Tolley®CPD

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Personal tax

Cars and optional remuneration arrangements (Lecture P1043 – 10.06 minutes)

The optional remuneration legislation, which became effective on 6 April 2017, applies to salary sacrifice arrangements and 'cash equivalent' benefits. The relevant details can be found in s.7 and Sch 2 FA 2017.

The rules affect all new salary sacrifice cars 'provided' (i.e. ordered and delivered) on or after the starting date if the car has CO_2 emissions of more than 75g/km.

The FA 2017 benefit in kind charge for a car made available under these arrangements is the higher of:

- the normal benefit figure (i.e. list price x appropriate % based on car's CO_2 emissions and fuel type); or

- the amount of salary foregone in relation to the benefit.

Where an employer agrees to a salary sacrifice arrangement involving a car, the employee is typically provided with a vehicle which is available for his private use, together with insurance, road tax, servicing and other running costs (these are separate and distinct payments/benefits from the provision of the car itself). Due to the way in which many car salary sacrifice deals are put together, contractual arrangements often reflect a global value of the benefit and this has resulted in some confusion as to what should be considered to be the amount of the salary foregone in relation to car benefit.

At a recent meeting between HMRC, HM Treasury and other interested stakeholders, HMRC Policy confirmed that FA 2017 requires employers to compare the amount of salary foregone for the car and that employers should not take into account any salary sacrifice relating to other payments and benefits such as insurance and servicing costs when considering the meaning of 'higher of'.

Therefore, if employers have included in their calculations salary sacrificed for any payments and benefits provided in connection with a taxable vehicle, this represents an incorrect interpretation of the new legislation which could result in employees paying too much tax and employers paying too much Class 1A NICs.

The technical analysis for this view is set out below.

S.69B ITEPA 2003 deals with situations where a salary sacrifice is made in connection with a number of different benefits. The legislation states that, where necessary (eg. where the value of the salary sacrifice relating to individual benefits is not transparent), there is provision for a 'just and reasonable' apportionment. The rules relating to the taxation of an employer-provided car are in ss.120 and 120A ITEPA 2003 and the tax consequences of the provision of 'other payments and benefits' such as the costs of insurance and servicing are dealt with in s.239 ITEPA 2003. FA 2017 makes it clear that the salary foregone should relate to the provision of the benefit and so it is unnecessary at this point to consider the salary foregone for any of the running costs.

Having done this, we then need to examine the salary sacrificed for any other payments and benefits provided in connection with the car as a separate exercise and to consider whether this could give rise to an additional benefit in kind charge. These other benefits would ordinarily be taxed independently were it not for the fact that there is specific legislation in s.239(4) ITEPA 2003 which exempts them. The key part of this provision reads:

> 'No liability to income tax arises . . . in respect of a benefit connected with a taxable car.'

The changes brought in on 6 April 2017 introduced a new s.228A ITEPA 2003 which stops certain exemptions applying to a benefit where the benefit is provided in conjunction with an optional remuneration arrangement. One example would be a salary sacrifice mobile phone that was previously an exempt benefit. S.228A ITEPA 2003 prevents the relevant exemption from applying and so the benefit is now taxable by reference to the higher of zero (as it would formerly have been exempt) and the employee's salary foregone. However, the let-out relating to payments and benefits provided in connection with a taxable vehicle is protected, given that s.228A(5)(a) ITEPA 2003 lists s.239 ITEPA 2003 as an excluded exemption.

Article contributed by Robert Jamieson

Hauliers' overnight allowance

HMRC has revised its Employment Income Manual to confirm that lorry drivers will not have to produce receipts to cover the exact cost of the overnight allowance paid to cover subsistence when they are sleeping in their cabs on long-haul trips. Other means of recording expenses such as photographs on a smartphone will be acceptable.

Applying the Rangers decision

Summary – In their first application of the Supreme Court's decision in the Rangers case, the First Tier Tribunal found that payments to employee benefit trusts were earnings.

The appellants had established employee benefit trusts (EBTs) with sub-funds for each employee to which they contributed funds. The sub-funds then made interest free loans to the employees. The issue was whether the amounts contributed to the sub-funds were earnings subject to NICs and PAYE.

Decision

The First Tier Tribunal referred extensively to the recent Supreme Court decision in Rangers [2017] UKSC 45. It found that the requirement for the employer to make a payment to charity and the terms of the EBTs (which provided that employees did not have a vested interest in the funds) did not amount to the kind of contingency that would prevent the payments from being earnings.

The First Tier Tribunal stated:

> 'It was absolutely clear that, under the scheme as it was intended to operate, the payments to charity would be made and the contingencies satisfied.'

The payments to charity had taken place so that the contingency had been satisfied; and the payments had become remuneration at that point if not earlier. As in Rangers, loans were invariably made at the employees' request on an unsecured basis and with no expectation of repayment; and the First Tier Tribunal found that the employees had agreed to the payments to the sub-funds. The First Tier Tribunal rejected the argument that Rangers only applied where employees had a real choice to receive the money in another way.

However, the First Tier Tribunal dismissed the notion that the scheme set up by the taxpayers was a sham. The tribunal observed that the sham principle requires a common intention to create different rights and obligations from those set out in the documents, and an intention to give a false impression to third parties. It was not prepared to accept the submission that the 'true agreement' between the parties was that there was a bare trust and/or that there was no obligation to repay the 'loans'. The trustees did have a discretion as a matter of law; and, although there may have been no intention to demand repayment of the loan, this was not the same thing as considering that there was no right to make such a demand.

Landid Property Ltd, Allen (Concrete) Ltd and La Vita Pizzeria Ltd v HMRC (TC06111)
Adapted from Tax Journal (29 September 2017)

Employed in two member states – Netherlands/ Austria

Summary – A person residing and employed in the Netherlands who, for three months, took unpaid leave and was employed in Austria, was to be regarded as normally employed in the both territories, provided that during that period of leave, he was considered as normally employed under the social security legislation of the Netherlands and that the activity carried out in Austria was habitual and significant in nature.

Since March 2006, X, a Dutch national had been residing and working in the Netherlands for an employer established in the Netherlands.

X and his employer agreed that he would take unpaid leave for three months. Under the terms agreed, the employer stated that the employment contract would remain in place during the period of leave and that X would resume his regular duties on return.

Between December 2008 and February 2009, X stayed in Austria where he worked as a ski instructor for another employer established in Austria.

X did not take any further periods of unpaid leave but the Netherlands tax authorities had confirmation from the Austrian authorities that, for the financial year 2010, X was registered as a worker in the Austrian social security registers on two occasions. Similarly, for the financial years 2011 to 2013 inclusive, X was entered in those registers once per year for a period of approximately one or two weeks.

In the main proceedings, the dispute focused on whether, during January and February 2009, X was insured on a compulsory basis under the Netherlands social security system and was therefore obliged to pay national insurance contributions.

