Tolley®CPD

May 2024

Disclaimer

CONTENTS

Personal tax

Beginning of the year tax planning 2024/25 (Lecture B1434 – 22.22 minutes)

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

2024 The Year of Elections

Tax planning this year should take into account the changes announced in the March Budget. However, it is rumoured that there will be a further statement in September followed by a General Election in the late Autumn. If there is a change of administration following the General Election there is likely to be a further budget a few weeks after the General Election.

In the context of this uncertainty, one can never be sure about the best tax planning measures. However, given that retrospective legislation is unusual due to potential legal challenges, actions taken now such as boosting one's pension may still be effective even if the lifetime allowance is re-introduced.

Most of the other planning suggestions in these notes will probably remain valid whoever forms the next government.

Charitable contributions

Charitable contributions through Gift Aid can be carried back to 2023/24. This is the taxpayer's choice. Gift Aid covers contributions to registered charities. The advantage of making charitable contributions early in the tax year is that one then has the flexibility of whether to carry them back to the 23/24 tax year or use them in the 2024/25 tax year.

ISA's/ Junior ISA's

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

Pension Contributions

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

- 2024/25 £60,000
- 2023/24 £60,000
- 2022/23 £40,000
- 2021/22 £40,000

Higher Earners

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

The income threshold, without pension contributions remained at £200,000 excluding pensions contributions. A taxpayer with a pension scheme can utilise all the unused relief carried forward; as long as their earnings do not exceed £200,000.

There is however no provision to carry back contributions and treat them as if they were made in an earlier year.

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

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

EIS and SEIS investments

The start of the tax year is a good time to consider them without feeling pressurised by the imminent end of the tax year. Remember that both EIS and SEIS investments can be carried back 1 year and set against the 2023/24 tax liabilities (not against taxable income). The current limit for EIS is £2million which includes knowledge intensive companies. The SEIS amount has also increased to £200,000 per person.

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

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

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

Capital Gains

The start of the tax year also gives greater opportunity for planning in terms of making disposals of assets particularly ones which are less liquid. Also, consideration needs to be given to the applicability of business asset disposal relief and also whether the proceeds are going to be reinvested in a tax efficient format. The annual exemption is £3,000 for the 24/25 tax year.

Corporation Tax

100% expensing has come into play indefinitely.

Sales of Residence

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

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

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

The reduced top rate of CGT of 24% for 2024/25 may not survive a change of administration.

Inheritance Tax

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

Tax Returns

There are significant advantages to filing tax returns early:

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

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

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

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

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

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

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

Contributed by Jeremy Mindell

Landlord boiler upgrades

Last December HMRC sent out One-To-Many Letters asking landlords to check the property pages of their Self Assessment tax returns for 2021/22.

Having reviewed available data, HMRC were concerned that some landlords may have been inappropriately claiming capital costs as deductible repair-related expenses.

The letter stated that the following expenses were deductible:

- exterior and interior painting and decorating;
- stone cleaning;
- damp and rot treatment;
- mending broken windows, doors, furniture and machines such as cookers or lifts;
- repointing;
- replacing roof slates, flashing and gutters.

The letter clearly stated that the costs of "upgrading a central heating boiler from an older, less efficient model" was disallowed.

However, in March 2024, HMRC followed this up with a correction letter, confirming that the cost of a new boiler will be allowed as a deductible revenue expense against rental income where it is an upgrade due to an advance in technology and the new boiler does broadly the same job as the old one.

Taxpayers who amended their Self Assessment return as a result of the One-To-Many Letter received last year but now believe that they are entitled to claim tax relief for a boiler expense were asked to contact HMRC by emailing responseteam5@hmrc.gov.uk

https://www.tax.org.uk/hmrc-correction-issued-for-otm-letter-for-rental-cost-deductions

Gambler who worked (Lecture P1431 – 21.12 minutes)

Summary – The taxpayer had deliberately failed to declare income from working at a family-owned pub and also on the gain arising on the sale of a property.

Steven Hague's main source of income was from gambling.

He also worked at a family-owned pub but, as his father knew that he might lose all of his money gambling, he held on to his money "for safekeeping" until it was "needed".

On 26 October 2007, Steven Hague sold a property that he had bought the previous year. Later, in March 2011, he purchased another property.

However, between 2007/08 and 2015/16, the period under appeal, there was no record of him having filed any tax returns to declare income received or capital gains arising.

Having investigated his affairs, HMRC issued nine discovery assessments totalling £67,177 for the years 2007/08 to 2015/16 covering his failure to declare and pay capital gains tax on the property sale, as well as income tax on his income. Further, nine penalty assessments were issued totalling £43,665.

Steven Hague appealed, arguing that the deposits into his bank account were family gifts and exempt gambling winnings. Further, he argued that he had made a loss on the property sale.

Decision

The First Tier Tribunal found that, as a matter of fact, Steven Hague had received wages in cash, and made a gain on the disposal of his property. Further, no income tax was paid on the wages and no gains were declared.

The assessments for the tax years 5 April 2015 and 5 April 2016 were within the ordinary four-year time limit (s.34 TMA 1970).

By not taking any steps to declare his income and gain, the Tribunal found that he had been negligent, meaning that the four-year limit was validly extended for raising the discovery assessments for the years 2007/08 to 2013/14.

The First Tier Tribunal found that HMRC had made 'best judgment' assessments based on the information made available or obtained from other sources. Steven Hague had not provided any reliable, alternative basis to reduce the assessments in any way.

The assessments and penalties were upheld.

The appeal was dismissed.

Steven Hague v HMRC (TC09074)

HICBC and military service (Lecture P1431 – 21.12 minutes)

Summary – The taxpayer had taken reasonable care so that two of the five years of assessments were cancelled. However, he did not have a reasonable excuse, meaning the penalties were upheld in full.

Until 2014, Paul Baron was in the army and did not have any children of his own. When he moved out of army accommodation, he moved in with his partner who, since November

2009, had been claiming Child Benefit in respect of her children from a previous relationship. Paul Baron claimed he was not aware of this.

Prior to 2015/16 Paul Baron was not required to notify his liability to tax to HMRC or submit a Self Assessment tax return.

On 8 January 2021, HMRC issued a letter to Paul Baron highlighting the High Income Child Benefit charge (HICBC) and giving some explanation of when it applied.

This was followed up with a letter sent in June 2021 explaining that they considered that he was liable to HICBC in 2015/16 through to 2019/20. This letter included a calculation of the amount of the HICBC and the risk of penalties, including a failure to notify penalty.

HMRC issued discovery assessments totalling £3,258, covering 2015/16 to 2019/20 for liability to income tax relating to the higher income child benefit charge and penalties of £517 for failure to notify liability to the charge.

Paul Baron appealed arguing that:

- he did not have any children of his own and when the advertising campaign was launched by HMRC in 2013/14, he was a single man in the army, often away on operations;
- he did not know that the HICBC existed;
- HMRC should have made him aware of the problem well before the five years of assessments were issued;
- he had always been taxed through PAYE and had no reason to consider whether he had to submit Self Assessment tax returns.

Decision

The First Tier Tribunal confirmed there was no dispute about the facts or calculations.

At the hearing, HMRC accepted that the initial advertising campaign would not have been relevant to Paul Baron and he would not have been aware of the HICBC at that time. The First Tier Tribunal concluded that he would have become aware of the charge on receipt of HMRC's letter dated 8 January 2021.

The discovery assessments made in relation to 2017/18 to 2019/20 were made within the standard four-year time limit. During these years, he was liable for the HICBC and those discovery assessments were upheld.

The discovery assessments made in relation to 2015/16 and 2016/17, relied on the extended six-year time limit (s.36(1) TMA 1970), which requires Paul Baron to not to have taken 'reasonable care' to avoid the insufficiency of tax. Given his ignorance of the HICBC until January 2021, he had taken 'reasonable care' in the two tax years 2015/16 and 2016/17. HMRC were not entitled to rely on the extended time limits for the assessments for those two years and those assessments were cancelled.

The Tribunal found that the penalties for failure to notify were validly issued but did Paul Baron have a reasonable excuse for his failure to notify liability to HICBC? The Tribunal had already concluded that he had taken reasonable care but went on to consider when his ‘excuse’ ended and whether the failure was then remedied without unreasonable delay.

Having become aware of the potential for HICBC in January 2021, it was not objectively reasonable for Paul Baron to take no further action until after the letter that he received in June 2021. This was an unreasonable delay and consequently the Tribunal found that he had no reasonable excuse for the failure to notify. The penalties were upheld.

Mr Paul Barron v HMRC (TC09053)

SEIS denied (Lecture P1431 – 21.12 minutes)

Summary – With the existence of disqualifying arrangements, HMRC were correct not to issue the company with compliance certificates for the Seed Enterprise Investment Scheme.

CHF Group raised funds for programmes through a “fund” under which third-party investors were invited to subscribe for shares in special purpose investee companies, each of which held the intellectual property rights to a particular concept or show.

The CHF Group raised funds from third-party investors who subscribed for shares representing 50% of the voting rights and economic equity in a special purpose investee company with the group’s parent company, CHF Media Group Limited, holding the other 50%. Each company held the intellectual property rights to a programme or project.

Coconut Animated Island Limited (CAIL) was one such special purpose investee company, formed in May 2017 to exploit the intellectual property rights of a pre-school animation programme called Coconut Bay and related spin-offs.

