended result being that no liability under the former sub-sale rules, failed.

Under the scheme, the taxpayers formed an unlimited company and contributed cash of sufficient amount to purchase the target property by subscribing for shares.

The property's owner then contracted with the company for the sale of the property.

The company paid the agreed price for the property and at the same time as the completion of the sale, the company reduced its capital and made a distribution in specie of the property to the taxpayers.

The taxpayers argued that the effect of s.45 FA 2003 was that the contract between the vendor and the company should be disregarded and that there was no consideration for the distribution from the company, so that no SDLT was payable.

Decision

The Court of Appeal applied a purposive construction to s.45 (as elaborated in the Ramsay line of cases). It rejected the taxpayers' argument that the legislation dealt with legal rights in land and was not concerned with commercial reality so that it was not permissible to look beyond the legal formalities. The court held that no statute was excluded from the requirement for purposive construction and it was both permissible and necessary to look at the scheme as a whole. The effect was that the funds provided by the taxpayers to the company was consideration given indirectly for the purchase of the property. Looking at the facts in the round, the taxpayers had parted with £955,000 and in return acquired the property.

Although that was enough to determine the appeal the court also considered the taxpayer's secondary argument. They accepted that the amount paid by the company for the property would still be chargeable consideration under the notional contract between the vendor and the taxpayers (as envisaged by s.45) because the company and the taxpayers were connected persons. However, they argued that HMRC were not entitled to argue this point because they had made a deliberate decision not to do so at the First Tier Tribunal and the Upper Tribunal had refused to allow them to introduce it. The Court of Appeal disagreed that the Upper Tribunal had refused to allow the point, it was just that the Upper Tribunal had not decided the point as it was unnecessary to do so. In any event, the court would have given permission for HMRC to argue it. It was a pure point of law, with wider implications for SDLT, it required no further fact finding and the taxpayers had conceded that it was correct.

Michael and Bridget Brown v HMRC [2024] EWCA Civ 92

Adapted from the case summary in Tax Journal (16 February 2024)

Administration

Omissions were not deliberate

Summary – A taxpayer's errors and omissions from his tax returns did not result from deliberate behaviour but arose as a consequence of the tragic death of his accountant's son.

For more than 40 years Charles Collier had been involved in property development, buying, renting and selling properties for over 40 years as a sole trader, as a partner in a partnership as well as a shareholder and director of various project specific companies.

Between 2005 and 2012, he earned annual income that was regularly in six figures and in 2008/09 was more that £2 million. It included employment income, partnership income, dividends, interest and rental income.

Severely dyslexic, with a reading age of 12, he was heavily reliant on a team of close and trusted professionals. Since the late 1980s, tax and accountancy services had been provided by 'PC' (this is how he is referred to in the decision), with regular face-to-face meetings taking place to ensure that his affairs were always in order.

Following the tragic death of his 22-year old son in 2006, who fell from a roof with some suggestion that an unknown party had caused his death, the standard of PC's work declined. The late preparation and filing of accounts became the norm. PC was regularly absent from his office and was difficult to contact. Reluctantly, Charles Collier decided to gradually move his work to another firm and by late 2011, Young & Co become his accountants and tax advisers.

Young & Co discovered that PC's work was disorganised, had a number of omissions and errors including undeclared rental income, an undeclared gain, and undeclared commissions within the partnership accounts including one in 2007/08 in excess of £310,000.

Suspecting tax fraud, in December 2012 HMRC undertook a Code of Practice 9 investigation. Various assessments and penalties followed relating to Charles Collier, his wife and partnership.

Charles Collier and the partnership accepted the omissions had been made but appealed, arguing that the failures had not resulted from his deliberate behaviour but rather he argued that at all times he had "acted in good faith and believed the tax returns were correct when they were submitted". Having been made more than six years after the end of the year of assessment to which they related, he believed the assessments were out of time.

Decision

A credible witness, the First Tier Tribunal accepted that the sums involved were not significant in either absolute or relative terms when compared to Charles Collier's overall activities.

Given his dyslexia, he would not have been aware that the returns contained the omissions that they did.

He had not deliberately turned a blind-eye to what was going on but rather, the omissions occurred as a result of either negligent or careless conduct.

The Tribunal found that the assessments and amendments were made more than 6 years after the end of the year of assessment to which they related, and so were out of time and were invalid.

Consequently, the penalty assessments and determinations, based upon the out of time assessments and amendments, were also invalid.

The appeal was allowed.

Charles Collier and others v HMRC (TC09004)

Correct location

Summary – Despite the taxpayer and HMRC appointing London-based counsel, judicial review proceedings were transferred from London to Manchester, the place in which the claim was most closely connected.

The taxpayer lived in the Wirral and was a director of a company based in Liverpool. HMRC served him a personal liability notice for alleged personal responsibility for inaccurate PAYE returns submitted by the company. The notice covered a penalty in the sum of £124.9million.

The taxpayer issued judicial review proceedings. He appointed a solicitor based in Liverpool, who instructed counsel based in London. In the judicial review claim form, the taxpayer's representatives stated that the south-east region was the area with which the claim was most closely connected. As a result, the hearing was allocated to the administrative court in London.

However, the court service attempted to move the hearing to the court in Manchester as the nearest centre to Liverpool.

The taxpayer objected, saying there was no particular public interest that the proceedings be heard in Manchester. Further it would be more expensive because of the lawyers' travel costs.

HMRC also opposed the move to Manchester because its solicitor and team were based in the south-east as was its counsel.

Decision

The High Court judge did not accept this. He said there was a general public interest that a judicial review claim should be heard in the court centre for the region with which the claim was most closely connected. He said:

> "Claims should not "default" to the regional venue for the south-east region, just because it is the capital, or by reason of some hierarchical perception about the London administrative court as a national venue or its judges as the A Team."

Further, it was not for lawyers to 'drive' the location of a hearing – that would undermine the ethos of the administrative court as a single national court operating at three venues.

The judge concluded with a 'final reality-check' on costs, pointing out that it was both the claimant's and HMRC's choice to instruct London-based counsel.

He pointed out that the claim was worth £124.9 million and the claimant and his solicitors had instructed 'leading and junior counsel'. They were perfectly happy to travel to and stay in London for meetings which also entailed costs.

The judge did not therefore accept that any additional cost to the various parties would 'displace the considerations supporting this case being dealt with in the region to which it is most closely related'.

The claim was transferred to Manchester.

The King (on the application of A Bale) v CRC, King's Bench Division, 15 December 2023

Adapted from the article in Taxation (1 February 2024)

Self Assessment returns required

Summary – The taxpayer had no reasonable excuse for filing the tax returns issued by HMRC late. HMRC were entitled to issue the returns in order to check that tax had been correctly paid over.

In January 2020, HMRC issued notices one week apart for Sarah Godliman to file Self Assessment tax returns for the years ending 5 April 2018 and 5 April 2019.

The taxpayer submitted these electronically on 27 October 2021, more than 550 days late. Accordingly, HMRC issued late filing penalty notices totalling £1,400 (Sch. 55 FA 2009).

Sarah Godliman appealed, arguing that:

- the figures detailed in the tax returns contained errors and that neither should have included any income or profit from self-employment;
- she had been placed in the Self Assessment regime in error and was not required to complete Self Assessment returns.

HMRC argued that Sarah Godliman had failed to demonstrate that a tax return was not required as:

- she had made no contact with HMRC contesting the need for her to complete a tax return;
- she had accessed HMRC systems twice in 2019 in respect of registering for Self Assessment as a sole trader;
- both returns submitted included income from employment and profit from self-employment.

Decision

The Tribunal noted that further penalties that had been imposed upon the taxpayer by HMRC for the tax years of 2013/14 and 2016/17 were not being pursued by HMRC and had been cancelled.