The Court of Appeal, Netherlands, ruled that the employment relationship between X and his employer established in the Netherlands continued during the period of unpaid leave and that Netherlands legislation continued to apply during the months of January and February 2009.

X appealed and the referring court stayed the proceedings requesting a preliminary ruling from the CJEU.

Decision

Article 14(2)(b)(i) of the Regulation had to be interpreted as meaning that a person residing and employed in the territory of one member state who, for a period of three months, took unpaid leave and was employed in the territory of another member state, was to be regarded as normally employed in the territory of two member states within the meaning of that provision, provided that, during that period of leave, he was considered as normally employed under the social security legislation of the first member state and that the activity carried out in the territory of the second member state was habitual and significant in nature, which it was for the referring court to determine (see [29] of the judgment).

X v Staatssecretaris van Financiën [2017] All ER (D) 68 (Sep) C-569/15

Employed in two member states – Netherlands/ Belgium

Summary - CJEU interpreted Article 14(2)(b)(i) of Council Regulation (EEC) 1408/71 as meaning that, the person who was employed by an employer established in one member state but resided in another member state where he carried out part of his employment was not to be considered to be normally employed in the territory of two member states.

During 2009, a Netherlands national resident in Belgium, worked for his employer established in the Netherlands. He worked 121 hours in Belgium, representing approximately 6.5% of the total number of hours worked that year. That time comprised 17 hours spent visiting clients and 104 hours during which he worked from home. Those activities were not carried out according to a set pattern and X's employment contract did not contain any arrangement for working in Belgium. The rest of the work X carried out for his employer in the year was performed in the Netherlands, both in the office and during visits to potential clients.

The regional Court of Appeal, Netherlands, ruled that the work that X performed in Belgium during 2009 was merely occasional. It held that those activities should not be taken into consideration when determining what social security legislation was applicable and, in accordance with art 13(2)(a) of Council Regulation (EEC) 1408/71, only Dutch legislation was applicable for the 2009 financial year.

X appealed on a point of law against that judgment before the referring court. The referring court stayed the proceedings and referred a question to the CJEU for a preliminary ruling.

Decision

Article 14(2)(b)(i) of the Regulation had to be interpreted as meaning that a person, such as the one in question in the main proceedings, who was employed by an employer established in the territory of one member state and who resided in another member state where he carried out, during the past year, a part of his employment activity amounting to 6.5% of his hours worked without such an arrangement having been agreed with his employer in advance, was not to be considered to be normally employed in the territory of two member states, within the meaning of that provision.

X v Staatssecretaris van Finaciën [2017] All ER (D) 62 (Sep) C-570/15

Dividends paid to nominal director and shareholder not taxable

Summary – Rebecca Vowles was not liable to pay tax on dividends paid because the dividends had not been paid to her, but to her partner, who had controlled the company. She had held her shares on behalf of her partner who was the person entitled to receive the dividends.

Rebecca Vowles lodged two appeals with the First-tier Tribunal against various amendments and discovery assessments relating to under-declared tax in her tax returns for the tax years ended 2008 through to 2014.

The issues to consider were whether:

1. Rebecca Vowles argued that she had not been responsible for the tax returns for the first four years in issue, that Mr Max Walker had been in control of her life, and that she had signed whatever she had been asked to sign;

2. The discovery assessments had been within the four-year time limit and properly made, under TMA 1970 s 29;

3. She was liable to tax on the dividends. She argued that she had never received the dividends, even those declared in her own tax returns;

4. She was liable to tax on benefits in kind because as an employee, she had had the use of a car belonging to the company;

5. She had correctly declared rental income on her two properties, Florida Cottage and Bishops Mooring and if the interest payments on the loans secured on the properties were deductible;

6. The Tribunal had jurisdiction to consider over-declarations. Should the Tribunal discharge the 2008 and 2009 amendments, and the 2010 and 2011 assessments, to her over-declarations in her tax returns in those years.

Rebecca Vowles argued that she had been in a physically and mentally abusive relationship with her partner, Max Walker, and that knowing that he had been disqualified as a director, she had agreed to be the director and shareholder of the company, but that Mr Walker had effectively controlled and run the company and that Mr Walker had controlled all of her correspondence with HMRC. She had not considered her possible legal responsibilities.

There was a director's loan account that recorded debits from the company bank account and credits of dividends. Although Rebecca Vowles was the sole director, she argued that she knew nothing about the director's loan account nor the crediting of dividends to her. HMRC argued that Rebecca Vowles and Mr Walker both had had access to the director's loan account and that they had both spent money out of the company's bank accounts, such spending ultimately being reflected in the director's loan account as dividends. On that basis, HMRC made assessments and amendments to Rebecca Vowles' tax returns on the basis that she had under-declared tax in her tax returns on dividend payments and benefits in kind.

She owned a property Bishops Mooring that was re-mortgaged when she divorced from her husband. She owned a half share in a second property, Florida Cottage, gifted to her by her father. Both of these properties had been re-mortgaged at various times but Rebecca Vowles claimed that she did not know what the money was used for. She also had an interest in Verona house that she had bought with Mr Walker.

Decision

The Tribunal:

1. Rejected Rebecca Vowles' argument. It was accepted that she had been the victim in an abusive relationship, and had not known the contents of the tax return. She had not been under duress when she had consented to Mr Walker acting on her behalf and had signed the documents. Therefore, the tax returns were her returns and HMRC had been entitled to enquire into them that they had done this within time.

2. Found that both discovery assessments had been in time and met the formal requirements of TMA 1970 s 29(1).

3. Rebecca Vowles had not been entitled to receive the dividends. Whilst in law, she had been the shareholder of the company, she had held her shares on behalf of Mr Walker who, in equity, had been the person entitled to receive the dividends. The dividends had clearly been paid to Mr Walker. He had controlled the loan account to which the dividends had been credited and had clearly received the dividends. She had not had access to the bank accounts.

4. The company had not made the car available to her. It had made the car available to Mr Walker and he had made it available, when it had suited him, to Rebecca Vowles. She had not been provided with fuel and so the appeal was allowed with respect to the car and fuel benefit.

5. HMRC agreed that it was correct to deduct the interest on the re-mortgage to buy out her ex-husband's interest in Bishops Mooring as this liability was incurred in order to purchase the business property. However, HMRC had rightly disallowed the interest on the later mortgages because they had not been shown to have been used for the purpose of the property rental business. HMRC's amendments were upheld.

6. She did not have a reasonable excuse for the failure to file the tax returns for 2008-2010 on time and so in principle the penalty would be upheld. HMRC's conclusions on the appropriate deductions should not be disturbed.

7. If HMRC questioned one aspect of a tax return, they had to accept that the taxpayer could counter by proving that another aspect of the same tax return was unduly favourable to HMRC, even if the taxpayer would be out of time to make a stand-alone correction. The 2008 and 2009 self-assessments as amended by HMRC and the 2010 and 2011 discovery assessments were discharged as her under-declared property income was less than her declared liability to dividends and a benefit in kind. The assessments and amendments for 2008 to 2011 would be discharged.