The company made an advance assurance application to HMRC that the shares issued would qualify under the SEIS and in October 2017, HMRC confirmed that, on the basis of the information supplied, HMRC would authorise the company to issue compliance certificates to individual investors.

The agreement was entered into in July 2018 with substantially the same terms as those in the draft provided to HMRC. Under that agreement, the company would pay another CHF Group company for production services.

A month later, HMRC advised the company of the new risk-to-capital condition requirement being introduced for shares issued on or after 15 March 2018. Later, HMRC informed the company of their decision to refuse to authorise the issue of compliance certificates in respect of shares issued between 19 March 2018 and 5 April 2018.

The company appealed to the First Tier Tribunal who found that the company had met both risk-to-capital condition ‘to grow and develop its trade in the long term’ and the ‘qualifying company requirement.

However, the appeal failed as the First Tier Tribunal found that the shares were issued under 'disqualifying arrangements' as the money raised was 'paid to or for the benefit of a relevant person' meaning it was spent in consequence or anticipation of a disqualifying arrangement. The Tribunal stated:

> “We cannot see how it is possible to reach a contrary conclusion on the facts in this case given the extensive involvement of members of the CHF Group in virtually every aspect of the ‘arrangements.”

Coconut Animated Island Limited appealed to the Upper Tribunal on the grounds that Condition A was not met because the First Tier Tribunal had erred in law.

Decision

The Upper Tribunal confirmed that ‘Condition A requires that, as a result of the money raised by the share issue being spent on the qualifying trade, the whole or a majority of the amount raised by the share issue is, in the course of the arrangements, paid to or for the benefit of a relevant person.’

In determining whether Condition A was satisfied, the Upper Tribunal stated that they needed to address two issues.

1. What was the scope of any “arrangements” and were the sums raised by the share issue to which those arrangements related paid to CHF Entertainment Limited “in the course of” the arrangements?

2. Was CHF Entertainment Limited a relevant person in relation to those arrangements – i.e. was CHF Entertainment Limited a party to the arrangements or a connected person of a party to the arrangements?

The Upper Tribunal reviewed the arrangements with the CHF Group, finding that the group was heavily involved in the arrangements. At the time of the share issue these arrangements included the:

- incorporation of Coconut Animated Island Limited;

- acquisition by Coconut Animated Island Limited of the intellectual property from Mr Fenna, who conceived Coconut Bay and was the creative director of CHF Entertainment Limited;

- raising of funds by Coconut Animated Island Limited by the issue of shares to the investors in the CHF Fund, which included the group;

- agreement between Coconut Animated Island Limited and CHF Entertainment Limited for the production services to be provided by CHF Entertainment Limited.

It was accepted by the parties that the bulk of the proceeds of the relevant share issues were paid by Coconut Animated Island Limited to CHF Entertainment Limited for production services.

The Upper Tribunal concluded that CHF Entertainment Limited was a party to the arrangements and found that an amount representing the whole or the majority of the amount raised under SEIS was, as part of the arrangements, paid to or for the benefit of a relevant person or relevant persons.

The company's appeal was dismissed.

Coconut Animated Island Limited v HMRC [2024] UKUT 00075 (TCC)

Capital taxes

PPR relief – Proving 'residence' (Lecture P1435 – 12.27 minutes)

The capital gains tax (CGT) principal private residence (PPR) relief legislation broadly states (at TCGA 1992, s 222(1)) that the relief applies to a gain on the disposal of, or of an interest in, all or part of a dwelling house which is, or was at any time in the individual's period of ownership, their only or main residence.

What does 'residence' mean?

The meaning of 'residence' was considered well before PPR relief existed. In *Levene v IRC* [1928] AC 217, Viscount Cave L.C. stated: "… the word 'reside' is a familiar English word and is defined in the Oxford English Dictionary as meaning 'to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place'."

In a PPR relief context, a 'residence' has been simply described (in *Frost v Feltham* Ch D 1980, 55 TC 10) as "a place where someone lives". Furthermore, five general principles drawn from the case *Goodwin v Curtis* [1998] STC 475 were highlighted in *Dutton Forshaw v HMRC* [2015] UKFTT 478 (TC):

> '(1) The word "reside" is an ordinary word of the English language.
>
> (2) It is necessary to look at the nature, quality, length and circumstances of a taxpayer's occupation of a property in deciding whether it qualifies as a residence.
>
> (3) Temporary occupation at an address does not make a person resident there.
>
> (4) There must be some degree of continuity or some expectation of continuity to turn mere occupation into residence.
>
> (5) The question of when occupation becomes residence is one of fact and degree for the Tribunal to decide.'

Quality over quantity

HMRC states in its Capital Gains Manual (at CG64427) that there is no minimum period of occupation that would enable an individual to establish a residence.

In addition, a succession of cases have indicated that the *length* of occupation in a dwelling is not as important as the *quality* of occupation. For example:

- In *Dutton Forshaw* (see above), a dwelling was only occupied by the taxpayer for two months out of a total ownership period of 44 months, but that was still sufficient for the dwelling to be judged as the taxpayer's only residence.

- However, in *Yechiel v HMRC* [2018] UKFTT 0683 (TC), four months of occupation was not considered sufficient to qualify for PPR relief. The tribunal stated that 'quality' of residence would include not only sleeping, but 'living' there (i.e., cooking, eating a meal, and generally spending leisure time there).

- Conversely, in *Bailey v HMRC* [2017] UKFTT 658 (TC), a PPR relief claim was allowed where the taxpayer had two relatively short periods of occupation, but there was a sufficient degree of permanence for the property to be his 'residence'.

Other cases have shown that factors such as where the taxpayer's pets lived, and the non-existence of adequate cooking facilities, were relevant to the question of residence.

'Remarkably little evidence'

More recently, in *Patwary v Revenue and Customs* [2024] UKFTT 53 (TC), the taxpayer bought a property in April 2010. He stated that he lived at the property from April 2010 to October 2013 with his girlfriend. The couple married in 2012 but were later divorced. The property was also occupied by a tenant who shared the whole property with them. From October 2013, the property was occupied by a tenant, while the taxpayer went to live with his parents. The taxpayer made a gain when the property was sold in February 2016. HMRC opened an enquiry, and eventually issued a closure notice, refusing the taxpayer's PPR relief claim.

The First-tier Tribunal (FTT) noted that the taxpayer had provided "remarkably little evidence" of residence in the property over a three-year period. The period under review was April 2010 to October 2013. The tribunal accepted that after a period of time has elapsed, some documents may be difficult to obtain; however, it appeared unlikely that no documentation from that period would remain or could be obtained had the taxpayer tried. In addition, the tribunal noted that there was no supporting documentation such as statements from his lodger or his ex-wife. The tribunal had basically been presented with nothing but assertions by the taxpayer to back up his claim that he had lived at the property, and therefore the tribunal concluded that the taxpayer had not discharged the burden of proving that HMRC's assessment was incorrect.

Factors to consider

The question of whether a dwelling constitutes a residence is very fact specific; each case has its own relevant factors. However, HMRC's Capital Gains Manual (at CG64545) includes a non-exhaustive list of factors which are commonly relevant when determining where a taxpayer resides. These factors are in the context of individuals with two or more residences, for the purposes of determining which property is occupied as the individual's main residence. However, they are also potentially helpful in identifying whether a property is a residence more generally:

- 'For each dwelling-house, what is the is the timeline of events from the date of acquisition until the date of disposal? When was the dwelling-house first used and last used as a residence? It may be necessary to look at periods before the first use or after the last use e.g. where the individual was living at someone else's property.

- If the individual is married or in a civil partnership, where did the family spend its time? Spouses or civil partners who are living together can only have one main residence between them.

- Are there any dwelling-houses owned solely by the spouse or civil partner that also need to be considered?

- Is the size and location of the dwelling-house suitable for it to be the main home of the family according to their size and lifestyle?
    - How many rooms are there?
    - How was it furnished?
    - If the individual has children, where did they go to school?
    - Where was the individual's place of work? Where was their spouse or civil partner's place of work?
    - Where was the individual registered with a doctor / dentist?
- At which residence was the individual and their spouse, or civil partner, registered to vote?
- Which address was used for correspondence?
    - Banks & Building Societies
    - Credit cards
    - Utility bills
    - HMRC and other Government departments
- At which address was the individual's car registered and insured?
- Which address was the main residence for council tax? Were there any council tax exemptions in place, such as for the dwelling-house being uninhabitable or a second residence?
- Does the utility bill usage suggest that it was occupied as the main residence of the individual and their family?'

Other potential factors can be gleaned from case law. For example;

- *Simpson v HMRC* [2019] UKFTT 704 (TC) - The tribunal held that the sparse furnishings in a taxpayer's flat was inconsistent with an intention to live there permanently;
- *Harte v HMRC* [2012] UKFTT 258 (TC) - No personal possessions were taken to the dwelling, no TV license or internet connection existed there, and no friends or family were entertained or stayed overnight there.
- *Lam v HMRC* [2018] UKFTT 310 (TC) - The tribunal considered there was an insufficient degree of permanence and expectation of continuity of occupation during a period when the dwelling was being renovated. The taxpayers slept at the dwelling in sleeping bags during the week and returned to their rented property at weekends.
- *Hussain v HMRC* [2022] UKFTT 13 (TC) - The taxpayer's occupation of a derelict hospital building for a year was insufficient to amount to 'living in' the old hospital, so it hadn't been a 'residence' for PPR relief purposes.