The First Tier Tribunal agreed with HMRC's view, noting that:

- the two tax returns included both employment and self-employment income;
- no evidence had been supplied showing any attempt to correct the information;
- she had logged into HMRC's systems in 2019 to register for Self Assessment as a sole trader.

HMRC were within their rights to require the taxpayer to complete the returns, to enable them to verify that no tax was due.

With no reasonable excuse for the late filing of her returns, the appeal was dismissed.

Sarah Godliman v HMRC (TC09046)

Gambling winnings and other client explanations (Lecture P1425 – 15.05 minutes)

This article considers explanations of non-taxable sources that may be given by clients to explain shortfalls in their expenditure requirements, or when asked to identify the source of bank deposits. The situation may arise as a result of investigation work by the adviser, or in response to queries from HMRC.

Background

During the course of an HMRC enquiry, the investigating officer may ask the client to explain the source of deposits to their private bank accounts, or the client might be asked to explain a shortfall in their expenditure requirements. Alternatively, the adviser may be undertaking analysis of these issues, in anticipation of queries from HMRC.

Where the client has been diverting takings, or otherwise extracting funds from their business, they might provide a "cover story". The adviser should test such explanations before responding to queries from HMRC. Failure to do so can undermine the credibility of other explanations provided to the inspector.

Whatever the explanation given by the client, it is important to verify the claimed source, and establish what supporting documentation is available. Advisers will appreciate that the position is more difficult, and even more likely to be challenged by HMRC, when the funds involved have been received in cash.

"I won it on a horse", and other betting/gambling winnings

The basic position is that betting and gambling do not constitute trading (the profits are not taxable, and losses are not allowable). That position was established in the case of Graham v Green [1925] 9TC309, and is acknowledged by HMRC in their Business Income Manual (see BIM22015). The position has been confirmed in subsequent cases, and the principle remains, even with the evolution of new forms of gambling, including spread-betting (although there are some exceptions – see HMRC's BIM22020).

There are circumstances in which the gambling winnings of professional gamblers are taxable, but that is outside the scope of this session.

An explanation frequently given is that the relevant amount was won on a horse, or was obtained from other betting or gambling activity. HMRC are highly suspicious of such explanations and will want supporting evidence. In the absence of documentary evidence, HMRC will want full details including, in the case of a claimed winning bet on a horse race, the horse, the event, date and time of the race, the amount of the bet, and the name of the bookmaker. HMRC will also want details of how the bet was placed, and the source of funds for the stake. Even with that information, they may still not accept the explanation.

Where there are a series of claimed winning bets, HMRC will want the details for each race, and details of other bets placed, including losses. HMRC take the view that, over a period of time, the bookmaker will always win. HMRC's guidance on this topic says, at EM2077, "Any suggestion that a taxpayer, as an individual punter, has been able … to beat the professionals regularly and consistently at their own game, is highly improbable". The guidance goes on to say that the explanation should not be accepted without "compelling evidence". There may be little in the way of supporting documentary evidence, and the adviser will need to establish what evidence might be available, and re-assess the client's position.

Depending on the nature of the betting or gambling activity, there may be a greater likelihood that supporting evidence is available, and the adviser needs to consider the particular client's circumstances. Winnings from gambling are, generally, not taxable, as noted above, although there are exceptions, including in relation to professional bookmakers. However, the onus is on the taxpayer to demonstrate that the relevant amounts have originated from gambling. Many cases have not succeeded at the tribunal because the taxpayer failed to provide supporting evidence. The case of Simon McMillan v HMRC (2019) bucked that trend, as, although the taxpayer had disposed of the records relating to his betting activities, which were conducted in cash, he was successful at the First-tier tribunal. Mr McMillan was considered a credible witness, and there were a number of witness statements, and the tribunal accepted that evidence.

Loans

When a client indicates that they have received a loan, it is important to establish whether there is a loan agreement. Although it might be unusual to have such an agreement for loans between family members, particularly close relationships (from a parent, or sibling, for example), where the loan is from a business associate or friend, it would be reasonable to expect that the transaction was documented. There might not be a formal loan agreement, but, at the very least, you would expect to see an email exchange confirming the position.

In addition to a loan agreement, it would be prudent to obtain evidence of receipt of the loan by your client into their bank account, and a copy of the corresponding bank statement from the lender, showing the payment out of their account. It would also be helpful to obtain copies of bank statements showing evidence of loan repayments by your client, if there have been any such payments. Copies of the corresponding bank statements from the lender will help to complete the audit trail. Whether it is possible to obtain copies of all the relevant bank statements is another matter.

If it is not possible to obtain copies of the bank statements and there isn't a loan agreement, the only documentary evidence your client may be able to obtain is a statement from the lender confirming the position. Whether HMRC will accept a statement without other corroboration will depend on the circumstances, and the facts of the case, but it would not be uncommon for the officer to resist any such claims.

In the absence of any supporting evidence, HMRC may ask for the name and address of the lender, so that they can undertake internal checks. They will determine the lender's ability to provide the funds. However, advisers should note that HMRC may not be prepared to undertake such checks, and put the onus firmly on the client to support his position.

Gifts, inheritances and windfalls

The position for claimed gifts, inheritances and windfalls is the same as for loans, in that HMRC will want supporting evidence. In relation to gifts, a copy of the corresponding bank statement from the donor may suffice. For an inheritance, it should be possible to get documentation, or correspondence, from the solicitor, if there is one, administering the estate. Where there is a claimed windfall, as with a lottery win or similar payment, you should consider obtaining confirmation of the source from the provider, if none was given with the payment. As with the other scenarios discussed in this session, it is important for the adviser to get the client's comprehensive explanation, and for that explanation to be robustly examined.

Similar considerations apply when clients claim that bank deposits arise from cash hoards, or the sale of furniture or other personal effects.

Practical considerations

It is important for advisers to pre-empt HMRC queries, where possible, and ensure that any bank statements or other documents sent to the inspector are reviewed if they have not previously been provided by the client. If it is not possible to review the statements, perhaps on grounds of cost, the adviser should ensure that the client understands the consequences if there are deposits to the bank account which cannot be explained or documented. The same considerations apply when reviewing the client's means' position, and their ability to fund personal expenditure, if that is being examined by HMRC (usually after a deficiency in the accounts or tax return has been established).

The circumstances should be established with the client, such that the source of the receipt(s) is identified. Advisers should be prepared to explore the explanations given by the client. It is important to determine the position, and ensure, as far as possible, that explanations are obtained before documents are sent to HMRC. The credibility of other explanations given to HMRC will be undermined if stories of, for example, betting winnings are later found to be false. The adviser's position is more difficult if the client's explanations relate to cash receipts.

When an explanation has been provided, such as those discussed in this session, it is important to establish what supporting evidence there is, and whether that will be sufficient to satisfy HMRC, or, ultimately, the tax tribunal. Consideration should be given as to what further documentation can be obtained. Evidence can be presented at the tribunal, if HMRC does not accept the explanations and the officer issues an assessment. However, my view is that if there is evidence available, or that can be obtained, it should be presented to the HMRC officer rather than wait for the matter to be escalated such that there is a tribunal hearing, with the associated delay in reaching a conclusion and the increase in associated costs.

Where the client provides an explanation that is not supported, or that the client subsequently accepts is not correct, advisers should consider whether the client needs to make a voluntary disclosure (for which see my session on that topic).

Advisers need to be aware that questions on bank deposits or the client's means' position may also arise at a meeting with the inspector. If the above advice has been followed, the adviser will have reviewed bank statements provided to HMRC, and explored any potential weaknesses. However, if the adviser agrees to take his client to a meeting with the enquiry officer, he should ensure that such matters have been addressed, and that the client is suitably prepared.