Rebecca Louise Vowles v HMRC (TC06123)

Conferred rights on dividends treated as foreign income dividends

Summary – the CJEU confirmed that the BT Pension Scheme should be granted effective legal remedies to recover the tax credits it was entitled to in relation to foreign income dividends

Under s246C ICTA 1988 the applicant pension scheme trustees were not entitled to tax credits on dividends treated as foreign income dividends but they were entitled to such credits with respect to dividends received outside the foreign income dividend regime from UK-resident companies. The trustees believed that this was inconsistent with EU law, and so brought an action against HMRC before the First-tier Tribunal, looking to obtain a tax credit for these dividends. Both the First Tier and Upper Tribunal upheld the decision. HMRC appealed to the Court of Appeal.

The Court of Appeal decided to stay the proceedings and refer questions to the CJEU for a preliminary ruling on an interpretation of EU law concerning the scope of art 63 of the Treaty on the Functioning of the European Union.

Issues and decisions

Article 63 TFEU had to be interpreted as conferring rights on a shareholder, receiving dividends treated as foreign income dividends, who was resident in the same member state as the company distributing those dividends, in the light of Test Claimants in the FII Group Litigation v Inland Revenue Commissioners (Case C-446/04) ([2006] All ER (D) 168 (Dec))

EU law required that the domestic law of a member state provide remedies to shareholders who, in a situation such as that at issue in the main proceedings, had received dividends treated as FIDs, but had not, however, obtained a tax credit in respect of those dividends, in order to enable those shareholders to enforce the rights that art 63 TFEU conferred on them. In that regard, the national court with jurisdiction had to ensure that shareholders not subject to income tax in respect of dividends who had received dividends that had their origin in foreign-sourced dividends treated as foreign income dividends, such as the trustees, had a remedy which:

- ensured payment of such a tax credit — of which the beneficiaries had been unduly deprived — under rules which were not less favourable than those relating to an action seeking payment of a tax credit, or of a comparable tax advantage, in a situation where the tax authorities had unduly deprived the beneficiaries of that tax credit or of that tax advantage during a distribution of dividends which had their origin in the dividends received from a UK-resident company; and

- allowed the protection of the rights conferred on such shareholders by art 63 TFEU to be guaranteed in an effective manner (see [61] of the judgment).

The fact that the trustees were not subject to income tax in respect of the dividends they received was not such as to alter the answers given to the first two questions asked by the referring court.

Even if the infringement of EU law at issue in the main proceedings was not, in the referring court's view, sufficiently serious so as to give rise to the non-contractual liability of the member state concerned in favour of the company distributing dividends treated as foreign income dividends, under the principles established in Factortame, that circumstance was not such as to alter the answers given to the first two questions.

The fact that a UK-resident company had distributed an increased amount of dividends treated as FIDs in order to make up for the fact that the recipient shareholder had not been entitled to a tax credit was not such as to alter the answers given to the first two questions asked by the referring court.

Trustees of the BT Pension Scheme v Revenue and Customs Commissioners C-628/15

Pensions lifetime allowance protection - guide for administrators

The guide sets out the information pension scheme administrators may need to send to HMRC in respect of members who apply for fixed protection or individual protection against the reduced lifetime allowance.

HMRC has updated this guide for the new lifetime allowance scheme administrator look-up service, enabling administrators to check whether scheme members have valid lifetime allowance protection.

To use the look-up service administrators will need their member's protection notification number and their scheme administrator reference that members can find in their personal tax account, even if they didn't apply for lifetime allowance protection online.

www.gov.uk/guidance/pension-administrators-check-your-members-protection-status

Property losses and the new interest rules (Lecture P1042 - 12.32 minutes)

From April 2017, the residential buy to let finance charge deduction against rental income is being phased out and is being replaced by a 20% tax reducer. This is happening over four years:

	Tax deductible	Tax reducer
2017/18	75%	25%
2018/19	50%	50%
2019/20	25%	75%
2020/21	0%	100%

Clients affected

Basic rate taxpayers that remain in the basic rate band after the interest has been added back will be unaffected by the new rules. Although their taxable income will increase, this will only be taxed at 20% with this additional charge being effectively cancelled out by the 20% tax reducer.

Where adding back the finance charge takes the taxpayer into the higher rate band or, the taxpayer is already paying tax in the higher rate band, they will be worse off. These taxpayers must look to see how badly they are affected before deciding what action to take. If their gearing is low, say £200,000 loan at 2%, they will only be £800 worse off by 2020/21.

The set-off

In 2017/18, 25% of the finance charges will be added back in arriving at taxable rental income. Once the individual's tax liability on all income has been calculated, they are able to deduct the lower of 20% of the:

- Disallowed property finance costs;
- Profits of the letting business, net of any loss relief; and
- Adjusted total income (Total income less savings income, dividend income and personal allowances).

Any excess that is not relieved is carried forward.

Illustration 1

In 2017/18, Amy has employment income of £55,000. Her property income before interest is £7,000 and related mortgage interest is £3,000.

	2017/18
Employment income	55,000
Rental income (£7,000 – £2,250)	4,750
	59,750
Personal allowances	(11,500)
Taxable income	48,250
Basic rate tax	6,700
Tax at 40%	5,900
Less interest relief at 20% on £750 *	(150)
Net tax liability	12,450

* Lower of £4,750, £48,250 or £750 (3,000 x 25%)

Illustration 2 – losses

In 2017/18, George has employment income of £20,000. His property income before interest is £2,800 and his mortgage interest is £3,500. He has property losses brought forward totalling £3,000 and non-deductible mortgage interest in 2017/18 is £875 (3,500 x 25%).

	2017-18
Employment income	20,000
Rental income [£2,800 – £2,625 – £175 loss relief)	0
	20,000
Personal allowances	(11,500)
Taxable income	8,500
Basic rate tax	1,700
Less interest relief at 20% on £0 *	(0)
Net tax liability	£1,700

*Lower of £0, £8,500 or £875

George has the following amounts to carry forward to 2018/19:

- Interest £875 (£875 - £0);
- Property losses £2,825 (3,000 – 175).

In 2018/19, George has employment income of £22,000. The property income before interest is £3,000 and mortgage interest is £3,500. The non-deductible interest is 50% of £3,500 so £1,750.

	2018-19
Employment income	22,000
Rental income [£3,000 – £1,750 – £1,250 loss relief)	0
	22,000
Personal allowances	(11,500)
Taxable income	10,500
Basic rate tax	2,100
Less interest relief at 20% on £0 *	(0)
Net tax liability	£2,100

*Lower of £0, £10,500 or £2,625 (£875 + £1,750)

George has the following amounts to carry forward to 2019/20:

- Mortgage interest of £2,625 (£875 + £1,750);
- Property losses of £1,575 (£2,825 - £1,250).

Continuing the example to a third year, in 2019/20 George has employment income of £23,000. His property income before interest is £4,000 and he has mortgage interest of £3,000. For 2019/20, the non-deductible interest is 75% of £3,000 so £2,250.