Evidence is key

The case law and HMRC's guidance highlight that it is not enough for someone merely to assert that the 'occupation' and 'residence' elements of the PPR relief requirements were present. Several tax cases have shown that taxpayers failed in their PPR relief claims due to insufficient evidence to demonstrate occupation as a residence.

Contributed by Mark McLaughlin

No unconditional contract (Lecture P1431 – 21.12 minutes)

Summary – With 'insufficient certainty as to the terms of the purported agreement prior to 3 December 2014', the taxpayer had failed to establish that any contract was made between her and her close company for the disposal of the goodwill before that date.

Frances Delaney owned and ran two nursery schools from church premises under personal licences. Her business gained reputation and grew. In order to protect herself from personal liability and with the aim of ultimately selling her business, she was advised to transfer her business to a limited company.

In 2012, with her two church licences due to expire in 2014, she began to renegotiate with the church diocese and as part of those negotiations the possibility of a transfer of the business to a limited company was discussed. In order to facilitate incorporation, the existing personal licences would need to be replaced with the granting of leases to the new company.

Miss Delaney's Nursery Schools Limited (MDNSL) was incorporated in November 2013, with Frances Delaney as sole director and shareholder.

Correspondence with the churches confirmed that she was "looking to operate (her business) under a corporate structure in the future" but no business sale agreement was ever drafted.

In November 2013 Frances Delaney started to investigate alternative premises, which were found and terms agreed in December 2013. However, the landlord withdrew in January 2014. Under the circumstances, Frances Delaney continued negotiations with the church and the personal licences which were renewed as an interim measure for the period through to 31 August 2014.

Negotiations were re-opened with the alternative landlord, with more suitable premises offered. Planning permission was needed for change of use from residential use and if granted, the property then needed to be inspected and registered with OFSTED.

An underlease was agreed on 9 September 2014, with MDNSL responsible for applying for "Planning Consent". If such Planning Consent was not granted the company was entitled to give one month's notice of termination of the lease.

Planning consent was granted on 11 December 2014 and the company began to make the changes necessary in order to run a nursery school from the property. Frances Delaney, in her capacity as director, decided not to make the application for OFSTED registration as a new provider of nursery school education until completion of the building works, enabling the entity and property registrations to be made and considered at the same time. The appointed head teacher spent the period from January to September 2015 overseeing the works to the new property and the preparation and submission of the OFSTED applications. The company and the property were both duly registered in July 2015.

Frances Delaney claimed entrepreneurs' relief on the gain on disposal of her nursery business, including goodwill, to her close company.

However, HMRC issued a closure notice stating that entrepreneurs' relief was not available on the disposal of goodwill, as there was no unconditional contract for disposal in place prior to 3 December 2014.

Frances Delaney appealed arguing that the unconditional contract for the disposal was made in September 2014.

Decision

The First Tier Tribunal confirmed that prior to 3 December 2014 a taxpayer who disposed of a business, including goodwill, to a limited company to which they were connected was entitled to claim entrepreneurs' relief. However, following a change in law, entrepreneurs' relief is denied on any such disposal occurring after 3 December 2014 (s. 169L TCGA1992). So, the issue to decide was whether there was an unconditional contract for the disposal of the business in place before 3 December 2014.

The First Tier Tribunal stated that the extended personal licences and the break clause in the lease enabled the Frances Delaney to keep all her options open for the running of the business until she had certainty that she could transfer the business to company who would then be able to operate it.

The First Tier Tribunal found that by 3 December 2014 the company had been incorporated, it had entered into a lease agreement and it had employed a head teacher. However, these were preparatory steps only and by 3 December 2014 there was no written contract or definite intention that Frances Delaney would incorporate her nursery business as both Planning consent and OFSTED registration were outstanding. Further, the Tribunal stated that:

> "most significantly there was, at that point, no agreed mechanism by reference to which the consideration payable for the transfer would be determined and thereby there was a lack of certainty that MDNSL would acquire and at what price (or how such price would be determined)."

The appeal was dismissed.

Frances Delaney v HMRC (TC09101)

Tax liability when bankrupt (Lecture P1431 – 21.12 minutes)

Summary – The gain arising on the exercise of a property option was taxable on the taxpayer as he had remained the beneficial owner throughout, despite the property being vested in his trustee in bankruptcy for a number of years.

On 31 July 1997, Edward Newfield inherited a property, valued at £55,000, from his mother.

Two and a half years later, having been declared bankrupt, beneficial ownership of the property vested in his trustee in bankruptcy. After three years, in February 2003, he was discharged from bankruptcy.

Bankruptcy related restrictions remained in the property until 2016, when they were removed.

On 4 May 2016, Edward Newfield granted an £1 option to a company, Choiceplace Properties Limited, to buy the property for £215,000 and in September 2016 the option was exercised.

Edward Newfield did not declare a capital gain on his Self Assessment tax return as he argued that he was only liable to CGT while he was the beneficial owner of the property. Given that he had only reacquired ownership of the property a short period before its disposal date, there was no increase in value.

HMRC disagreed and, following an enquiry, sought to charge tax on the gain with proceeds on exercise being the £215,000 paid plus the £1 paid for the option at grant. The cost of acquiring the asset was an allowable deduction.

The issue in this case was who was liable to the capital gains tax?

Decision

The First Tier Tribunal stated that it was not clear when, following his discharge from bankruptcy, the property revested in Edward Newfield. However, this was not relevant for capital gains tax purposes as s.66(1) TCGA 1992 clearly covered the matter. It stated:

> "In relation to assets held by a person as trustee or assignee in bankruptcy or under a deed of arrangement this Act shall apply as if the assets were vested in, and the acts of the trustee or assignee in relation to the assets were the acts of, the bankrupt or debtor (acquisitions from or disposals to him by the bankrupt or debtor being disregarded accordingly), and tax in respect of any chargeable gains which accrue to any such trustee or assignee shall be assessable on and recoverable from him."

For CGT purposes, bankruptcy does not to affect the ownership of assets as the bankrupt is to be treated as holding the relevant assets throughout the period when ownership of the assets is vested in the trustee in bankruptcy.

The appeal was dismissed.

Edward Newfield v HMRC (TC09058)

Place of effective management of trusts

Summary - The First Tier Tribunal had made no error of law in the test it had applied to identify the place of effective management of certain family trusts for the purposes of the UK/Mauritius treaty.

The taxpayers were settlors of family trusts that had engaged in a 'round the world' tax planning scheme which aimed to avoid UK CGT on disposals of shares on a company flotation.

To be effective, the scheme relied on the place of effective management (POEM) of the trusts being in Mauritius at the time of disposal under the UK/Mauritius double tax treaty residency tiebreaker.

The scheme was very similar to that considered in *HMRC v Smallwood* [2010] EWCA Civ 778, in which the Court of Appeal had upheld the Special Commissioners' decision that the POEM of the trusts at the relevant time had been the UK, and not Mauritius.

The First Tier Tribunal, having regard to the *Smallwood* decisions, had approached the question of POEM by considering where the real top-level management (or the realistic, positive management) of the trusts was found. Applying this approach, the First Tier Tribunal found on the evidence that the POEM of the trusts was the UK during the relevant period.

The taxpayers appealed to the Upper Tribunal claiming that the First Tier Tribunal had misconstrued *Smallwood* and had applied the wrong test to identify POEM. The taxpayers claimed that the First Tier Tribunal should instead have applied a test of 'usurpation' (of decision-making function) derived from the Court of Appeal decision in *Wood v Holden* [2006] EWCA Civ 26. Applying that correct test, the taxpayers argued, the fact that certain decisions of the Mauritius trustees involved adopting a plan or proposals devised and superintended by someone else in the UK was not sufficient to conclude that decision-making function of the Mauritius trustees had been 'usurped', such as to displace the location of the effective management from the place in which actual decisions were taken. *Wood v Holden* had involved identifying the location of the central management and control of a company, however the taxpayers pointed to statements made by Chadwick LJ in that case to assert that the test for identifying the location of central management and control of a company was in substance the same test as that for identifying the POEM of a company.

Decision

The task for the Upper Tribunal was therefore to decide what the test for POEM was.

The Upper Tribunal, firstly, did not accept that any reasoning expressed in *Wood v Holden* as to the POEM test was part of the ratio of that case. It was also not clear to the Upper Tribunal that what was said in *Wood v Holden* about the relationship between the tests for central management and control and POEM was to say that they were the same, but rather simply indicated views as to the answers to the two tests in the circumstances of the particular case.

The Upper Tribunal went on to closely analyse the decision of the Special Commissioners and judgments in the Court of Appeal in *Smallwood*. The Upper Tribunal concluded that *Smallwood* was a case where UK residence had been found by the Special Commissioners without any usurpation of the trustees, and the majority of the Court of Appeal had endorsed a test for POEM which involved looking at the circumstances in which the scheme had been devised and implemented. When looking at the trustees as a single continuous body of persons (as they are treated by CGT legislation) and over a wider period, the Special Commissioners had not found it necessary to apply the tool of *Wood v Holden*; the Special Commissioners had expressly rejected *Wood v Holden* as providing no assistance.

The Upper Tribunal did note, however, that it was perhaps surprising that Hughes LJ in the Court of Appeal had not rejected the *Wood v Holden* approach in clearer terms, when it had been endorsed by Patten LJ in his dissenting judgment, although in the Upper Tribunal 's view 'that must have been and was the disagreement between them'.