HMRC's Enquiry Manual does not provide the adviser with much assistance in this area. Most of the content regarding betting and claims of non-taxable sources is withheld because of exemptions in the Freedom of Information Act 2000. Advisers should note that HMRC can be expected to robustly challenge any claims of non-taxable sources, including in relation to bank deposits or shortfalls in personal expenditure requirements. Officers are advised, at EM2053, that they "should not accept such claims unless you are satisfied that they are correct". This will involve HMRC examining the available evidence, seeking to question the client in person, and considering the client's credibility and behaviour during the enquiry.

Contributed by Phil Berwick, Director at Berwick Tax

Deadlines

1 March 2024

- Corporation tax for periods ended 31 May 2023 (companies not paying by instalment)

2 March 2024

- Unpaid income tax/class 4 NICs for 2022/23 automatic 5% penalty from today

7 March 2024

- Due date for VAT returns and electronic payment for 31 January 2024 quarter

14 March 2024

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

19 March 2024

- Non-electronic PAYE, NI, CIS and student loan liabilities for month to 5 March 2024
- File monthly CIS return

21 March 2024

- File online monthly EC sales list –businesses in Northern Ireland selling goods only
- Supplementary intrastat declarations for February 2024
  - arrivals only for a GB business
  - arrivals and despatch for a business in Northern Ireland

22 March 2024

- PAYE, NI and student loan liabilities to clear HMRC's bank account

31 March 2024

- Accounts to Companies House
  - private companies with 30 June 2023 year ends
  - public limited companies with 30 September 2023 year ends
- Reclaim close company tax paid on loan to participators if loan repaid during year to 31 March 2020
- File CTSA returns for companies with accounting periods ended 31 March 2023
- Approval of claims for VAT partial exemption special method if to be backdated to 1 April 2023 (March year ends)
- End of chargeable period for annual tax on enveloped dwellings

News

Finance Act

The Finance Bill received royal assent on 22 February and is now the Finance Act 2024.

https://hansard.parliament.uk/lords/2024-02-22/debates/3C50507E-67DF-47D7-9E8A-11F89B6D00C8/RoyalAssent

Granting EMI options

HMRC's Employment Related Securities Bulletin 54 reminds businesses of the change in reporting deadline introduced by clause 13 FB 2024.

For Enterprise Management Incentives options grated from 6 April 2024, companies must notify HMRC of the grant by the 6 July following the end of the tax year in which the options are granted.

The 92-day deadline is unchanged for options granted before 6 April 2024.

https://www.gov.uk/guidance/employment-related-securities-bulletin-54-february-2024

Business taxes

Transition profits guidance

HMRC has published new guidance explaining how to calculate the transition profit for 2023/24 for taxpayers affected by basis period reform.

The guidance covers identifying and then apportioning the 'standard' and 'transition' parts of the basis period.

HMRC gives an example of preparing accounts to 31 December each year with THE;

- standard part running from 1 January to 31 December 2023; and
- transition part from 1 January to 5 April 2024.

It explains how to work out how much of the transition profit, after the deduction of overlap relief, should be taxed in 2023/24.

The remainder is spread over the next four tax years ending with the year 2027/28.

HMRC will publish a new calculator tool in April 2024 for this purpose.

https://www.gov.uk/guidance/work-out-your-transition-profit

Adapted from `taxation (29 February 2024)

The expansion of the cash basis **(Lecture B1422 – 16.22 minutes)**

In his Budget Speech on 15 March 2023, the Chancellor said that the Government would be consulting on expanding the cash basis of accounting for unincorporated businesses with trading income. This consultation ran until 7 June 2023 and detailed revisions to the scheme were announced in the Autumn Statement on 22 November 2023. The new measure, which only affects self-employed taxpayers and does not apply to companies, has been set out in Cl 16 and Sch 10 FB 2024.

The cash basis – a self-explanatory system – is a method which unincorporated businesses can use to calculate their taxable trading profits as an alternative to employing the traditional accruals approach.

Currently, a person has to elect under S25A ITTOIA 2005 to utilise the cash basis, normally by notifying HMRC as part of the self-assessment tax return procedure. Historically, the accruals basis has been the default method for calculating profits, with the cash basis representing an opt-in regime.

The latest provisions change all this so that, for 2024/25 onwards, the cash basis becomes the default method for calculating trading profits (new S24A ITTOIA 2005 (as inserted by Para 2 Sch 10 FB 2024)), unless:

- the trade is an excluded trade (see new S25B ITTOIA 2005 (as inserted by Para 11 Sch 10 FB 2024) which specifies seven conditions under any of which the trade will be regarded as 'excluded'); or

- an election is made under new S25C ITTOIA 2005 (as inserted by Para 5 Sch 10 FB 2024) for the profits of the trade to be calculated in accordance with generally accepted accounting practice (GAAP), ie. the traditional accruals approach.

A S25C ITTOIA 2005 election ceases to have effect in the tax year:

- in which the trade becomes an excluded trade; or

- when there is an election to use the cash basis.

A further election to use GAAP can always be made subsequent to that tax year.

Para 3 Sch 10 FB 2024 makes amendments to S25 ITTOIA 2005 to require GAAP to be used where the cash basis does not apply.

By virtue of Ss31A and 31B ITTOIA 2005, businesses are only able to participate in the cash basis if their turnover is £150,000 or less and they are generally forced to leave the regime where their turnover exceeds £300,000. Para 6 Sch 10 FB 2024 removes these turnover restrictions in their entirety. Thus, sole traders and partnerships of individuals of any size are able to use the cash basis.

Cash basis businesses cannot deduct more than £500 in interest costs from their taxable profits in any one year (Ss51A and 57B ITTOIA 2005).

This interest restriction has been removed by Para 7 Sch 10 FB 2024, allowing such businesses to deduct any amount of interest provided that it is incurred wholly and exclusively for the purposes of the trade. The cash basis and accruals basis rules for interest deductions have therefore been aligned.

Cash basis users are also restricted in the loss relief from which they can benefit where trading losses have been incurred. Sideways loss relief and relief against capital gains are not permitted (S74E ITA 2007). Losses generated in a cash basis trade can only be carried forward and set against future profits from the same trade or alternatively used under the terminal loss relief rules when there is a permanent cessation of the trade. These restrictions have been abolished by Para 8(a) Sch 10 FB 2024. From 2024/25 onwards, cash basis losses can be set sideways against total income (or gains) of the same period or carried back to earlier years.

Para 8(b) Sch 10 FB 2024 amends S384B ITA 2007 to remove the restriction of relief for interest paid on a loan the purpose of which was to buy plant or machinery for use by a partnership or to buy an interest in a partnership where the firm uses the cash basis for its trade. The restriction remains where the partnership uses the cash basis for a *property* business.

These FB 2024 provisions represent a fundamental change which will create very different profit (and loss) figures for a large number of businesses currently using the accruals basis.

It will be interesting to see whether anti-avoidance legislation has to be brought in, given that wider usage of the cash basis will make it easier to manipulate the taxpayer's profits and losses than under the accruals basis.

Also, as one commentator has pointed out:

> 'This move has the potential to tackle one of the biggest stumbling blocks to the implementation of Making Tax Digital for income tax self-assessment by allowing taxpayers to turn the data they have readily to hand – bank statements – into the required quarterly reports rather than having to process accruals-based adjustments to make quarterly data and estimates more meaningful.'

Another consequence, which should not be overlooked, is that clients who operate the cash basis may, in time, decide that they no longer need professional assistance with their accounting and tax, although this is likely to take effect over a period of years.

Contributed by Robert Jamieson

HMRC interest in the Badges of Trade **(Lecture B1423 – 16.50 minutes)**

One of the issues which has caught the attention of the press recently is the news that HMRC are getting information from online selling platforms which might enable them to identify individuals who are not paying sufficient tax. This would be on the basis that the activities are significant enough to be trading such that income tax and National Insurance Contributions would be due.