	2019-20
Employment income	23,000
Rental income [£4,000 – £750 – £1,575 loss relief)	1,675
	24,675
Personal allowances	(11,500)
Taxable income	13,175
Basic rate tax	2,635
Less interest relief at 20% on £1,675 *	(335)
Net tax liability	£2,300

*Lower of £1,675, £13,175 or £4,875 (£2,625 + £2,250)

George has the following amounts to carry forward to 2020/21:

- Mortgage interest is £3,200 (£4,875 - £1,675);
- Property losses have all been utilised.

Capital Taxes

PPR and short period of occupation

Summary – principal private residence relief was granted even though the taxpayer had only occupied the property for two periods of less than six months.

Stephen Bailey owned a house in Maidstone where he originally lived with his children. Ms Read, his partner, had a property that she owned in Feltham, Middlesex where she lived during the week and in the Maidstone property at the weekend.

Mr Bailey's company bought a property in Richmond in February 2008 for £420,000 with a three month bridging loan. Mr Bailey would obtain a personal mortgage and then buy the Richmond property from his company who would then clear their bridging loan. The intention was that the couple would live in the property as their family home and the Maidstone property would be let.

Mr Bailey moved some of the furniture from Maidstone to Richmond but left much in Maidstone as the intention was to let the Maidstone property furnished. He lived in the Richmond property for two and a half months while he tried to obtain his mortgage. Due to the financial crash in 2008, Mr Bailey could only obtain a "buy-to-let" mortgage to buy the Richmond property.. He bought the property from his company on 2 May 2008 for £429,000. The terms of the loan required him to move out and let the Richmond property; he moved in with Ms Read at Feltham.

When the Richmond property tenant died and his widow left, Mr Bailey moved into the Richmond property and commenced decorating and getting the house ready for the family to move in with him. However, he soon realised that because of his mental state he was unable to cope with living in the house and he decided to sell it. On 31 August 2010 it was sold for £550,000 realising a gain of £121,000. The gain should have been included in Mr Bailey's 2010/11 tax return and a claim for main residence relief made in the return. However, the gain was omitted altogether.

HMRC opened an enquiry into the return on 12 March 2014 and requested information concerning the ownership and sale of a property in Richmond; later HMRC raised an assessment for just over £27,000 and issued a penalty notice.

Mr Bailey claimed that he was eligible for PPR relief (s.222 TCGA 1992). He claimed that he had resided at the Richmond property for a short time before it was sold and so he was deemed to have owned the property for the last three years of ownership and that the entire gain was exempt under s.223 TCGA 1992.

Decision

The First Tier Tribunal said that it is the quality rather than quantity of occupation that counts (*Goodwin v Curtis)* and there is no minimum period of residence for the relief to apply.

It was clear to the Tribunal that when Mr Bailey moved into Richmond in 2008 it was intended to be a family home for him, his children, Ms Read and her son. Although only a limited amount of furniture was moved in at the time, there was a reason for that.

After a few months in the property, he was forced to move out due to circumstances beyond his control. It was a choice between letting the property and losing it altogether.

When Mr Bailey moved back in after his friend's death in 2010, he had intended to move his family in when it had been decorated. However, owing to his mental state, he was unable to cope with living in the property and decided to sell it. It is unclear how this second period of occupation fitted in with the buy-to-let mortgage which, presumably, still existed, but this does not affect the findings.

Taking all the circumstances into account, the Tribunal were satisfied that on both occasions Mr Bailey intended that his residence would be on a permanent basis and that the property would be his home. During his occupation in 2008, Mr Bailey did not own the property and so this period would not qualify him for PPR relief. In 2010, he owned and occupied the property from May to August. Although brief, this was a case where "quality" trumps "quantity". The Tribunal fund that at least part of his residence in 2010 had the requisite degree of "permanence, continuity or expectation of continuity" for Richmond to have been his "residence" for the purposes of s.222 TCGA 1992.

The Tribunal held that PPR relief was available and the appeal allowed

Stephen Bailey v HMRC (TC06085)

Shares with no right to a dividend **(Lecture P1044 – 22.09 minutes)**

In McQuillan v HMRC (2016), the First-Tier Tribunal held that a class of redeemable ordinary shares with no dividend entitlement constituted shares that have a right to a dividend at a fixed rate and therefore did not form part of the ordinary share capital of the company concerned.

The taxpayer (M) and his wife set up a sandwich shop business in 1999. In 2004, along with his sister (Mrs P) and her husband, M turned the operation into a company (Streat) with a view to franchising the business. Initially, Streat's issued share capital consisted of 100 £1 ordinary shares, of which 33 were held by each of M and his wife. The remaining 34 shares were owned equally by Mrs P and her husband. Mrs P and her husband subsequently lent £30,000 to the company.

The company's business was successful and grew rapidly. In 2006, they approached Invest Northern Ireland (INI), which is a regional business development agency, for a grant. INI agreed to provide the grant on condition that the £30,000 loan was converted into shares and that these shares would not be repaid before March 2009. At a board meeting on 12 June 2006, it was duly resolved that the £30,000 advance be converted into 30,000 redeemable ordinary shares of £1 each. These new shares carried no votes and were redeemable at par from March 2009 onwards on a date to be agreed by the directors.

Towards the end of 2009, a much larger business offered to buy up Streat. This was accepted. At a board meeting on 14 December 2009, the directors resolved that the 30,000 redeemable ordinary shares be repaid at par with immediate effect. Nine days later at a further meeting, it was resolved to pay a dividend for the period ended 31 October 2009 of £700 per share. This was the only dividend that Streat ever paid.

On 1 January 2010, the purchasers acquired all 100 £1 ordinary shares and the four shareholders then ceased to have any involvement with Streat.

M and his wife claimed entrepreneurs' relief in respect of their capital gains on the CGT pages of their 2009/10 tax returns which, following an enquiry, HMRC refused to allow. HMRC's stance was that the 30,000 redeemable ordinary shares counted as 'ordinary share capital' and so, although M and his wife had been directors of Streat throughout, they did not satisfy the requisite 5% shareholding test for the one-year period ended with the date of their disposal. On this basis, M, for example, had held 33 shares out of a total issued share capital of 30,100 shares for most of that one-year period, ie. a holding of just over 0.1% of the company's ordinary share capital.

It should be borne in mind that s.989 ITA 2007 defines 'ordinary share capital' as:

> 'all the company's issued share capital (however described), other than capital the holders of which have a right to a dividend at a fixed rate but have no other right to share in the company's profits'.

Having expressed sympathy with the taxpayers' plight, the First-Tier Tribunal concluded the argument by stating that having no right to a dividend is equivalent to a right to a dividend at a fixed rate. They contrasted Streat's actual position with an alternative (hypothetical) structure under which the redeemable ordinary shares could have carried a fixed dividend of a purely nominal amount (eg. 1/15000th of a £ per share). They also referred to the subsequent change in CGT law that took effect on 6 April 2008 when entrepreneurs' relief was introduced.