The Upper Tribunal proceeded to conclude that the First Tier Tribunal, in considering where the real top-level management of the 'trustee qua trustee' was found, had not used the tool of *Wood v Holden* and, in light of the judgment of Hughes LJ in *Smallwood*, it had been entitled to take that approach. The Upper Tribunal was therefore satisfied that the First Tier Tribunal had made no error of law and the appeal was dismissed.

Geoffrey Haworth and others v HMRC [2024] UKUT 58 (TCC)

Adapted from the case summary in Tax journal 15 March 2024

Converted barn and paddock **(Lecture P1431 – 21.12 minutes)**

Summary – A converted barn bought with a paddock was found to be entirely residential property, meaning that the SDLT mixed-use rates did not apply.

On 20 December 2021 Jessica Harjono & Yusdi Santoso bought a property consisting of a converted barn with three acres of land. Roughly half of the land was a fenced paddock with gates to the garden and also to the main access road.

The paddock was subject to a grazing agreement that was in place at completion and the taxpayers believed this to be a commercial arrangement. Consequently, an SDLT return was submitted and tax paid on the basis that the property was mixed use, with the lower rates of tax being paid.

Following an enquiry, HMRC concluded that the grazing agreement was not in place at the effective date and even if it was, it was a barter of convenience, and the paddock was still part of the grounds of the dwelling. HMRC issued a closure notice on the basis that the higher residential rates applied and sought to collect an additional £113,250 of SDLT.

The taxpayers appealed.

Decision

The First Tier Tribunal concluded that the grazing agreement was in place at completion but, having taken all the facts and circumstances into account, it still constituted part of the grounds.

The Tribunal referred to the word commercial as being a “weasel” word stating:

> “In mixed-use situations it is increasingly being asserted that any letting of part of a property for a market rent is commercial and, as if by magic, the land leaves the residential pot and turns up in the mixed-use pot. As the cases show, this simplistic analysis is being rejected by the courts."

The Tribunal went on to say:

> "What is of greater significance in these sorts of situations is the use to which the land is ultimately put and whether that use is inconsistent with the householders' use of the dwelling as such."

The three-acre plot that included the paddock was "consistent and proportionate to the size and nature of the house and garden", with access to the paddock from the garden. The paddock was a selling point for the house and gardens.

It was part of the "wonderful outside space for families and friends to enjoy". Despite the land registry showing two titles, the property was bought in a single transaction, with the paddock having been used since 2009 as part of the house and garden.

The appeal was dismissed.

Jessica Harjono and Yusdi Santoso v HMRC (TC09107)

Option not for exclusive purpose of a property development trade

Summary - An option in respect of a residential property was not acquired and held exclusively for the purpose of development and resale in the course of the appellant's property development trade for the purposes of relief from the 15% rate of SDLT and ATED.

The residential property which was the subject of the option was owned by a director of the appellant (who was also a majority shareholder in the appellant's parent company). HMRC raised an SDLT assessment and issued closure notices resulting in ATED being payable in respect of the option on the basis that the option had not been acquired, and was not held, by the appellant exclusively for the purpose of development and resale in the course of a property development trade and accordingly reliefs from the 15% rate of SDLT and ATED were not available in the circumstances.

In their submissions HMRC argued that the option had not been acquired or held exclusively for the prescribed purpose and noted the essential difference between an 'exclusively' test and a 'main purpose' one.

HMRC averred that the additional purposes of acquiring the option included to:

(i) provide the appellant with more time to raise funds to purchase the freehold of the relevant property;

(ii) assist with the vendor director's pressing need for funds;

(iii) prevent the sale of the property to a third party; and

(iv) provide the vendor director with accommodation while she looked for another residence.

HMRC contended that such additional purposes were 'so inevitably and inextricably' linked to the decision to acquire the option that they could not be perceived as being merely incidental and must therefore be taken to be purposes for the acquisition.

Alternatively, HMRC contended that relief would not be available on the basis that the vendor director as a 'non-qualifying individual' had been permitted to occupy the property following acquisition of the option.

The appellant argued that the requirement in the legislation focused on the purpose for the acquisition of the interest in the land as distinct from any other part of the transaction and there was no basis for considering how the transaction might otherwise have been structured. In addition, the appellant attempted to characterise the additional purposes identified by HMRC as mere preliminary steps to the required exclusive purpose which did not amount in their own right to separate purposes.

Decision

The First Tier Tribunal concluded that the option was not acquired for the exclusive purpose of development and re-sale in the appellant's property development trade and that there were additional purposes for the acquisition.

The First Tier Tribunal found that the additional purposes were:

(i) addressing the vendor director's pressing needs for funds,

(ii) preventing the sale of the property to a third party, and

(iii) providing time for the appellant to raise funds to acquire and develop the property.

While the First Tier Tribunal acknowledged that these additional purposes may in isolation be viewed as integral parts of a property development trade, due to the nature of the arrangements and in particular the high fee paid for the option (which was drawn down by the vendor director via her director's loan account) and the vendor director's control of the appellant's parent company, the First Tier Tribunal held that any such common commercial purpose was undermined and that one of the primary purposes of the acquisition was to address the director's pressing need for funds.

Accordingly, the appeal was dismissed.

Whilst not necessary to determine the appeal, the First Tier Tribunal also addressed HMRC's alternative argument regarding occupation by a non-qualifying individual but rejected this argument on the basis that the appellant had not permitted the vendor director's occupation following acquisition of the option since she occupied as of right as the freeholder (and such permission was not within the gift of the appellant).

Investment And Securities Trust Limited v HMRC (TC09109)

Adapted from the case summary in Tax Journal (5 April 2024)

Administration

New penalties system applies to MTD ITSA volunteers

HMRC has issued guidance on the new late-filing and late-payment penalties regime that will apply to taxpayers who sign up to making tax digital for income tax self assessment (MTD for ITSA) on a voluntary basis.

Volunteers will need specifically to agree to the new penalty regime applying to them when they sign up to take part – agents are able to agree on behalf of clients.

Broadly, the new late submission penalties are points-based. The taxpayers will not face financial penalties if they make a single mistake; they will apply only if the taxpayer persistently fails to meet their obligations. For each annual return a taxpayer submits late, they will get a penalty point, until they reach the penalty point threshold of two points. On reaching that threshold, the taxpayer will receive a £200 penalty. Another £200 penalty will be imposed if the taxpayer misses the deadline for submitting any more annual returns, while they are at the penalty point threshold.

If the taxpayer does not reach the penalty point threshold, HMRC will remove the individual penalty point automatically after a specified period.

HMRC has confirmed that volunteers for MTD for ITSA will not receive any late submission penalty points for missing quarterly updates during the testing phase.

Adapted from Taxation (11 April 2024)

Deadlines

1 May 2024

- Corporation tax for periods ended 31 July 2023 (SMEs not paying by instalments)

3 May 2024

- Filing date for printed form P46(Car) for quarter ended 5 April 2024

7 May 2024

- Electronic filing and payment of VAT liability for quarter ended 31 March 2024

14 May 2024

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

19 May 2024

- Pay PAYE/NIC/CIS/student loan liabilities for month to 5 May 2024 (non- electronic)
- File monthly construction industry scheme return

21 May 2024

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

22 May 2024

- PAYE, NIC, CIS and student loan liabilities should have cleared HMRC's bank account

31 May 2024

- Employees at 5 April 2024 should have received form P60 from their employers
- Submission of short-term business visitor annual report
- Companies House should have received accounts of:
  - private companies with a 31 August 2023 year end
  - public limited companies with a 31 November 2023 year end
- Corporation tax self-assessment returns for periods ended 31 May 2023

News

Tax Administration and Maintenance Day (Lecture B1431 – 24.25 minutes)

On 18 April 2024 the government announced various tax policy proposals and updates which included the those detailed below.

VAT treatment of private hire vehicles

The government published a consultation on the potential tax impacts of the two Uber-related High Court cases (Uber Britannia Limited v Sefton Borough Council (2023) and Uber London Limited v Transport for London (2021).

The High Court found that where private hire vehicle organisations accept bookings from passengers they are acting as principal under a contractual obligation with the passenger to provide the journey and so must charge VAT on their fares.

Ahead of the ongoing appeal of the 2023 High Court judgment, the government's consultation invites views on potential government interventions that could help to mitigate any undue adverse effects on the private hire vehicles sector and its passengers.

The consultation closes on 8 August 2024

https://assets.publishing.service.gov.uk/media/661e7dd67469198185bd3e51/PHVs_ConDoc_-_FINAL.pdf

Charitable donations

In order to encourage charitable giving, later this year the government plans to consult on introducing VAT relief for low value goods donated by businesses to charities which charities then give away free of charge to people in need.

Tackling Non-Compliance in the Umbrella Companies Market

In June 2023, the government consulted on options to reduce tax non-compliance in the market and will publish a response to its consultation in due course.

HMRC has announced that it will publish new guidance later this year, including an online pay checking tool to help umbrella company workers to check whether the correct deductions are being made from their pay.