It is not an easy argument for HMRC to make and relies on the 'badges of trading' being met. There is statutory definition of trade which includes 'any venture in the nature of trade' which is not helpful. In the end, it is a question of fact whether someone is trading so there is scope for a disagreement to arise as to whether there is trading taking place.

Much of the case law relating to trading comes from a time when there was no capital gains tax so the difference between trading and not meant the difference between paying tax and not. However, we do still see this issue addressed in some cases.

The badges of trade are generally those included in the list below but it has often been stressed that this is not a comprehensive list and no single issue is decisive. The list is:

- Is there a profit-seeking motive?
- Are there systematic and repeated transactions?
- What is the nature of the asset and can it only be turned to advantage by selling it?
- Are there similar trading transactions or interests?
- Have you made changes to the asset which makes it more saleable or saleable at a greater profit?

- Were the sales carried out in the way that is typical of trading?
- Was money borrowed to buy the asset and could the funds only be repaid by selling the asset?
- What is the interval of time between the purchase and the sale?
- How did you get the asset as acquisition by inheritance or gift might mean it is less likely to be trading?

It is possible to look at these in more detail, both in a general context and also from the view of an individual who is selling on a platform such as Ebay.

Profit seeking motive

This is a not an easy one to start with. No-one is going to buy an asset in any circumstances hoping that it is going to lose value. If you buy a house which you are going to let out you are also going to be hoping that it will go up in value if you ever want to sell it.

HMRC would need to prove that the asset was acquired with an intention to re-sell at a profit with other factors (discussed below) then needing to be considered. Some assets (and the example always given is shares) are more likely to be held as an investment and any asset which has an income stream attached to it can be seen more as an investment asset.

Of course, intention can change. Someone might by a property which they intend to refurbish and let out. Their circumstances might then change such that they decide to sell or someone might make them an offer they can't refuse! In neither case would it be easy for HMRC to treat that as trading income.

With someone who is dealing on Ebay there is a going to be a clear difference between someone who is selling off surplus items and someone who is actively buying items to sell on the platform. Both will have a profit-seeking motive but the other badges can be used to demonstrate that there is no trade.

Repeated transactions

The more transactions there are, the greater the likelihood that you start to veer into trading. However, it is important to acknowledge that a single transaction can be trading so again this is not determinative.

A good illustration of the problem with repetition is seen in a tax case where a taxpayer started a driving school which they sold for a profit. He then repeated this some 30 more times. The first transaction was the sale of a capital asset but the High Court found that the repetition meant that subsequent transactions were trading.

In an Ebay type situation, an individual could have many transactions if they have a lot of surplus items to get rid of. However, it is unlikely (although not impossible) that would be over a long period of time. What might happen is that someone starts off using an online platform to sell accumulated 'junk' but then realises how profitable it can be and starts to source items to sell. It would be that point when you would have to consider if a trade has started.

Nature of the asset

In reality, an asset could be subject to trading but some are more likely to be problematic. In the HMRC Business Income Manual at para. 20245, it is acknowledged that there are issues with trading arguments with the following types of assets:

- Those commonly bought for investment, such as shares, which yield an income;
- Those where there is personal use or enjoyment such as paintings or classic cars;
- Fixed assets used in trade, for example plant and machinery.

This is not definitive since art dealers will be buying and selling paintings but they are clearly trading. The repeated references to shares typically being held as investments is part of a wider view within HMRC that share dealing is not normally a trade. This is because there are often losses involved and HMRC do not want such losses to be available to set off against other income.

In an Ebay situation, it is unlikely that the assets will be of the type which are normally held as investment. However, an online platform could still be used to sell assets previously held as investments which are now being liquidated by the owner.

Similar trading transactions

If a person who is buying and selling assets has related interest or expertise then it is more likely what they are doing is trading. A good example would be someone who is a builder who renovates property in their spare time and tries to argue that this is not a trading transaction. On one Court case the comment made was:

> *'a one-off purchase of silver cutlery by a general dealer is much more likely to be a trade transaction than such a purchase by a retired colonel'.*

From an online selling perspective, this might be relevant where someone has a trading business and uses Ebay or similar to sell off surplus stock. Such transactions would be part of the underlying trade.

Changes to the asset

A modification to make an asset more saleable would be typical of trading activities in some cases. This would also include buying in bulk and breaking down assets into smaller lots to facilitate a sale.

However, this does need to be taken with some caution. An Ebayer who has clothes to sell and does some minor repair work on the items before they are sold or where something is cleaned up before sale is not likely to be seen as a trader for this reason alone.

Was the manner of selling indicative of trading?

This badge can perhaps now been seen as somewhat obsolete. The options available to anyone who wants to buy and sell items is wide given the nature of the internet and social media. It is difficult to see that this would be relevant in many cases.

The cases in the past where this has been a relevant factor is where there has been a forced sale (in one case of a property portfolio) which was not found to be trading.

Was money borrowed to fund the activities?

This badge looks at a situation where you have borrowed money which can only be repaid by selling the item purchased. There was a case involving Norman Wisdom in the 1960s where he borrowed money to invest in silver to hedge against devaluation of the currency. He borrowed money at a very high rate of interest which meant he would have to sell the metal quickly as he could not fund the interest costs.

In the context of online sales, it is difficult to see that this would be relevant in many cases but it is still something that needs to be considered.

Time between purchase and sale

It makes sense that someone who buys and sells quickly could be at risk of this being treated as a trading transaction. However, there can be reasons for selling quickly, including deciding that you just don't like something!

In the context of online selling, a person who is selling off surplus goods is not going to be at risk of being caught by this. A person who starts to buy to sell is more likely to have problems.

Method of acquisition

As noted above, if something has been inherited or gifted, then it is less likely to be trading unless you have been gifted the property to enable you to trade with it!

The risk with online sales lies with the person who is buying to sell on the platform.

Conclusion?

The wide range of online selling platforms means that there is a difficulty in making generic conclusions about the risks involved here. Anyone who is not otherwise self-employed can make use of the £1,000 trading allowance even if they are deemed to be trading on a small scale.

This initiative (if it is that) by HMRC is more about tackling those who are using online selling as a way of dodging scrutiny from the authorities. It feels like the biggest risk is going to be where items are being bought specifically to sell online which does happen. The greyer areas might be with platforms such as Etsy where people are selling items they have made themselves. In many cases, there could be argument that they are just using such a platform to sell the products of a hobby and only really getting back a small return on materials used. When does this become a trade?

It is important in a wider context to consider whether trading is a better option. A recent case involving a couple who were denied a deduction for capital gains purposes for a payment made to an individual who project managed the renovation of a property they had purchased raises interesting questions. Their intention had been to renovate the property personally and then rent it out but circumstances changed. No relief was available for the 'profit share' as it was not an allowable deduction within s38 TCGA 1992. If they had presented this as a trade, would they have been able to argue that cost was wholly and

exclusively for the trade? Other expenses, such as interest, are also not deductible for capital gains purposes.

Finally, it is worth acknowledging that HMRC do still look at trading where property transactions are not declared on the basis that private residence relief is due. However, a recent case on this point (which had a twist on the residency point as the taxpayer was claiming that they were living in job related accommodation) was found to be a capital transaction (albeit without the private residence relief) even though a number of properties had been renovated and sold over a relatively short period of time. This case shows how difficult it is to argue around the badges of trading.

Contributed by Ros Martin

Company credit card and loan write off (Lecture B1421 – 22.28 minutes)

Summary – A director's personal use of his company credit card was taxable employment income and the write-off of an intercompany loan had an unallowable purpose.

James Keighley was a shareholder and director of Primeur Limited.

For many years, he used a company credit card to pay for personal expenses but never reimbursed the company.

No adjustments were made in the company accounts, the sums did not appear on his P11Ds and he never declared the expenses on his personal tax returns.