The First-Tier Tribunal reasoned that, where the meaning of a legislative provision is not clear, 'considerations of common sense may be relevant under ordinary principles of statutory interpretation'. The redeemable ordinary shares were therefore ignored and M and his wife were after all entitled to make their entrepreneurs' relief claim.

HMRC appealed against this judgment and, on 6 September 2017, the Upper Tribunal overturned the earlier decision. The Upper Tribunal judges did not consider that there was any ambiguity or difficulty about the meaning of s.989 ITA 2007. The legislation, in their opinion, does not countenance a right to no dividend as being a right to a dividend at a fixed rate. They went on:

> 'It is in our view plain, on the literal meaning of s.989 ITA 2007, that to be within (the) excluded class the shares in question must have a right to a dividend. Once it is determined, as a matter of fact, that the shares carried no right to a dividend, there is no question of the shares falling outside the definition of "ordinary share capital".'

Streat was not therefore a personal company as far as M and his wife were concerned. As a result, entrepreneurs' relief was not available to the founding shareholders.

After a discussion about the impact of the First-Tier Tribunal's finding in Castledine v HMRC (2016), HMRC v McQuillan (2017) concludes with these words:

> 'Like the First-Tier Tribunal, we sympathise with the circumstances in which (M and his wife) have found themselves. We recognise that they are the kind of entrepreneurs for whom the relief was devised. They saw an opportunity to develop a business in a particular market and they devoted their time, energy and resources to building up a successful company with all the risks and rewards that that involves. The statistics (M's accountant) cited to us at the hearing about the rapid growth of the business in terms of outlets, employees and turnover are undoubtedly impressive. They are understandably aggrieved that they should be denied relief in circumstances where, through a commercial requirement of a grant-provider, a loan to Streat was converted into shares with no change in the economic substance and which remained a financial liability for accounting purposes, where they say they would have been entitled to taper relief under the law as it then stood and where, after the shares had been issued, there had been a change in the law so as to deny them relief.

A definition such as that in s.989 ITA 2007 is apt to produce results that appear unfair. There will be deserving cases that fail to qualify for relief and non-deserving ones that do qualify. Such a definition may enable those who are well-advised to fall within its terms, whilst leaving a trap for the unwary. There is certainly a case for the legislation to be reviewed to address what may understandably be perceived as unfairness in particular cases, of which this is one. That will, however, be a matter for Parliament if it determines that such a change should be made.'

Article contributed by Robert Jamieson

HMRC updates CGT Manual for investors' relief

From March 2019, investors' relief will allow individuals and trustees to claim a reduced rate of capital gains tax on certain disposals of shares in unlisted trading companies.

The relief was introduced in Finance Act 2016 and will apply to newly issued shares purchased on or after 17 March 2016, provided they are held for a minimum of 3 years from 6 April 2016 and will be subject to a separate lifetime limit of £10 million of gains.

HMRC has published new guidance on the relief which can be found at CG63500 onwards.

www.gov.uk/hmrc-internal-manuals/capital-gains-manual/cg63500p

Trusts' exit charges

Summary – S80 TCGA 1992, that imposes an exit charge for trusts when trustees cease to be UK resident, was incompatible with the principle of freedom of establishment. However, the transfer of the trust's place of management to Cyprus could not mean that the UK had to abandon its right to tax a capital gain that had arisen on its territory before that transfer

Mr Panico Panayi, a Cypriot national, had created four trusts for the benefit of his children and other family members. He had transferred 40% of the shares of his company to them.

When the Panayi trusts were created, Mr Panayi, his wife and their children resided in the United Kingdom. Early in 2004, Mr and Mrs Panayi decided to leave the UK to return to Cyprus permanently. Before their departure, in August 2004, they both resigned as trustees and Mr Panayi appointed three new trustees, all resident in Cyprus.

In December 2005, the Panayi trustees sold the shares held in the Panayi trusts and reinvested the proceeds of that sale. In January 2006, the trustees filed tax returns, including self-assessments, for the tax year 2004/05, in respect of each of the Panayi trusts. An accompanying letter provided HMRC with details of the change of Panayi trustees and the subsequent disposal of shares by those trustees.

HMRC considered that a charge to tax was triggered by the appointment of new trustees under s80 TCGA 1992 , since the majority of the Panayi trustees were no longer resident in the UK; and, consequently, the administration of the Panayi trusts had moved to Cyprus in the 2004/05 tax year.

The Panayi trustees appealed, challenging the compatibility of the exit charge (and its immediate payment) with the fundamental freedoms of movement under EU law.

Decision

The CJEU first observed that an entity such as a trust that, under national law, possesses rights and obligations that enable it to act in its own right, and which actually carries on an economic activity, may rely on the freedom of establishment.

The court found that a restriction on this freedom was established; the relevant unrealised capital gains would not have been liable to taxation in the UK if the newly appointed trustees had been resident there. The effect of the legislation was that a trust that retained its place of management in the UK and a trust for which the place of management was transferred to another member state were treated differently. That difference in treatment was liable to:

1. discourage the trustees, who manage the trust, from transferring the place of management of the trust to another member state; and,

2. deter the settlor, insofar as the trust instrument permits, from appointing new non-resident trustees.

However, the court accepted that the transfer of the place of management of a trust from one member state to another could not mean that the member state of origin had to abandon its right to tax a capital gain which had arisen on its territory before that transfer. A member state was therefore entitled to charge tax on those gains at the time when that taxpayer left the country. Such a measure was justified on grounds connected with the preservation of the allocation of powers of taxation between the member states.

The Panayi trustees claimed, however, that even if there had been no immediate taxation of the capital gains concerned on the transfer of the place of management of the trusts, the UK would not have been prevented from taxing those gains in the value of assets held in the Panayi trusts, because, under s.87 TCGA, capital gains made by non-resident trustees and attributed to resident beneficiaries, in the form of capital payments, can be taxed as gains accruing to those beneficiaries.

However, the court pointed out that the triggering of s 87 would depend on the discretion of the trustees and beneficiaries, and was therefore not sufficient to preserve the powers of the UK to tax capital gains arising in its territory.

Finally, the court found that the requirement for immediate payment was disproportionate and therefore precluded by TFEU.

Trustees of the P Panayi Accumulation & Maintenance Settlements v HMRC (Case C-646/15) Adapted from Tax Journal (22 September 2017)

Practical SDLT issues **(Lecture B1043 – 17.09 minutes)**

Chargeable interest

Stamp Duty Land Tax (SDLT) is payable when there is a chargeable interest in land resulting from a freehold or leasehold purchase but it does not include a licence to occupy land. It only applies to land located in the UK but since the introduction of the Land and Buildings Transaction Tax north of the border, it no longer applies to Scottish land.