The government will introduce a due diligence requirement to drive out "bad actors from labour supply chains". This will be achieved by working with the recruitment industry and other key stakeholders to consider the details of a statutory due diligence regime aimed at reducing non-compliance.

https://www.gov.uk/government/consultations/tackling-non-compliance-in-the-umbrella-company-market

Mandating postcode provision for Freeports and Investment Zones NIC reliefs

Employers operating in a Freeport or Investment Zone are able to claim secondary Class 1 NIC relief. Provided that 60% of an employee's working time is spent in the tax site, employers do not have to pay any employer NICs on up to £25,000 of the eligible employee's earnings per year for up to 36 months.

In an attempt to reduce employer error and enable assurance of claims by HMRC without them having to contact the employer, the government is consulting until 15 May 2024 on draft regulations under which employers will be required to provide their employees' workplace postcode to HMRC.

The postcode will need to be the postcode in the special tax site where the eligible employee is expected to spend at least 60% of their working time. This is information the employer should readily hold as it underpins eligibility to the relief and therefore should be possible to provide at the point of claiming the relief.

This requirement will:

- encourage employers to check eligibility at the point of claim, reducing employer errors from the outset;
- support HMRC in assuring validity of claims without generally having to contact the employer, enabling data driven compliance activity.

After the consultation, secondary legislation will be brought forward, with software developers given time to make changes ahead of its implementation.

https://www.gov.uk/government/consultations/freeport-and-investment-zone-employer-national-insurance-contributions-reliefs

Business taxes

Suppressed cash sales (Lecture B1431 – 24.25 minutes)

Summary – The company had deliberately suppressed cash takings but the Tribunal required the suppression to be recalculated based on the company's claim that between 30% and 40% of total sales were made in cash.

From March 2012 to November 2018, Cheon Fat Limited operated a Chinese restaurant offering an a la carte menu (including set meals), an all-you-can-eat buffet, a lunch menu and take away facility. It was also licenced.

Following an initial covert visit to the restaurant in April 2016, HMRC considered revenue to be at risk and so undertook a number of further visits through May during which they ordered, ate and paid for meals whilst also observing and taking notes of the business activities. The meals were paid for in cash and no VAT receipt was requested as HMRC's aim was to subsequently collect the VAT records to verify whether VAT has been declared on the meals purchased by its officers.

Unannounced visits were made in November 2016 and July 2017, just before closing time, to observe the restaurant's cashing up procedures. As a result of these two visits, and the analysis undertaken of the days on which test purchases were made, HMRC considered that cash sales were being suppressed. Three out of five of the meals bought by HMRC officers in May had been excluded from the records. Further, HMRC observed that there were at least two meal ticket pads in use at any one time but the business chose to declare just one sequence of numbers and even then, only incompletely.

HMRC calculated the undeclared takings based on the expected ratio of cash to credit card sales ratio, using a percentage established at the November 2016 and July 2017 visits and information received from Worldpay about credit card sales.

HMRC considered that the suppressed takings had been for the benefit of the shareholder/directors and had not been correctly recorded in the directors' loan account and so additional corporation tax was due (s.455 CTA 2010).

HMRC also noted that the company did not appear to be accounting for VAT in respect of all of the 10% service charge added to eat-in meals and other more minor calculation errors.

HMRC issued:

- Corporation tax assessments for the years ended 31 March 2013 to 31 March 2016 totalling £247,428 plus penalties of £102,700;
- VAT assessments for the periods 12/12 through to 12/16 totalling £136,709 and related penalties of £53,715.

The penalties were calculated on the basis of deliberate behaviour for both corporation tax and VAT, with full mitigation for helping and giving but no mitigation for telling as the company had denied the suppression of takings throughout.

The company appealed.

Decision

The First Tier Tribunal rejected HMRC's method for calculating the suppressed takings due to errors in HMRC's calculation process.

The Tribunal accepted the company's claim that between 30% and 40% of total sales were made in cash, much more than the 9% declared in the business records for the four-year assessment period. Figures were recalculated accordingly.

The Tribunal agreed that there had been 'considerable cash suppression' and that the director's behaviour could not have been 'anything other than deliberate'.

Cheon Fat Limited v HMRC (TC09094)

Distributions not dividends of a capital nature (Lecture B1431 – 24.25 minutes)

Summary – Distributions were dividends of a non-UK resident company and were not dividends of a capital nature meaning they were liable to income tax.

Alexander Beard was a UK resident and a shareholder in Glencore PLC, a publicly listed company incorporated in Jersey and domiciled in Switzerland.

In 2011, when the company restructured, he had acquired his shares.

As a shareholder, he received:

- cash distributions in 2011/12 to 2015/16 paid from the company's share premium account, which were not debited to retained earnings;
- an in-specie distribution of shares in a subsidiary, Lonmin plc, in 2015.

On 8 October 2019, HMRC issued a closure notice assessing Alexander Beard to income tax on these distributions.

Alexander Beard appealed to the First Tier Tribunal arguing that the distributions from the non-UK resident company were of a capital nature, and so under s.402(4) ITOIA 2005, were not liable to income tax. He argued they were instead liable to capital gains tax.

The First Tier Tribunal found that despite the distributions being paid from the share capital account, they were not a repayment of capital, but rather dividends that were liable to income tax.

The company appealed to the Upper Tribunal.

Decision

The parties agreed that there were two questions to address:

1. Were the distributions “dividends”?

2. If the distributions were “dividends”, were they “dividends of a capital nature” for the purposes of s 402(4) ITTOIA 2005?

Following the decision in *First Nationwide v HMRC*, the Upper Tribunal stated that there was no definition of “dividend” in ITTOIA 2005, and that dividend should be given its ordinary meaning for “English law purposes” and then “look at the foreign law governing the relevant payment”. In this case, it was the Companies (Jersey) Law 1991

The Upper Tribunal agreed with the First Tier Tribunal, who had found that the distributions:

- fell within the meaning of a dividend as a matter of ordinary usage for English law purposes;

- fulfilled almost exactly the example description provided in *First Nationwide*;

- were paid out of share premium account by the same mechanism as would be used for paying a dividend out of trading profits (Part 17 CJL 1991).

Further, the Upper Tribunal agreed with the First Tier Tribunal’s conclusion that there was nothing either in the Jersey legislation or the manner in which the payments were made to indicate that the distributions could not be treated as fulfilling the English law definition of a dividend.

Having found that the distributions were dividends, the Upper Tribunal moved on to consider whether the dividends were of capital nature under s.402(4) ITTOIA 2005 and concluded that they were not. Referring once more to the First Nationwide case, the Tribunal found that under Jersey law payments made under Part 17 CJL 1991 could only be treated as an income distribution.

The appeal was dismissed.

Alexander Beard v HMRC [2024] UKUT 00073 (TCC)

Declaratory relief in relation to failed film partnership scheme

Summary - The High Court struck out the taxpayer's claims for declaratory relief, the substance of which was a declaration that HMRC notices issued under s.28B(4) TMA 1970 disallowing his claim for sideways relief were invalid.

Nigel Barklem was a partner in a film partnership, Film 2K Partnership (Film 2K) that made losses in the tax years 1999/2000 and 2000/01 (the 'relevant periods'). Those losses were stated to be trading losses and were apportioned between its partners in accordance with s.12AA TMA 1970.

The claimant filed Self Assessment tax returns for the relevant period claiming sideways relief for his share of the partnership's losses under ss.380 and 381 ICTA 1988. In order to claim sideways relief, s 381(4) required that Film 2K was trading on a commercial basis and in such a way that profits in the trade could reasonably be expected to be realised.

HMRC opened enquiries into Film 2K's partnership returns for the relevant periods. The enquiry also gave rise, by virtue of s.12AC TMA, to a 'deemed enquiry' into the partners' tax returns.

In 2019, HMRC issued closure notices, reclassifying Film 2K's trading losses as losses arising from an investment business.

The closure notices stated that:

(i) Film 2K was not trading during the relevant periods; and

(ii) 'if the partnership was trading, it was not trading on a commercial basis with a view to profit and is not treated as a partnership'.

The partners initially appealed the closure notices but ultimately entered into a settlement agreement with HMRC pursuant to s.54 TMA. Following the settlement of the appeal, HMRC issued notices to the partners, including the claimant, under s.28B(4) TMA (the 's 28B notices') closing the deemed enquiries into their personal tax returns. The s 28B notices disallowed the sideways relief claimed in relation to Film 2K's losses.

The claimant sought declaratory relief from the High Court that, if in law Film 2K was never a partnership, then the s.28B(4) notices were invalid and of no effect because there was no partner on whom to serve them. The High Court dismissed the claim. Scrutinising the wording of the closure notices, it acknowledged that it was 'curious' that they had described Film 2K as not being a partnership; however, it concluded that 'reading the closure notices as a whole, it is indisputable that the amendments made were on the basis that there was a partnership with an investment business but that it was not trading in the tax years ending 5 April 2000 and 5 April 2001.'

The High Court also relied on the settlement agreement which, it concluded, was entered into on the basis that the closure notices were upheld without variation. As a result, HMRC were entitled to issue the s.28B(4) notices to give effect, in the partners' tax returns, to the closure notices which had reclassified Film 2K's losses as relating to an investment business.

In case the High Court was wrong in its interpretation of the closure notices and settlement agreement, it also struck out the declaratory relief claims as an abuse of process on the basis that:

(i) even if Film 2K was deemed not to be a partnership, HMRC would nevertheless have had the power to issue the s.28B(4) notices; and

(ii) any challenge on that point could only be brought by a judicial review claim.