James Keighley also owned shares in Valley Dale Properties Limited.

Primeur Limited and its shareholders made loans to Valley Dale Properties Limited:

- The shareholder loans were unsecured;
- The loan from Primeur Limited was secured on a property.

Valley Dale Properties Limited sold the property at a loss. With insufficient funds to repay the loans, the loans to the shareholders were repaid in full, while the loan from Primeur was written off. Based on advice received, Primeur Limited claimed the loan write off as a loan relationship debit.

Following an enquiry, HMRC issued:

- discovery assessments and penalties to James Keighley based on deliberate behaviour for all years from 2001 to 2017, with years prior to 2013/14 based on the presumption of continuity.
- NIC and penalty determinations as well as assessments to Primeur Ltd;
- a discovery assessment denying relief for the loan write off on the basis that either the:
  - two companies were connected; or

- loan write off had an unallowable purpose.

James Keighley and Primeur Limited appealed.

Decision

The First Tier Tribunal found that the discovery assessments and associated penalties in respect of the credit cards issued to James Keighley were upheld, with his conduct found to be deliberate. It was hard to believe he did not know or question the tax implications of such high personal expenditure incurred using a company credit card. James Keighley was unable to provide evidence to justify that HMRC's assessments based on 'presumption of continuity' were excessive.

While James Keighley's penalties based on deliberate behaviour were upheld, those issued to Primeur Limited's in respect of NIC were reduced as the director's deliberate behaviour could not simply be transferred to the company. HMRC had failed to show that the company intended to mislead HMRC.

Moving to the loan write off, the First Tier Tribunal concluded that the companies were unconnected but that the loan write off did have an unallowable purpose.

James Keighley and a second shareholder held a majority of the shares and votes in each company but the companies were found to be unconnected as a third person, Mr Fearnley:

- held shares in Primeur Ltd (but not in Valley Dale Properties Ltd);
- a shareholders' agreement provided a list of things which could be done only with his consent.

However, on the sale of the property, Valley Dale Properties Limited was obliged to repay the secured loan in full. Repaying the shareholders first meant that the unsecured creditors benefitted, which deliberately deprived the company of income. Repaying in this way represented an unallowable purpose, which was not within the company's business or commercial purposes.

The Tribunal found that the accountants, acting on behalf of Primeur Limited, had been careless as it made no mention that the loan was secured and failed to even consider the unallowable purpose rule. The assessment was not out of time.

Mr James Keighley and Primeur Limited v HMRC (TC09023)

Late R&D claim

Summary - a late Research and Development expenditure credit (RDEC) claim was denied as HMRC had not made an error in law and had not acted unreasonably in reaching their decision.

Bureau Workspace Ltd appointed new agents for its accounting period to 31 December 2020. Having identified that the company was eligible to make a RDEC claim in respect of that year, the company checked the previous year and discovered that the company could also have made a claim totalling some £350,000 in respect of the prior year.

With the company having already submitted its tax return for that year, the agent sought to amend the earlier return. They were up against a tight deadline as the agent's offices were closing for its Christmas break on 23 December and the amended return, together with supporting computations, needed to be submitted by 31 December 2021.

On 23 December, the agents successfully filed the online return and corporation tax computation for the accounting period to 31 December 2020 but had difficulty filing the previous year's amended return and computation. By around 7pm that evening the agent managed to file the online return but failed to file the supporting corporation tax calculation. When the offices reopened in the New Year, the deadline for filing the completed claim had elapsed. The computation was filed 20 days late on 20th January.

HMRC denied the claim stating that the submission of the amended return without the corporation tax computation was not a valid claim as:

> "a notice amending a return must be in such form as an officer of HMRC may require and must contain such information and be accompanied by such statements as HMRC may reasonably require (para 15 (2) and (3), schedule 18, Finance Act 1998).'

HMRC confirmed this in writing, stating that HMRC would not use its discretion to allow the late claim. There were no exceptional circumstances and it was not outside the company's control to have submitted the computation that was required.

The company brought judicial review proceedings, challenging HMRC on two grounds:

1. By refusing to process the claim because the claim was not accompanied by a corporation tax computation, HMRC had erred in law;

2. If there was no such error of law, the refusal was unreasonable.

Decision

In the Court's opinion, there was a requirement for the computation to be filed at the same time as the amended return. Although there is no formal mechanism set out in the legislation imposing what is required to be submitted to satisfy para 15(2) or (3) FA 1998, "HMRC has set out its requirements in the HMRC Manual CTM 93300 and CIRD 81800 and 89705". Further the Court stated that HMRC's requirements had been clearly communicated to agents in Agent Update 70.

The Court stated:

> "HMRC Manuals contain guidance for HMRC staff, they are published and constitute a public record of the requirements which HMRC has imposed under para 15(2) and (3)."

These sources make it clear that for a RDEC claim to be valid, HMRC require the supporting corporation tax computation to be submitted as part of the claim.

As a result, the Court found that HMRC made no error of law when they rejected the claim as being incomplete.

The Court concluded that HMRC's decision to deny the claim was reasonable:

- It was the agent's responsibility to ensure that although the agent's offices were closed over Christmas and New Year, arrangements were in place to ensure that deadlines during this period were met.

- Although the agent had experienced software issues, they did not try to submit the calculation in another way or on a later day. So, for example, Agent Update 70 as well as HMRC's Corporate Intangibles Research and Development Manual and Company Tax Manual make it clear that it could have been sent by email.

Bureau Workspace Ltd's application was refused.

Bureau Workspace Ltd v Advocate General for the Commissioners of HMRC [2024] CSOH

Disposals of LLP interests

Summary - Payments made to individual members of a UK LLP on 'sales' of their 'capital interests' were taxable as miscellaneous income.

The appellants were individual partners in a management consulting firm which conducted business in the UK through a UK LLP, together with that LLP.

The main issue in this case was the correct tax treatment of payments received by those individuals on the disposal of certain interests they held in the LLP, called 'capital interests'.

Capital interests were allocated to partners in the firm, and their value increased or decreased based on the group's global performance.

Pursuant to the limited partnership agreement, an individual would be required to sell their interests to the corporate partner in the LLP (BCG Ltd) in certain situations, including retirement.

The appellants' case was that, as interests in the partnership, payment received on their disposal should be taxed on a capital gains basis, with the benefit of entrepreneurs' relief.

HMRC's position was that the payment should be taxed as income.

Decision

The First Tier Tribunal found that capital interests were allocated to partners in the firm as part of the overall package of remuneration and incentivisation provided to senior personnel, through giving them a longer-term financial interest in the group.

Despite their name, the Tribunal found that they were not interests in the capital of the LLP or a share in its assets, nor an interest in its goodwill, as the holders' rights were against BCG Ltd and to be paid an amount at a future date calculated by reference to the increase (if any) in the value of the global business.

The First Tier Tribunal went on to decide that the capital interests were not part of the LLP's profit-sharing arrangements and therefore were not taxable as income pursuant to the partnership profit sharing rules in s.850 ITTOIA 2005. There was a disconnect between the profit of the LLP and the value of the capital interests, and BCG Ltd was not a 'mere conduit' in this regard, as had been contemplated in *BlueCrest* [2023] EWCA Civ 1481. To conclude

otherwise 'would involve rewriting the contractual arrangements between the parties in such a way as the Upper Tribunal in *BlueCrest* decided was outwith even the most purposive construction of s 850'.

The above conclusion was not altered by the special rules for mixed member partnerships in s.850C ITTOIA 2005. The key reason here was that an individual's profit share in the LLP (i.e. their profit allocation representing salary and bonus, calculated via an annual compensation framework) would not have been higher in the absence of the capital interests.