Chargeable consideration

For SDLT to be payable, the land transfer must normally take place in exchange for chargeable consideration. Two exceptions to this are when land or property is:

- gifted - no SDLT payable as the transaction is outside the scope;
- transferred to a company on incorporation – there is a deemed transfer at market value.

However where land is transferred but the recipient takes on the mortgage relating to the property, that is regarded as chargeable consideration.

Rates of tax

Stamp Duty Land Tax applies at different rates to residential and non-residential property. Where six or more dwellings are being transferred then that is treated as a transfer of non-residential property. However, where a number of dwellings are being transferred, there is also the option of claiming multiple dwellings relief (see below).

Where a property has mixed use, so maybe there is a flat over a shop, you do not apportion between residential and non-residential property but instead treat the whole property as non-residential.

Residential rates

SDLT is calculated like income tax and the percentage only applies to the amount that falls within that band. This is known as the 'slice' system.

0- £125,000	0%
To £250,000	2%
To £925,000	5%
To £1,500,000	10%
Over £1,500,000	12%

3% surcharge – residential property

Where a property has already been bought and subsequent properties are bought, maybe to be used as a second home or to let out, there is a 3% surcharge payable on top of the normal SDLT rate.

The main exception to this is where the individual is selling their main residence and they are buying a property that is going to replace that main residence. The 3% surcharge is still payable but can be claimed back if the original property is sold within 3 years.

Linked transactions

There are special rules to prevent people fragmenting property transactions in an attempt to reduce the SDLT that is payable.

The linked transactions rule applies where there is a seller, or anyone connected to them, selling more than one property to the same buyer, or anyone connected to them. In this, the consideration for all of the properties being sold are aggregated and SDLT is payable as if there was just one larger property being sold.

Multiple dwellings relief

This relief was originally introduced to ease the SDLT burden for builders and property developers. The multiple dwellings relief effectively reverses the impact of the linked transactions rule. Using this relief, an averaging process serves to lower the highest band that the properties fall into.

SDLT is calculated in three steps:

1. Calculate the average price for all dwellings;

2. Calculate the SDLT payable (using the 3% surcharge rates) on one dwelling using the average price from step 1;

3. Multiply the SDLT liability calculated in step 2 by the total number of dwellings.

However, the total SDLT cannot be lower than 1% of the total consideration.

Non-residential rates

The rates payable on the purchase of commercial and mixed-use property is as follows:

0- £150,000	0%
To £250,000	2%
Over £250,000	5%

15% SDLT rate

Historically non-UK domiciled individuals often held UK residential property in non-UK resident companies. This served to mitigate any possible IHT that might become payable on that property by taking advantage of the excluded property rules.

As a result, the government introduced the 15% SDLT rate that applies to residential property bought by a company and used by an individual. The rate applies to properties over £500,000 but no band system applies. SDLT is calculated as a straight 15% on the total value of the property.

There is relief for any genuine property purchases by property dealers, developers, or companies letting their property to the public.

Article created from a seminar by Peter Rayney.

Administration

Late filing of Non Resident CGT return

Summary - A non-resident individual, who had filed her non-resident CGT return late in its first year of operation, had a reasonable excuse.

Ms McGreevy had filed a non-resident CGT return late and penalties had been imposed against which she was appealing. The return related to the sale of a property located in Kent by the taxpayer while she resided in Australia.

HMRC considered that she had no reasonable excuse for her failure, as there had been ample publicity for the fact that a non-resident who disposes of a dwelling situated in the UK must make a non-resident CGT return within 30 days of the completion date.

Decision

The First Tier Tribunal found that the daily penalties had been incorrectly imposed, as there was no evidence that the decision to impose them had been made by an HMRC officer.

Furthermore, HMRC had failed to notify the taxpayer of the starting date for daily penalties (FA 2009 Sch 55 para 4). The First Tier Tribunal also noted that HMRC had ceased to impose daily penalties for the late filing of non-resident CGT returns. As to the other penalties (imposed after a six months and then a 12 months delay), they were valid and so the issue was whether the taxpayer had a reasonable excuse for the delay.

The Tribunal observed that the non-resident CGT return was in its first tax year of operation, and concluded that it had been reasonable for the taxpayer to think that she only needed to mention the gain on her SA tax return.

Finally, the tribunal found that the maxim 'ignorance of the law is no defence' was not relevant to this case. It pointed out that its operation is confined to criminal statutes and that, even in that sphere, it is often given too wide a meaning.

The Tribunal was unusually fierce in its criticism of HMRC, declaring: 'The arguments advanced by HMRC about knowledge of the law are little short of preposterous. The Tribunal observed that an obvious cohort of taxpayers who may be subject to non-resident CGT were non-residents who filed income tax returns of rents received from UK properties. However, HMRC had not contacted them, relying instead on the chancellor's Autumn Statement and on an 'obscure document' on its website.

Rachel McGreevy v HMRC (TC06109)
Adapted from the summary in Taxation Journal (29th September 2017)

Reasonable behaviour - Late filing penalties

Summary – The taxpayer had reasonable excuse for his 2013/14 tax return being filed late by his accountant.

The taxpayer paid the tax due for his 2013/14 return on time but, due to marriage problems and resultant ill health, he failed to provide the information needed by his accountants to enable him to complete the tax return by that date. The information was supplied in June 2015. After that time, he had contacted his accountant several times to seek assurance that the return would be filed. He had been promised the return would be submitted by 31 July and so made no more contact with the agent on that understanding. However, the return was not submitted until October 2015 by which time HMRC had issued late filing penalties including daily penalties.

The taxpayer appealed.

Decision

The First Tier Tribunal found that the taxpayer's personal difficulties and illness constituted a reasonable excuse for the delay in providing the return material.

The judge decided the taxpayer had been 'proactive and involved throughout the process' and that it was reasonable for him to assume the return had been filed by the end of July. If he had had 'any lingering doubts' about that, he would, as his previous actions showed, have contacted the adviser again.

The taxpayer's appeal was allowed.

M O'Neill v HMRC (TC6107)

Off-payroll working (IR35) in the public sector: paying an intermediary

In the public sector, the public authority is responsible for deciding if the off-payroll working rules apply to an engagement and if they do, the public authority, agency or other third party responsible for paying the worker’s intermediary must:

- calculate a deemed direct payment to account for employment taxes associated with the contract;
- deduct those taxes from the payment to the worker’s intermediary;
- report to HM Revenue and Customs (HMRC) through Real Time Information (RTI) the taxes deducted;
- pay the relevant employers’ NICs.

Calculating the deemed direct payment

The deemed direct payment is calculated by:

- Working out the value of the payment to the worker's intermediary, having deducted any VAT due;

- Deducting the direct costs of materials that have, or will be used in providing their services;

- Deducting expenses met by the intermediary that would have been deductible from taxable earnings if the worker was employed.

From this amount, the tax and NICs are deducted as appropriate and then reported using a Full Payment Submission (FPS), as for other workers on the payroll.