Nigel Barklem v HMRC [2024] EWHC 651 (Ch)

Adapted from the case summary in Tax Journal (12 April 2024)

Loan relationship debits disallowed

Summary - Loan relationship debits relating the discount on the issue of debt instruments issued by a subsidiary of the Barclays Group in order to increase its capital ratios in response to the 2008 financial crisis was disallowed.

In late 2008, the Barclays group entered into the following transactions in order to increase its Tier 1 capital ratios and avoid the need for a government bail-out.

A subsidiary of Barclays issued £3 billion of reserve capital instruments (RCIs) to two strategic investors and some other institutional investors. At the same time, a parent company issued five-year share warrants over its own shares for a nominal sum to the strategic investors.

The subsidiary accounted for the transactions on the basis that £800 million of the total £3 billion it received was in fact value paid by the investors for the warrants, so that the cash receipt was shown in its accounts as £2.2 billion for the RCIs and £800,000 as a capital contribution from Barclays. The difference was treated as an accruing discount deductible as a loan relationship debit over ten years.

HMRC considered that the £3 billion was paid for the RCIs so that the accounts were not GAAP compliant and did not fairly represent losses arising in respect of the RCIs (or that the credit to equity reflecting the capital contributions fairly represented a credit).

Decision

The main issue considered by the First Tier Tribunal was whether the £3 billion was paid for the RCIs alone or whether, as the company argued, part of it should be viewed in substance as paid for the warrants.

The tribunal accepted that the two transactions were part of a package deal but held that the full amount was paid for the RCIs and the warrants were given away (effectively by Barclays' shareholders who would ultimately bear the economic cost).

The key factors in this conclusion included that the RCIs were written as debt instruments issued at par and there was no suggestion in the documents that the consideration for the warrants was partly received by payment for the RCIs. The institutional investors paid for the RCIs at par and did not receive any warrants. The issue of the warrants cost Barclays nothing; it was the existing shareholders who potentially gave up value as their earnings per share would fall. In the circumstances of the financial crisis the strategic investors were able to get what they wanted. It was clear that they obtained real value out of the deal and obtained the warrants without any compensating reduction in the coupon on the RCIs.

On this basis, the expert accounting evidence showed that the subsidiary's accounts should have recognised the full £3 billion in respect of the RCIs. This was sufficient to dismiss the appeal, but the tribunal went on to consider HMRC's other arguments and held that it would have reached the same conclusion.

Barclays Bank plc v HMRC (TC09115)

Adapted from the case summary in Tax Journal (5 April 2024)

Debt indemnity did not give rise to a remittance to the UK

Summary – the Upper Tribunal upheld the decision of the First Tier Tribunal that arrangements under which the taxpayers settled a debt indemnity arising from a share sale did not give rise to a remittance to the UK.

The taxpayers:

- were UK-resident non-domiciled individuals who claimed the remittance basis;
- sold their shares in Visage Group Ltd to a Luxembourg resident company.

At the time of the sale, another company, Internacionale Retail Ltd, indirectly owned by the taxpayers via a Jersey company owed Visage Group Ltd's subsidiary £6 million and, under the share purchase agreement, the taxpayers provided an indemnity in respect of the debt.

Shortly after the sale, it became clear that the debt could not be recovered so that the indemnity would be triggered. A series of transactions took place under which the:

- Jersey company purchased clothing goods from another company in the Luxembourg company's group for an amount equal to the debt;
- The Luxembourg company and the taxpayers entered into a side letter in which it was agreed that the payment for the clothing would reduce the debt to nil.

The clothing was worth only £200,000 and was gifted to a charity.

The funds to make the payment by the Jersey company were contributed by the taxpayers from the proceeds of the share sale.

The side letter also provided that the taxpayers would be released from all obligations under the indemnity and the Luxembourg company would ensure that Internacionale Retail Ltd would not be pursued for the debt.

The creditor then issued a credit note to Internacionale Retail Ltd in respect of the debt.

HMRC argued that the transactions gave rise to taxable remittances to the UK. For this to be the case, both conditions A and B in s.809L ITA 2007 had to be satisfied.

The First Tier Tribunal had held that condition A was satisfied but condition B was not and so the case moved to the Upper Tribunal.

Decision

The Upper Tribunal dismissed HMRC's appeal on different grounds, finding that the First Tier Tribunal had been wrong to conclude that condition A was satisfied.

The First Tier Tribunal had held that the Luxembourg company had provided a service to Internacionale Retail Ltd and to the taxpayers in the UK by procuring non-enforcement of Internacionale Retail Ltd's debt and waiving the taxpayer's obligations under the indemnity.

The First Tier Tribunal had adopted a wide definition of 'services' and held that the services provided were analogous to financial services. The Upper Tribunal considered that 'services' in the remittance rules referred to services in the ordinary sense of the word which are normally provided on a commercial basis in exchange for payment. On that basis, the benefits to Internacionale Retail Ltd and the taxpayers did not amount to services. Parliament could have provided for any kind of benefit with a monetary value to give rise to a remittance but had not done so. In addition, even had there been any services, they were not provided in the UK. Condition A was therefore not satisfied.

As both conditions had to be met, this was sufficient to dismiss HMRC's appeal. In case it was wrong, however, the Upper Tribunal also considered condition B (as it would apply on the assumption that condition A was satisfied). It held that the First Tier Tribunal had been wrong to conclude that the condition was not met. It rejected the First Tier Tribunal's finding that the transactions were in effect the same as a payment under the indemnity. In fact, their whole purpose was to avoid a claim under the indemnity, and that was their actual effect.

HMRC v Raj Sehgal and Sanjeev Mehan [2024] UKUT 00074 (TCC)

Adapted from the case summary in Tax Journal (12 April 2024)

Pillar 2 Part 4 – Adjusted profits (Lecture B1435 – 32.53 minutes)

Introduction

The effective rate of tax is calculated for each jurisdiction in the which the group operates. Broadly it is the aggregate tax expense of entities in the jurisdiction ÷ the aggregate profit before tax of those entities.

Tax expense in Pillar 2 terms is called the 'covered tax balance'. Profit before tax in Pillar 2 terms is called the 'adjusted profits'.

This session focuses on the main principles to consider in arriving at 'adjusted profits' for an entity in a jurisdiction. These principles need to be applied to all entities in that jurisdiction to arrive at the aggregate adjusted profits.

A future session will focus on the covered tax balance.

Reminder of the calculation of the effective tax rate (s.132)

1. Calculate the 'adjusted profits' for the period of each 'standard member' (i.e. not an investment entity or minority-owned member) in that territory

2. Subtract the sum of the losses of members that made a loss in the period from the sum of the profits of members made a profit in the period

3. If 2 is nil or a net loss, the effective rate is deemed to be 15% (so that no top-up amount arises) and the calculation finishes

4. If 2 is a net profit, calculate the combined 'covered tax' balance (sum of the positive and negative covered tax balances) for the 'standard members' of the group in that territory (which can be negative)

5. If the balance in 4 is nil, the effective tax rate is nil (which means 15% top-up tax may be payable)

6. If the balance in 4 is not nil, divide the balance in 4 by the result of step 2

7. Except where step 3 or 5 applies, step 6 is the effective tax rate (when converted to a percentage)

Overview of calculation of adjusted profits

The starting point is ‘underlying profits. These are, broadly, the profit before covered taxes of the entity determined in preparing the consolidated financial statements of the ultimate parent and, by default, it includes income, expenses, gains and losses arising from transactions with other group members.

These underlying profits are then adjusted in accordance with the provisions of Chapter 4, F(No.2)A 2023, a similar idea to adjusting profit for corporation tax purposes but with totally different types of adjustments.

Certain elections can be made to vary the calculation of various amounts (see below).

Underlying profits (s.134)

Normally, the underlying profits of a member, other than one that is a permanent establishment (e.g. a foreign branch) are the member’s profits as would be determined in preparing the consolidated financial statements of the ultimate parent.

It is permitted to determine the underlying profit of the member under a different accounting standard using the information in its separate financial accounts if

1. it is not reasonably practicable to determine the profits on the basis of the accounting used in the consolidated financial statements, and

2. the alternative accounting standard is an acceptable or authorised accounting standard (GAAP in the jurisdiction where the entity is located), and

3. the alternative accounting standard is actually used for the financial accounts of that member, and

4. The information in those accounts is reliable (i.e. an auditor applying generally accepted auditing standards of a ‘relevant territory’ would reasonably conclude that the member has processes in place likely to make the information in the financial statements fair and accurate)

If presented in a foreign currency, the profit is converted at the average fx rate for the period.

If the application of an accounting policy under an alternative accounting standard result in a difference of more than €1 million that is not eliminated over time, the underlying profits must be adjusted to eliminate the difference.

Underlying profits of permanent establishments (s.135)

The underlying profits of a member of a multinational group (MNG) that is a permanent establishment (PE) are the member’s profits:

- if the member has separate financial accounts, as reflected in those accounts.
- if not, as reflected in the underlying profits accounts of the main entity – this will require attribution of the profits between the PE and the main entity (see s.159 below).

If the member is a PE whose income is exempt from tax in the territory of the main entity (e.g. a s.18A CTA 2009 election has been made for a UK owned PE), the member's underlying profits include only its 'relevant income' and 'relevant expenses'.

Relevant income

The income of the member exempted from tax where the main entity is located which is attributable to operations carried out outside the main entity's territory

Relevant expenses

The expenses of the member attributable to those operations and that are not deducted for tax purposes in the main entity's territory.