The payments on 'sales' of capital interests were nevertheless income in nature and taxable as such under the miscellaneous income category in s.687 ITTOIA 2005. The source of the payments was not the underlying business of the LLP, or its profits, but the terms on which the capital interests were allocated under the limited partnership agreement.

In the event that its finding on miscellaneous income was wrong, the First Tier Tribunal found that the payments would be subject to income tax as proceeds from the sale of occupational income under Part 13 Chapter 4 ITA 2007.

Given these conclusions, the First Tier Tribunal would have dismissed the individuals' appeals on the capital interest issue.

However, the validity of several of HMRC's discovery assessments were successfully challenged by the appellants as the Tribunal found that HMRC had not shown that the errors in the individuals' returns were brought about carelessly (whilst the LLP had been found to be careless, the LLP was found not to have acted on the individuals' behalf in this respect), nor that the hypothetical officer test had been met. As a result, most of the individuals' appeals were allowed.

A couple of further legal points had also been in dispute, including whether a deferral of profit allocation to the individuals (to take advantage of the reduction in the higher rate of tax from April 2013) had been effective, and whether valid allocation of profits to BCG Ltd had taken place. The First Tier Tribunal found for the appellants on both issues.

The Boston Consulting Group UK LLP and others v HMRC (TC09049)

Adapted from the case summary in Tax Journal (9 February 2024)

'Hire cap' under the oil contractor regime

Summary - The 'hire cap' under the oil contractor regime applied to restrict the deduction available to the company for the cost of chartering a tender support vessel.

Dolphin Drilling Ltd chartered a vessel, the Borgsten, from an associated company, to provide services to the Dunbar oil platform under a contract with the platform's operator, Total.

The services included supplying water, compressed air and other chemicals to the platform and providing warehousing, heliport and storage, as well as accommodation for around 50 of Total's personnel who were working on the Dunbar (in addition to the company's own workers who worked on the Borgsten).

HMRC considered that the hire cap in s.356N CTA 2010 applied, but the company argued that the exception given by s.356LA (3) CTA applied because it was reasonable to suppose

that the use of the Borgsten to provide accommodation for the Total personnel was 'unlikely to be more than incidental to another use or other uses' to which the Borgsten was likely to be put.

The First Tier Tribunal had allowed the company's appeal, holding that something was 'incidental' to another matter if it was subordinate, or secondary, to it.

On the basis of that definition, the provision of accommodation, although important, was unlikely to be more than incidental to the use of the Borgsten to provide the other services to the Dunbar. The Upper Tribunal upheld this decision and HMRC appealed to the Court of Appeal.

Decision

It was common ground that 'incidental' had no specialist or technical meaning and had to be given its ordinary meaning. The Court of Appeal noted that seeking to provide a definition of ordinary words in legislation ran the risk of the non-statutory definition being treated as a substitute for the statutory words. Here, the First Tier Tribunal had in effect substituted a test of whether the provision of accommodation was in some way lesser than the provision of the other services. The First Tier Tribunal had therefore asked itself the wrong question.

Instead, the Court of Appeal said that 'one would normally say that use A is incidental to use B if it arises out of use B, something that is done because of use B, or in connection with use B, or as a by-product of use B'.

The use of the Borgsten for accommodation did not simply arise out of its use as a tender support vessel but was a significant and independent end. It may have been a secondary use, but it was not incidental to the other uses. The company therefore could not benefit from the exception in s 356LA (3) and the hire cap applied.

Anastasia Nourescu, Senior Associate at Stewarts, commented:

> 'While this case may appear to deal with a niche issue limited to the offshore oil industry, the decision will be of wider interest due to the Court of Appeal's consideration of the meaning of an “incidental” use or purpose. This word comes up at various points in the UK tax code, particularly in the context of anti-avoidance provisions and the “main purpose” test. As the court found, there is little precedent on what “incidental” and “more than incidental” mean, so the guidance set out in the decision may well have a far-reaching impact.’

She added:

> ‘Dolphin Drilling has already announced its intention to appeal the Court of Appeal decision to the Supreme Court. This is unsurprising given the taxpayer's success before the First Tier Tribunal and the Upper Tribunal on this finely balanced point of statutory construction, which leaves room for further argument,'.

HMRC v Dolphin Drilling Ltd (2024 EWCA Civ 1)

Adapted from the case summary in Tax Journal (19 January 2024)

High Court considers FII GLO limitation period

Summary - The High Court was required to ascertain when a constructive discovery of the possibility of a challenge against HMRC occurred, focusing on the professional and academic opinion of the now-established incompatibility between the UK and European tax regimes applicable to overseas dividends at the relevant time.

The claimants were members of the Franked Investment Income Group Litigation Order (FII GLO).

Members of the FII GLO have successfully demonstrated that when certain tax was paid to HMRC, it was paid on the basis of a mistaken understanding that the UK tax regime applicable to overseas dividends at the time was compatible with the provisions of various European treaties, when in fact it was not. As a result, members of the FII GLO are entitled to recover the amounts they paid under that mistake of law from HMRC, with the only remaining question being in respect of the limitation period.

Decision

The focus in this High Court decision was on the principles to be applied in deciding the point at which the claimants 'could with reasonable diligence' have discovered the mistake (referred to as the question of when there was a 'constructive discovery'). This was necessary in respect of both aspects of the claimants' case, being in relation to the payment of:

- corporation tax paid on income chargeable under Case V of Schedule D (the 'DV Challenge'); and

- advance corporation tax (the 'ACT Challenge').

The court was required to address several issues, including what steps a well-advised multi-national group based in the UK would have taken throughout the period under enquiry to seek to discover whether the relevant provisions of UK law were compatible with the relevant European law.

Where those steps would include taking advice from an appropriately qualified adviser(s), the court considered what that appropriate adviser would have known and what they would have advised (and how both would have changed over time).

The court held that an appropriate adviser would have expertise both in the UK tax system applicable to domestic and overseas dividends and in EU law matters, and that the appropriate adviser would have advised in July 1996 (being six years before the first claim in the FII GLO was made) that there was no worthwhile claim. The court therefore held that there was no constructive discovery in respect of either challenge by July 1996.

The claimants accepted that there was constructive discovery in relation to the DV Challenge in June 2000 when the CJEU judgment in Verkooijen (Case C-35/98) was published. The next question was therefore whether there was a constructive discovery relating to either challenge in the period between July 1996 and June 2000. The court examined the expert evidence and considered whether, despite the absence of any published professional and academic material that would suggest a 'partial dismantling of the consensus', constructive discovery of a DV Challenge occurred prior to June 2000. The court held it had not.

Turning to constructive discovery in relation to the ACT Challenge, relying largely upon the claimants' expert's opinion as to the existence up to June 2000 of a consensus among appropriately qualified advisers as to fundamental difficulties facing such a challenge, the court was satisfied that the professional consensus did not survive the Verkooijen judgment.

The court therefore held that constructive discovery of both challenges took place in June 2000.

Why it matters: The detailed consideration given to ascertaining what an appropriate adviser would have known at a particular point in time is likely to be of interest to any practitioner considering the effects of the Limitation Act 1980 s 32(1)(c).

The court's undertaking of this complex exercise makes interesting reading as it shows the great lengths gone to in order to set out what an appropriate adviser would have known and considered at various points during the period in question, often relying heavily on both parties' expert witness evidence.

Reliance was also placed on the progress of case law (predominantly the CJEU), particularly with a view to identifying any decision which would have fundamentally affected an appropriate adviser's view, and therefore advice, such that constructive discovery could be said to have taken place. There was a meticulous review of academic and professional literature to establish what 'legal thinking' was on the position.

BAT Industries plc and others v HMRC [2024] EWHC 195 (Ch)

Adapted from the case summary in tax Journal (16 February 2024)

Pillar 2 part 2 – Safe Harbour Provisions **(Lecture B1425 – 22.09 minutes)**

Introduction

The safe harbour elections allow the filing member to treat the top up amount in a territory as zero, if the relevant conditions are met.