Starter information

HMRC must receive a start declaration for each new 'employee'. Their primary employment is likely to be with their own intermediary and so the services provided to the public authority should be treated as a secondary employment. Starter declaration C is likely to be appropriate which means that initially tax code BR should be applied until HMRC issues a different tax code.

End of contract

At the end of the contract, it is important to:

- report the date of leaving to HMRC;

- report to HMRC any payments made to the intermediary after that date;

- provide the worker with a P45 at the end of the contract.

Irrelevant reporting fields

There are a number of reporting fields that are not relevant for workers engaged through their own companies. These are:

- Student Loan repayments (The worker will account for student loan obligations in their own tax returns or company payrolls);
- Statutory payment (Entitlement to statutory payments comes through their primary employment with their own company);

- Workplace pension payments (The worker is not subject to auto-enrolment in the public authority's pension).

www.gov.uk/guidance/off-payroll-working-in-the-public-sector-reform-for-fee-payers

HMRC guide to PAYE in-year late filing penalties

An employer can get a penalty if:

- their Full Payment Submission (FPS) was late;
- they don't file the expected number of FPSs;
- they don't send an Employer Payment Summary (EPS) when they didn't pay any employees in a tax month.

HMRC will not charge a penalty if:

- the FPS is late but all reported payments on the FPS are within 3 days of their employees' payday (this now applies until 5 April 2018). However employers who persistently file after the payment date but within 3 days may be contacted or considered for a penalty;
- they are a new employer and they filed their first FPS within 30 days of paying an employee;
- it is their first failure in the tax year to file a report on time.

www.gov.uk/guidance/what-happens-if-you-dont-report-payroll-information-on-time

HMRC Trusts and Estates Newsletter - September 2017

Trusts Registration Service

HMRC has launched a new Trusts Registration Service enabling trustees to register their trust online and provide information on the beneficial owners of the trust. The new service launched in early July for trustees and replaces the 41G (Trust) paper form, which was withdrawn at the end of April.

Under existing self-assessment rules, the trustees (or their agents) must register details of a trust with HMRC by 5 October of the year after a liability to Income Tax or Capital Gains Tax (CGT) first arises. The registration process, which will need completing via Trusts Registration Service, will include providing information about the beneficial owners of the trust. In subsequent years, or where the trust is already registered for self-assessment, the trustees (or their agent) of either a UK or non-UK (express) trust that incur a UK tax liability are required to provide beneficial ownership information about the trust, using the TRS, by 31 January after the end of the tax year.

Agents can register on behalf of trustees and will be able to enter updates for changes of circumstances from early 2018.

In this first year of TRS, to allow sufficient time to complete the registration of a trust for self-assessment and provide beneficial ownership information there will be no penalty imposed where registration is completed after 5 October but before 5 December 2017.

The new service will provide a single online service for trusts to comply with their registration obligations, will improve the processes around the administration of trusts, and allow HMRC to collect, hold and retrieve up to date information in a central electronic register.

Inheritance Tax (IHT) Online

A new digital service to help those needing to apply for a grant of probate is now available that replaces the paper IHT205 process.

To use this service, the person must:

- be the personal representative of the person who has died;
- be applying for a grant of representation (for example, probate) in England and Wales;
- have no IHT payable.

Professional agents should continue to use the existing processes.

Trusts - taxable pension lump sum death benefits paid to trusts

HMRC have developed two new forms to help trustees and pension scheme administrators meet their information obligations on taxable lump sum death benefits paid to trusts from pension schemes.

Background

When a pension scheme pays a taxable lump sum to a trust after the pension holder dies, the payment is taxed at 45%. This tax charge is called the special lump sum death benefits charge.

If the trust then makes an onward payment to a beneficiary (or beneficiaries) that is funded (or partly funded) from the pension lump sum death benefit payment, the pension tax rules allow the beneficiary to claim a credit for the 45% tax paid by the pension scheme administrator on the original lump sum. This may lead to a refund of tax.

To help the beneficiary reclaim any refund of tax that may be due, there are information requirements on the trust and the pension scheme administrator for these payments.

Pension scheme administrators should use R185 (Pension scheme admin) to provide information to a trustee, who is not a bare trustee, about a lump sum death benefit that was subject to the special lump sum death benefits charge under section 206 Finance Act 2004. Pension scheme administrators should provide this within 30 days of making the payment to the trust. The trust receiving the payments should keep this form.

The trustees will need this so they can provide this information to the beneficiary if they make an onward payment.

A trustee, who is not a bare trustee, should use R185 (LSDB) to provide information to a beneficiary about a payment made to them funded by a lump sum death benefit that was subject to the special lump sum death benefits charge under section 206 Finance Act 2004.

Trustees should provide this to the beneficiary within 30 days of making the payment, or within 30 days of receiving the information from the pension scheme administrator, whichever is the later date.

IHT Toolkit

A new section has been added to the toolkit identifying whether the deceased disposed of property on their death that qualifies their estate for the residence nil-rate allowance.

The IHT agent toolkit provides a brief overview of this new legislation along with links to available guidance to assist you in understanding whether the estate qualifies for RNRA.

www.gov.uk/government/publications/hm-revenue-and-customs-trusts-and-estates-newsletters

DOTAS – a recent case (Lecture B1044 – 14.00 minutes)

Summary – The First Tier Tribunal granted an order confirming that a scheme that involved 'dressing up' employee remuneration as betting winnings so as to avoid PAYE and NICs was notifiable under DOTAS.

HMRC applied for an order that certain arrangements, known as the Alchemy scheme, were notifiable. They argued that the scheme involved treating employee remuneration as betting winnings so as to avoid PAYE and NICs.

Under the scheme, employees entered into a spread bet and a call spread option, knowing that their employer would relieve them of the call spread option. This would result in the employee making money from the bet whilst their employers would suffer a corresponding loss.

Root2tax, the scheme promoter, argued that the arrangements were not notifiable because they did not give rise to a tax advantage as the money made by the employee were betting winnings received from a third party.

However, HMRC argued that this was an arrangement designed to extract money from a company what would normally be treated as employment income and so liable to income tax and NIC.

Decision

The Tribunal observed that no rational investor would have entered into the bet and matching option without the near certainty that he would be relieved of the latter.

The Tribunal concluded that the scheme was a standardised tax structure and was caught by DOTAS. An informed observer would conclude that the main purpose of the arrangements was to enable a client to obtain a tax advantage.

HMRC v Root2tax Limited And Root3tax Limited (In Liquidation) (TC06115)

Deadlines

1 November 2017

- CT due for periods ended 31 January 2017 for companies not liable to instalments;

2 November 2017

- Filing date for form P46 (Car) for quarter ended 5 October 2017;

5 November 2017

- Specified employment intermediaries to file return for quarter to 5 October 2017;

7 November 2017

- VAT returns and electronic payment due for 30 September 2017 quarter;

14 November 2017

- Quarterly CT instalment for large companies depending on accounting year end;
- Monthly EC sales list if paper return used;

19 November 2017

- PAYE, NIC, CIS, student loan due for month ended 5 November 2017 (not electronic);
- File monthly construction industry scheme return;

21 November 2017

- File online monthly EC sales list;
- Submit supplementary intrastat declarations for October 2017;

22 November 2017

- PAYE, NIC, CIS, student loan liabilities should have cleared into HMRC bank account;
- Budget;

30 November 2017

- File private company accounts with 28 February 2017 year end at Companies House;
- File public company accounts with 31 May 2017 year end at Companies House;
- CTSA returns filed for companies with accounting periods ended 30 November 2016.