The profits of a PE are ignored in determining the adjusted profits of the main entity and vice-versa to avoid double-counting, except for any profits of a PE that are excluded by s.159 below and which are then subject to s.160 below (attribution of losses between a PE and the main entity).

Summary of adjustments

1. Amounts included in other comprehensive income or shareholders' equity are generally ignored, except voluntary revaluation of property, plant and equipment (gain or loss in OCI is included in adjusted profits and the current or deferred tax effect is included in the covered tax balance);
2. Dividend income generally excluded (exceptions in s.141);
3. Investment FV gains and losses and disposal gains and losses generally ignored (unless owning < 10%);
4. Profit from equity accounting a qualifying interest generally excluded;
5. Illegal payments;
6. Fines and penalties of at least €50,000 for the same conduct;
7. Pension expense added back and replaced with amounts paid;
8. Intra-group transfers not at arms' length must be restated to arms' length price;
9. Debt forgiven and credited to P&L ignored in entity is in financial distress;
10. International shipping profits are ignored.

Changes in accounting policy / prior period errors (s.146)

In the accounts, these are normally accounted for retrospectively (net assets/ accumulated profits adjusted as at the start of the period when the change in policy is made/error discovered).

Member's profits are adjusted to include the amount of the change if it is attributable to a change in accounting policy that affects income or expenses included in the adjusted profits.

If there has been the correction of a prior period error, the underlying profit is adjusted if the amount of the error would have been included in the underlying profit of a previous period had it not have arisen, except if the correction results in a material decrease to the member's liability for covered taxes (such that there would have needed to be a post-filing adjustment of covered taxes – see future session).

Qualifying refundable tax credits (s.148)

If necessary, the profits of a member of an MNG are adjusted to ensure that qualifying refundable tax credits are treated as income (like the treatment of the RDEC in the UK), and that other tax credits (whether refundable or not) are not treated as income.

A refundable tax credit is 'qualifying' to the extent that it entitles a person to receive the amount of refundable tax credit as a payment or discharge of a liability) within 4 years of meeting the conditions for receiving it, unless it is creditable/refundable pursuant to a qualified or disqualified refundable imputation tax (s.253 – covered in a future session).

Permanent establishments (s.159)

A PE in accordance with a tax treaty has its underlying profits adjusted to reflect all income and expenses attributable to it in accordance with the tax treaty.

A PE in a location with which the UK does not have a tax treaty has its underlying profits adjusted to only reflect all income and expenses attributable to it in accordance with the law of the territory in which the PE is located.

If the member is a PE located in a territory without corporate income tax, its underlying profits reflect all income and expenses that would have been attributed to it in according with Article 7 of the OECD model tax treaty.

Amounts are included or excluded in the underlying profits of a PE whether they are subject to tax or not, or in the case of expenses, whether they are tax deductible or not.

Attribution of losses between main entity and PE (s.160)

The amount of PE loss treated as an allowable expense of the main entity in the territory where the main entity is located and not set off against income subject to tax under the laws of <u>both</u> the PE territory and the main entity territory (similar to the concept of 'dual inclusion income' in the hybrid mismatch legislation) is treated as an expense of the main entity when determining its adjusted profits ('the relevant amount').

Where this is the case, the relevant amount is excluded from the adjusted profits of the PE for the relevant period (to avoid double counting the loss) and any adjusted profit of the PE (up to the relevant amount) is treated as income of the main entity when computing the main entity's adjusted profits.

Any profit of the PE treated as income of the main entity is excluded from the adjusted profits of the PE for that period.

Example

MainEnt Inc. is a member of a large worldwide group located in Ruritania, with a UK ultimate parent company (the responsible member). It has a branch in Utopia, a low tax territory.

In the year ended 31 December 2024, MainEnt Inc. has adjusted profits for Pillar 2 purposes, ignoring its branch, of £24.6 million. The Utopian branch made a loss of £1.5 million.

Under Ruritanian tax law, £1.3 million of this loss is treated as deductible against the profits of MainEnt Inc. in Ruritania.

MainEnt Inc. also has rental income of £0.6 million arising in Utopia .

Under the double tax treaty between Ruritania and Utopia, this is taxable in both territories, with a double tax credit available in Ruritania for any Utopian tax suffered.

The branch loss in Utopia can be offset against total taxable income in Utopia.

Explain how the branch loss will adjust the profits of MainEnt Inc. for Pillar 2 purposes.

Analysis

So much of the PE loss of £1.5 million that is treated as an expense of MainEnt Inc. (£1.3 million) and is not set off against income taxable in both territories (£0.6m is set off against the rental income taxed in both territories, so the other £0.7m is not) is deducted in arriving at the adjusted profits of MainEnt Inc. The adjusted profits of MainEnt Inc. are therefore (£24.6m - £0.7m) £23.9 million.

The £0.7 million deducted in calculating MainEnt Inc.'s adjusted profits are excluded from the calculation of the branch's adjusted profits.

Elections to vary underlying profit calculations

The responsible member must consider if any of the following elections are beneficial.

1. Can elect that all members (or all members which are investment entities) ignore unrealised profits and losses from FV movements (s.161);

2. If later revoked, there is a catch-up adjustment to ensure all previous unrealised gains and losses are taken into account in the period of revocation;

3. Stock-based compensation (s.162) – using the amount tax deductible rather than the accounting expense;

4. Spreading of net gains on tangible assets over 5 years (current year and 4 prior years) – convoluted calculations (s.163) – will lead to recalculations of prior years if within scope of Pillar 2 previously;

5. Exclusion of intra-group transactions between group members in the same territory (s.164);

6. Inclusion of otherwise excluded equity gains and losses (s.165);

7. Exclusion of exchange gains or losses if hedging currency risk in ownership interests owned by the member or another group member (a net investment hedge) (s.166).

Underlying profits of transparent entities (s.168)

Where a member of an MNG ('M') is a flow-through entity (i.e. it is regarded as tax transparent where it is located and is not subject to a covered tax on its profits in another territory in which it is resident).

A proportion of its underlying profits is allocated to each entity or individual ('O') with an ownership interest in it to which one of two conditions apply:

1. 'O' is not regarded as tax transparent where it is located and M is regarded as tax transparent where O is located - If O's ownership interest in M is indirect, each entity through which O holds the interest must be tax transparent where O is located and none of these entities must meet Condition A;

2. O is a 'reverse hybrid entity' (i.e. it is transparent where established but opaque where its investors are located) and M is tax transparent where O is located. - if O's ownership interest in M is indirect, each entity through which O holds the interest must be tax transparent where O is located and none of these entities must meet Condition A nor B.

Where underlying profits of M are allocated to a member of M's group, those profits are included in the member's adjusted profits and excluded from M's adjusted profits.

Where underlying profits of M are allocated to an individual or to entity which is not a member of M's group (or would be allocated to them if M was regarded as tax transparent in the territory where they are located), those profits are excluded from M's adjusted profits.

Where there are indirect investors, the underlying profits of M allocated to the direct investor in M are reduced by the profits allocated to the indirect investor (to avoid double counting the profits).

Where M's underlying profits are allocated to a group member, they are excluded from adjusted profits of M to be allocated to other investors.

If the ultimate parent is a flow-through entity, it is to be treated as if it were not regarded as tax transparent in the territory in which it is located.

Adjustments where the ultimate parent is a flow-through entity (s.170)

If the ultimate parent is a flow-through entity and has an adjusted profit for the period before considering this section, its profits are further adjusted to exclude any ‘qualifying profits’.

These are profits to which the holder of a direct ownership interest in the ultimate parent are entitled and one of three conditions is met:

1. The holder of the ownership interest is taxable on it at a rate of at least 15% for a period that ends within 12 months of the group’s accounting period and it is reasonable to assume that the sum of the covered taxes payable by the ultimate parent on the profit the holder is entitled to plus the taxes payable by the holder is at least 15% of the profits to which the holder is entitled;

2. The holder of the ownership interest is an individual not resident in the ultimate parent’s territory and is entitled to no more than 5% of the profit and assets; or

3. The holder of the ownership interest is a governmental entity, international organisation, non-profit or pension fund located in the ultimate parent’s territory and is entitled to no more than 5% of the profit and assets.

Where profits are allocated to the ultimate parent as a result of s.168 above, those profits are regarded as profits to which holders of ownership interests in the ultimate parent are entitled (pro-rata).

If the ultimate parent makes a loss for the period, the loss is adjusted to exclude any amounts where a holder of an ownership interest is allowed to use part or all of the loss in computing their taxable profits.

This section also applies to a member that is a PE by which an ultimate parent that is a flow-through entity carries out its business.

Contributed by Malcom Greenbaum

VAT and other indirect taxes

Input tax disallowed (Lecture B1431 – 24.25 minutes)

Summary – The company failed to demonstrate a direct and immediate link between the expenses incurred and the taxable supplies that the business was making or intended to make.

Passion Incorporated Limited provided consultancy, advertising and marketing services.

In April 2019, having previously filed dormant accounts, the company applied to register for VAT with effect from 1 May 2019.

In November 2019 HMRC initiated a standard check of the company's VAT return for the period 7/19.

When requested documentation was not supplied, HMRC issued a reminder and requested similar records for the period ending 10/19, with additional tax periods added as supporting evidence for input tax claims was not supplied.