For the Income Inclusion Rule (IRR), the provisions are temporary (broadly only applying to the first 3 accounting periods of the regime), but it is hoped that permanent safe harbours will be introduced in due course.

For the Qualified Domestic Minimum Top-up Tax (QDMTT), the safe harbour is permanent.

UTPR – safe harbour

This is proposed to broadly apply where a jurisdiction’s headline tax rate is at least 20%. In this case it would be assumed that there are no under-taxed profits on which a top-up tax is necessary.

IIR - transitional safe-harbours (Schedule 16, Part 2)

The filing member of a Multi-National Group (MNG) can elect that all of the standard members of the group located in a territory specified in the election do not have top-up amounts or additional top-up amounts for an accounting period.

The conditions to make the election are that:

1. The period commences on or before 31 December 2026 and ends on or before 30 June 2028 (broadly, the first 3 years for which the group is subject to multinational top-up tax);

2. A qualifying CbCR report had been prepared for the territory;

3. The election had been made for the territory for each previous accounting period that commenced on or after 31 December 2023 in which the IIR rules applied to members of the group in the territory;

4. No deemed distribution tax election (s.189) has been made in respect of the territory for the accounting period;

5. At least one of the 'threshold test', the 'simplified effective tax rate test' or the 'routine profits' test is met (see below).

If the ultimate parent company is a flow-through entity, an election cannot be made in respect of its territory unless either

1. Its adjusted profits would be nil, or

2. All of its adjusted profits would be attributable to at least one PE where no income nor expense would be attributed to the ultimate parent by virtue of s.160 (attribution of losses between a PE and the main entity).

Qualifying CbCR report

This is a CbCR

1. Prepared in accordance with the OECD guidance,

2. Filed in accordance with the law, and

3. In which information relating to the territory is prepared on the basis of qualified financial statements of the multinational group.

Where there is no requirement to file a CbCR report in a territory, the filing member can include a report containing the same information as a full CbCR in the information return in which the safe harbour election is made.

Qualified financial statements (Sch 16, para 4)

These are the accounts used to prepare the consolidated financial statements or financial statements of group members prepared in accordance with acceptable accounting standards or an authorised accounting standard.

Acceptable accounting standards are: UK GAAP, IFRS and the GAAP of Australia, Brazil, Canada, An EEA state, Hong Kong, Japan, Mexico, New Zealand, China, India, Korea, Singapore, Switzerland and the United States of America.

Authorised accounting standards are accounting standards permitted by the body responsible for prescribing, establishing or accepting accounting standards for financial reporting purposes in the territory the entity is located in.

Where a group member is not included in the consolidation on a line-by-line basis on materiality grounds, that member's financial statements used for the group's CbCR are taken to form part of the group qualified financial statements.

Information from the qualified financial statements (revenue, profit (loss) before tax, 'qualifying income tax expense' (income tax expense adjusted for amounts not representing covered taxes and amounts relating to uncertain tax positions) and 'qualified substance-based income exclusion amount' is used to establish if the safe harbour tests are met.

The amounts to be used must be derived from whichever of 1. or 2. above was used to prepare the qualifying CbCR for the territory.

Where that information in respect of a territory is not available in qualified financial statements of an MNG, no safe harbour election can be made for that territory.

Qualified substance-based income exclusion amount

This consists of two elements and is designed to reduce the profits which are subject to a top-up tax where the entity in a jurisdiction has substance (e.g. employs people and/or acquires tangible assets for use in its business.

The payroll carve-out is a percentage of eligible payroll costs (9.8% in 2024 falling gradually to 5% by 2033). If the worker spends the majority of their time working in the territory, all their costs are included, otherwise an apportionment is made.

The tangible asset carve-out is a percentage of the average carrying value of tangible assets in the accounting period (7.8% in 2024 falling gradually to 5% by 2023)

Adjustments

Where the ultimate parent is subject to a deductible dividend regime, the profit before tax is reduced (but not below nil) for the amount deductible.

Where the standard members of a multi-national group in a territory have a net unrealised fair value loss from relevant ownership interests (at least an entitlement to 10% of an entity's profits, capital, reserves and voting power) exceeding €50 million, the loss is excluded from the aggregate profit (loss) of those members.

Profits and qualifying tax expense allocated to a member of a multinational group (MNG) from an investment entity as a result of an election under s.213 (investment entity tax transparency election) and s.214 (taxable distribution method election) must be included (to the extent they are not already) in the member's profit (loss) before income tax and qualifying tax expense.

Threshold test (Sch 16, para 7)

Revenue of the standard members in that territory for the period is less than €10 million and the aggregate profit (loss) before income tax of those members for that period is less than €1 million.

Revenue of members 'held for sale' (IFRS 5) not otherwise included in the consolidated revenue must be included for this purpose.

Simplified effective rate test (Sch 16, para 8)

Aggregate qualifying income tax expense of those members for that period, divided by the aggregate profit (loss) before income tax of those members for that period.

The test is met if the simplified effective tax rate of the standard members of the group in that territory is:

1. In an AP beginning before 1 January 2025, at least 15%,

2. In an AP beginning in 2025, at least 16%, or

3. In an AP beginning on or after 1 January 2026, at least 17%

Routine profits test (Sch 16, para 9)

The 'qualified substance based income exclusion amount' for that territory for the period is equal to or more than the aggregate profit (loss) before income tax for that period of the standard members of the group located in that territory, or the aggregate profit (loss) before income tax of those members for that period is nil or reflects an overall loss.

Common errors in safe harbour calculations

- Using CbCR figures not qualified financial statement figures
- Using entity figures, not totals for a territory
- Using incorrect consolidations for the tests, i.e. bottom up, rather than top-down

OECD guidance on safe harbour issues

The OECD has issued clarifying guidance on various issues arising out of the safe harbour legislation.

These are around the topics of:

- Purchase price accounting adjustments;
- Group member and JV groups in the same territory (each JV group is tested separately to the ordinary members of the group);
- Use of different sources of qualified financial statements for the same entity or PE (not permitted);
- Fields in the CbCR not used in the safe harbour calculations can come from any permitted source;
- And others.

See https://www.oecd.org/tax/beps/administrative-guidance-global-anti-base-erosion-rules-pillar-two-december-2023.pdf for more detail.

Contributed by Malcolm Greenbaum

VAT and other indirect taxes

Serviced accommodation (Lecture B1421 – 22.28 minutes)

Summary – The letting of serviced apartments was the supply of sleeping accommodation in an establishment similar to a hotel, inn or boarding house, meaning it was a taxable supply.

Realreed Limited owned a property in London that comprised 656 self-contained apartments, let on short- and long-term leases as well as some commercial units.

The issue in this case related the VAT treatment of the letting of 235 self-contained studio, one-bedroom or two-bedroom apartments that were let on a short-term basis, often as company lets. Advertised as 'home from home' apartments, the building looked similar to other residential buildings in the area, with no signage outside. Tenants could, and did, stay for extended periods of time.

While Realreed Limited supplied the apartments, Chelsea Cloisters Services Limited (a company under common ownership) provided optional maid service, as well as dry cleaning, Wi-Fi vouchers, key replacement, luggage storage and linen changes to guests staying in the apartments.

Chelsea Cloisters Services Limited:

- issued invoices for room rental, acting as Realreed Limited's agent;
- charged standard rated VAT on its own services supplied;
- receive payment from occupiers for both rental and additional services supplied.

At the end of each month, an inter-company adjustment was made representing the total value of the room rental, but no invoice was raised and no VAT was charged.

The company argued that:

- it was supplying exempt accommodation under Item 1, Group 1, Schedule 9 VATA 1994;
- services related to these apartments had been correctly treated as standard rated by Chelsea Cloisters Services Limited.