In August 2020 HMRC issued a Schedule 36 Information Notice for copies of VAT reports showing individual purchases and sales for the following periods: 10/19, 01/20, 04/20, and where not previously supplied copies of purchase invoices for the VAT claimed as input tax for 07/19, 10/19, 01/20 and 04/20.

On 30 November 2020 HMRC outlined its view of the information provided for the VAT periods 07/19, 10/19, 01/20, 04/20 and 07/20 which included an explanation that to recover input tax on costs it was necessary to demonstrate a direct and immediate link to the taxable supplies that the business was making or intended to make. Further information was requested.

In Spring 2021 HMRC issued:

- decisions disallowing input VAT for seven VAT periods (07/19 through to 1/21); and
- a 'best judgement' assessment for 10/19 to recover VAT that had already been repaid to the company.

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

HMRC argued that based on their experience, the expenditure incurred related to items normally associated with personal rather than business usage such as personal healthcare, subscriptions, taxis, restaurant meals, hotel expenses, club membership and entertainment. The company had been unable to provide adequate supporting evidence to prove otherwise.

Decision

The First tier Tribunal concluded that the key reason for disallowing most of the input tax claimed was due to HMRC being unable to determine whether the expenditure giving rise to the input tax was incurred for the purposes of the company's business as evidence was lacking.

Further reasons for the disallowance included:

- invoices not being addressed to the company;
- double counting of invoices; and
- claims for expenditure in relation to which no VAT had been incurred (for example a charitable donation and purchases made at Heathrow airport).

The First Tier Tribunal found that HMRC had acted fairly and applied the legislation correctly. The onus was on the company to demonstrate the link existed between the expenditure incurred and its taxable supplies, which the company had failed to do.

The company's appeal was dismissed.

Passion Incorporated Limited v HMRC (TC09064)

Four-day period best judgment assessment (Lecture B1431 – 24.25 minutes)

Summary – With no other evidence provided, HMRC's best judgement assessments, based on a four-day period, were upheld.

Martin and Ellena Byrne traded through a partnership. The business had no till. Cash and card sales were handwritten in Challenge duplicate books from which customers were given receipts.

HMRC selected their ladies' fashion business for a VAT enquiry as available merchant acquirer data showed that takings were only 111% of the turnover declared in its VAT returns.

In June 2016, HMRC carried out an unannounced visit to the business premises and obtained the Challenge receipt book on the premises at the time of the visit which covered the four days from Monday 13 June 2016 to Thursday 16 June 2016.

Having analysed the receipt book, HMRC identified that cash sales for this period were 28% of total sales but that these had not been recorded in the VAT returns. When asked, the partnership was only able to supply Challenge receipt books covering the period 27 May 2016 to 16 July 2016, claiming the rest had been destroyed in a flood.

Following further exchanges between the parties, HMRC issued a VAT assessment for the amount of undeclared cash takings by assuming that throughout the entire period to which the assessment related (03/12 to 09/17), cash takings were 28% of overall sales.

Later, HMRC revised the assessment downwards, with cash takings calculated 22.4% of overall sales, rather than 28% as one of the sums was found to be a card payment.

The Byrnes accepted that they had not declared their cash takings but appealed the percentage used by HMRC. They argued that the cash sales for the four-day period used to calculate the assessment included two, abnormally large sales, which distorted the final assessment and that the appropriate percentage was in fact 12%.

Decision

The First Tier Tribunal was satisfied that HMRC had acted in good faith and sought to apply a reasonable methodology to determine the assessment raised.

The First Tier Tribunal stated that it was for the partnership to 'establish a more reliable figure' than HMRC's assessment.

It was not disputed that the figure of 22.4% for cash sales correctly reflected the information from the review period but the partnership failed to identify any other:

- period that could be used as the basis for the assessment;
- methodology for making the ‘best judgement assessment.

The First Tier Tribunal accepted that two items had a significant effect on the cash percentage figure arrived at by HMRC but no evidence was provided to enable the Tribunal to conclude that these items necessarily distorted the accuracy of the percentage arrived at, or that removing them would necessarily lead to a more accurate figure.

Finding that the taxpayers had not discharged their burden of establishing by evidence a more reliable figure than the figure in the HMRC assessment, the appeal was dismissed.

Martin and Ellena Byrne trading as Eva (TC9054)

Time of supply and VAT groups (Lecture B1431 – 24.25 minutes)

Summary – VAT was due on performance related fees as the companies concerned were no longer part of the same VAT group at the time of supply.

Silverfleet Capital Ltd supplied investment management services in relation to a with-profits fund to The Prudential Assurance Company Limited. Both companies were part of the same VAT registration group until 2007 when, following a management buy-out, Silverfleet Capital Ltd left the VAT group.

As part of the agreement, performance fees were payable to Silverfleet Capital Ltd if certain targets were met. These targets were met but only after Silverfleet Capital Ltd had left the VAT group.

The issue to decide was whether VAT was chargeable on the fees:

- The Prudential Assurance Company Limited believed the fees were consideration for services carried out when the companies were members of the same VAT group and so no VAT was chargeable (s.43 VATA 1994);
- HMRC argued that the services were a continuous supply of services, meaning VAT was chargeable as the related invoice and payment had occurred after Silverfleet Capital Ltd had left the VAT group (SI 1995/2518, reg 90(1)).

The First Tier Tax Tribunal had found in the taxpayer’s favour while the Upper Tribunal had reversed the decision, finding in HMRC’s favour.

The Prudential Assurance Company Limited appealed to the Court of Appeal.

Decision

The Court of Appeal concluded that the correct approach to adopt was to identify when the supply was made under the time of supply rules before moving on to consider whether the companies were still members of the same VAT group at that time.

As a continuous supply of services, the time of supply was when the invoice was raised or paid. By that time, Silverfleet Capital Ltd was no longer a member of the VAT group, meaning that VAT was due on the supply.

The appeal was dismissed.

The Prudential Assurance Company Limited v HMRC [2024] EWCA Civ 300

Vehicle black box devices (Lecture B1431 – 24.25 minutes)

Summary – The taxpayer remained the owner of the black boxes and did not make any taxable supplies that would entitle it to recover the input VAT incurred on the provision and fitting of devices.

WTGIL Limited was known as Ingenie Limited at the time of the events in this case.

Ingenie Services Limited, a member of the Ingenie Limited VAT group, supplied telematics devices known as 'black boxes', which were installed in cars as part of insurance policies underwritten by a third party. Collected data from the box was provided to both the policyholder and the insurer. The box was intended to enable the policyholder to improve their driving and so obtain cheaper car insurance.

The group claimed that the provision and fitting of these devices were taxable supplies made by Ingenie Services Limited to policyholders. The company made a repayment claim totalling around £2 million seeking to recover related input tax.

HMRC denied the claim on the basis that the commission paid by the insurers to Ingenie Services Limited was consideration for the exempt supply of insurance intermediary services, meaning that the input tax was irrecoverable.

The case was dismissed by the First Tier Tribunal who found that there was no supply of goods or consideration given for the supply of services by Ingenie Services Limited to the policyholder relating to the devices.

The group appealed to the Upper Tribunal.

Decision

The Upper Tribunal found that there was no supply of goods for consideration as Ingenie Services Limited remained the owner of the black boxes as they were fitted as a condition of the insurance policy and could not be disposed of by the policyholder.

The Tribunal decided that there was a supply of services being the installation of the device. However, there was no direct link between the services provided and any consideration paid by the policy holder.

Finally, the Tribunal found that Ingenie Services Limited had not made a deemed supply for the purposes of Article 16 and paragraph 5 Schedule 4 VATA 1994.

The appeal was dismissed.

WTGIL Limited v HMRC [2024] UKUT 77 (TCC)

Financial hardship and lack of evidence (Lecture B1431 – 24.25 minutes)

Summary – A company's hardship claim was not supported by suitable documentary or oral evidence and so the hardship application was dismissed.

SC Business Gateway Ltd bought luxury goods in the UK and exported them to customers in Asia.

HMRC issued a best judgement assessment totalling just over £270,000 following their decision to disallow input tax claimed.

Normally, to be able to appeal, a taxpayer must either pay the assessment in full or deposit the amount owed to HMRC. However, this rule can be overridden where the payment 'would cause the appellant to suffer hardship' (s.84(3B) VATA 1994). Where hardship is granted, nothing needs to be paid until a decision is reached.

In this case, SC Business Gateway Ltd claimed hardship but this was denied by HMRC. The issue to decide was whether the company had discharged its burden of proof to show that it would suffer hardship if required to pay or deposit the amount of VAT due under the Assessment.

Decision

The First Tier Tribunal confirmed that the issue was whether, having considered all of the relevant information including any loan facility that might be available, the payment would cause financial hardship. A director simply stating that they cannot afford to pay was not enough.

The First Tier Tribunal considered the evidence provided, finding that the evidence relied on in the appeal was "thin on the ground". The company produced bank statements but with no transactions and failed to provide any company accounts or details of other bank accounts. The Tribunal had been made aware of two other bank accounts (Royal Bank of Scotland and the Bank of China) but was told that these accounts had been frozen in relation to anti-money laundering rules. No further information relating to these accounts was supplied.

Having considered all of the documentary and oral evidence, the Tribunal found that the company had failed to discharge the burden of proof in respect of the issue of hardship and the application was dismissed.

SC Business Gateway Ltd v HMRC (TC09075)