HMRC disagreed, arguing that:

- the supplies were excepted under item (d), which applies to "the provision in an hotel, inn, boarding house or similar establishment of sleeping accommodation".
- Note 9 to Group 1 provides that "similar establishment" "includes premises in which there is provided furnished sleeping accommodation whether with or without the provision of board or facilities for the preparation of food, which are used or held out as being suitable for use by visitors or travellers".

Decision

The First Tier Tribunal found that Realreed Limited provided temporary accommodation, with individuals typically staying for limited periods.

However, in deciding whether the exclusion from the VAT exemption applied, the ancillary services supplied by Chelsea Cloisters Services Limited must also be considered. In reality, Realreed Limited was providing sleeping accommodation in an establishment similar to a hotel for use by travellers and visitors.

The Tribunal moved on to consider the 'careless' behaviour penalty appealed by Realreed Limited, even though this was not needed. The First Tier Tribunal noted that nothing in financial terms turned on its decision as the penalty had been suspended and the period of suspension had passed.

Even though HMRC had previously conducted compliance visits and had not challenged the VAT treatment adopted by Realreed Limited at those times, the First Tier Tribunal upheld the careless behaviour penalty. Having received advice in 1991, over the years there had been significant changes to the way the company's business was run. A person taking reasonable care would have enquired as to whether the VAT treatment had changed.

The company's appeal was dismissed.

Realreed Limited v HMRC (T09013)

'Sensations Poppadoms' (Lecture B1421 – 22.28 minutes)

Summary – "Sensations Poppadoms sold by Walkers are standard rated, falling within the same VAT category as potato crisps.

"Sensations Poppadoms" produced by Walkers Snack Foods Limited are available in two flavours: Lime & Coriander Chutney and Mango & Red Chilli Chutney.

- The company argued that the products are zero rated under Item 1 Group 1 Part II to Schedule 8 VAT 1994, being "food of a kind used for human consumption." These should be treated as traditional zero-rated poppadoms.

- HMRC argued that the products were standard rated as they fell within excepted item 5 Group I Schedule 8 VATA 1994 which includes "...potato crisps, potato sticks, potato puffs, and similar products made from the potato, or from potato flour, or from potato starch...".

Further, Walkers contended that the products should be zero-rated under the principle of fiscal neutrality but HMRC disagreed.

The company appealed to the First Tier Tribunal.

Decision

At the hearing, both parties agreed that the poppadom products were packaged for human consumption without further preparation.

The First Tier Tribunal reminded us that the title given to a food does not determine its VAT rating. Poppadoms, in the traditional sense, are zero-rated and are not made from potatoes but rather gram flour. The Walkers product was not made traditionally. What mattered here, was whether the Walkers product was similar to a potato crisp and was made from potato.

The First Tier Tribunal stated that this was an aggregate test that took into account all of the potato-based ingredients, including potato granules. The Tribunal referred to the Pringle case (Proctor & Gamble UK [2009] EWCA Civ 407) where it was stated that 'the proportion of potato flour is significant being over 40 per cent'. As the poppadoms contained 40% potato-derived ingredients, the Tribunal were satisfied that the proportion of potato content was significant compared to other ingredients and the products fell within Item 5.

Referring again to the Pringles case, the Court of Appeal had found that similarity involves a question of degree and a multifactorial assessment of all the factors. The First Tier Tribunal considered the ingredients, manufacturing process, flavour, appearance and marketing strategy before concluding the poppadom products were similar to potato crisps.

The Tribunal found that the Walkers products fell within Note 5 and were standard rated for VAT purposes. The Tribunal agreed with HMRC, that the principle of fiscal neutrality had not been breached, as the company was unable to establish that their products were objectively similar to traditional poppadoms.

The appeal was dismissed.

Walkers Snack Foods Limited v HMRC (TC09024)

Neil Warren commented in Taxation (15 February 2024):

> "Neil Warren, independent VAT consultant, said: 'The case report was a revelation to me – I didn't realise that poppadoms were zero rated in the first place. I have just reviewed HMRC's policy note VFOOD8160 in its VAT Food manual and the list of products it considers to be standard rated and zero rated. This revealed that pork scratchings, twiglets and Doritos are accepted as being zero rated but not Wotsits or savoury rice cakes.
>
> 'There is only one word that can adequately summarise the legislation on VAT and food: ludicrous."

Ride-hailing taxi service (Lecture B1421 – 22.28 minutes)

Summary – The supply of a mobile private hire passenger transport service, without any additional services, was a provision of travel that fell within the scope of the Tour Operators Margin Scheme (TOMS).

Bolt Services UK Limited ran an on-demand private hire passenger transport service, whereby customers booked and paid for their journey via the company's smartphone App. Journeys were allocated to self-employed private hire vehicle drivers.

Under separate contracts, the drivers supplied Bolt Services UK Limited, who in turn resupplied the service on to their customers. There was no contractual relationship between the passenger and driver.

Rather than account for VAT on the full fare received from customers, Bolt Services UK Limited argued that VAT should be accounted for under the TOMS, calculated on the difference between the amount paid by passengers and the sums paid to drivers.

However, having failed to obtain a non-statutory ruling from HMRC that the TOMS applied, Bolt Services UK Limited appealed to the First Tier Tribunal.

It was common ground that many of the TOMS conditions were met, but HMRC disputed whether the company:

- provided services of a kind commonly provided by tour operators; and
- made an onward supply of drivers to its customers, without material alteration or further processing.

Decision

The First Tier Tribunal found in the company's favour on both points.

Taking a high level or general view, the passenger transport services were of a kind commonly provided by travel agents or tour operators. It did not matter that the rides were booked on-demand rather than being pre-booked.

The First Tier Tribunal stated that, where possible, it must interpret UK legislation that conformed with the EU legislation from which it was derived. Consequently, the correct test was whether drivers' services were supplied without material alteration or further processing 'so as to change them into in-house supplies', made from the company's own resources. The Tribunal found that the drivers' services directly benefited the travellers and were not inhouse services or materially altered or processed.

The appeal was allowed.

Bolt Services UK Limited v HMRC (TC09014)

Is ageing a health disorder? (Lecture B1421 – 22.28 minutes)

Summary – Ageing is not a disease and worrying about looking older is not a health disorder, meaning the related cosmetic treatments were not exempt medical care.

Aesthetic-Doctor.com Ltd operates a private medical clinic providing a wide range of cosmetic treatments.

HMRC argued that the company was making standard rated cosmetic supplies and, as the VAT threshold had been breached in April 2010, was required to register for VAT.

HMRC issued an assessment totalling £1,635,614 to collect VAT for the periods from 1 June 2010 to 31 March 2020. Further assessments were subsequently issued.

The company disagreed, arguing that their supplies were exempt medical supplies (Group 7, Schedule 9 VATA 1994).

The parties agreed that the director and shareholder was a qualified medical professional and so the services were wholly performed or directly supervised by qualified medical professionals.

The issue to resolve surrounded the fact that the exemption can only be claimed if the purpose of the service is to diagnose, treat, and insofar as possible, cure diseases or health disorders including the protection, maintenance or restoration of health.

Decision

The First Tier Tribunal acknowledged that it is possible for cosmetic treatments to fall within the concept of medical care but was that the case here?

The Tribunal found that it was clear from the evidence that the company's patients chose the company's services because "they wished to improve their appearance". The patients self-referred because they were dissatisfied with some aspect of their appearance. That does not mean that their health was affected or that they had a health disorder.

Based on the evidence provided the First Tier Tribunal found that the company was not diagnosing, treating and, in so far as possible, curing diseases or health disorders.

The company should have been registered for VAT, with the supply of services standard rated.

The appeal was dismissed.

Aesthetic-Doctor.com Ltd v HMRC (TC09030)