News

Fix day – problems solved?

With 23 October 2017 'fix day' having passed, the in-year fix should have corrected exclusions 48 to 56 and 58 to 59, which HMRC believes will cover most cases. Taxpayers should now be able to file online and the commercial software should calculate their tax correctly. However, it seems that version 5 of the online filing exclusions list for 2016/17 includes a number of new exclusions to watch out for!

If, having filed after 23 October 2017, the tax return software indicates that a paper tax return is still required, the return should be submitted with a completed self-assessment reasonable excuse form for not filing online, stating in box 6 that the return falls into one of the online filing exclusions. Without that form, a paper tax return received after 31 October will trigger an automatic £100 late filing penalty.

For Returns that have already been submitted electronically with an incorrect tax computation for 2016/17, HMRC says it will issue a corrected computation on form SA302, together with a letter to the taxpayer.

http://www.sa2000.co.uk/2017-exc-indi.pdf

Scottish Budget

Budget for 2018/19

The Scottish government will publish its draft Budget for 2018/19 on 14 December.

2019/20 Budget

A new Budget process will be adopted for the 2019/20 Draft Budget. In line with the Budget Process Review Group recommendations, it will offer Parliament a year round approach to Budget scrutiny within the framework as set out in the Review Group report:

- Full Year Approach: a broader process in which committees have the flexibility to incorporate budget scrutiny including public engagement into their work prior to the publication of firm and detailed spending proposals;

- Continuous cycle: scrutiny should be continuous with an emphasis on developing an understanding of the impact of budgetary decisions over a number of years including budgetary trends;

- Output / outcome focused: scrutiny should also be evaluative with an emphasis on what budgets have achieved and aim to achieve over the long term, including scrutiny of equalities outcomes;

- Fiscal Responsibility: scrutiny should have a long term outlook and focus more on prioritisation, addressing fiscal constraints and the impact of increasing demand for public services; and

- Interdependent: scrutiny should focus more on the interdependent nature of many of the policies that the budget is seeking to deliver.

news.gov.scot/news/budget-date-announced

Welsh government publishes rates for new devolved taxes

From 1 April 2018, land transaction tax and landfill disposals tax will replace SDLT and landfill tax respectively in Wales.

Residential land transaction tax rates

Price threshold	Main residential rates
£0 - £150,000	0%
£150,000 - £250,000	2.5%
£250,000 - £400,000	5%
£400,000 - £750,000	7.50%
£750,000 - £1.5m	10%
£1.5m-plus	12%

For people buying an additional residential property, the higher rate of tax will be levied – an additional 3% on top of the main residential rate in each band; this is the same as under the current stamp duty land tax regime.

Non-residential land transaction tax rates

Price threshold	Rates
£0 - £150,000	0%
£150,000 - £250,000	1%
£250,000 - £1m	5%
£1m plus	6%

Non-residential LTT lease rates

Net present value threshold	Rates
£0 - £150,000	0%
£150,000 - £2m	1%
£2m plus	2%

Landfill disposals tax

For landfill disposals tax, the following rates are planned:

	2018-19	2019-20 (assumed rate)
Standard rate	£88.95	£91.70
Lower rate	£2.80	£2.90
Unauthorised disposals rate	£133.45	£137.55

The new unauthorised disposals rate will be set at 150% of the standard rate.

New taxes

Under the Wales Act 2014, the Welsh Government has powers to put forward proposals for the development of new taxes in areas of devolved responsibility. The Finance Secretary announced a shortlist of 4 new tax ideas that will be developed further this autumn:

1. Vacant land tax;
2. Disposable plastic tax;
3. Tourism tax; and
4. A levy to support social care. One of these will be put to the UK government in 2018 to test the Wales Act powers.

gov.wales/newsroom/finance1/2017/171003-progressive-tax-plans-for-wales-published/?lang=en

CWG5 (2017): Employers' guide to Class 1A NICs on benefits in kind

HMRC updated this guide in September 2017 with:

- a new paragraph (in Part 3, section 9) about calculating Class 1A NICs as part of salary sacrifice or other optional remuneration arrangements;
- Part 5 (special cases) also now contains a new section covering optional remuneration arrangements.

www.gov.uk/government/publications/cwg5-class-1a-national-insurance-contributions-on-benefits-in-kind

Simple assessment - ending the tax return

Simple Assessment is a new way of collecting tax that will make life easier for millions of customers who have had to do Self Assessment tax returns in the past.

Currently, around 11 million people have to complete a tax return every year to provide HMRC with information about their income.

With greater use of existing data HMRC can now find the information for some of those customers elsewhere without needing them to complete a tax return

Simple assessment is a power introduced by Finance Act 2016, allowing HMRC to assess income tax or CGT liabilities using information already held, without the need for individuals to complete a self-assessment tax return;

From September 2017 HMRC will remove the need for some customers to complete a tax return, starting with two groups:

1. new state pensioners with income more than the personal tax allowance in the tax year 2016 to 2017;

2. PAYE customers, who have underpaid tax and who cannot have that tax collected through their tax code.

All existing state pensioners who complete a tax return because their state pension is more than their personal allowance will be removed from Self Assessment in 2018/19.

HMRC has begun issuing 'simple assessments' in the form of a tax calculation (P800) or simple assessment letter (PA302); when received, taxpayers have 60 days in which to challenge incorrect information contained within their simple assessment.

www.gov.uk/government/publications/issue-briefing-simple-assessment-ending-the-tax-return

Growth support service for mid-sized businesses

HMRC has launched its new 'growth support service', through which businesses with a UK turnover above£10 million or at least 20 employees can apply for dedicated specialist help with compliance, or guidance on available reliefs, where the business is undergoing particular forms of growth including:

- Turnover increased by > 20% in the last 12 months, where increase is > £1 million;
- Growth related mergers and acquisitions;
- Growth related group reorganisation;
- Initial and subsequent offerings of shares on any stock exchange for public purchase;
- Capital that increases balance sheet total by > 20% where that capital is > £1 million;
- Notifying HMRC and submitting Senior Accounting Officer certificate for the first time;
- Making quarterly instalment payments for the first time;
- Entering VAT Payments on Account regime;
- Exporting goods or services for the first time;
- Establishing a presence in a new territory;

- Other significant business growth;

The Growth Support Service aims to help businesses:

- understand any new tax issues and reporting requirements;
- get your tax right before you file your return;
- consider reporting and governance risks caused by the growth of your business;
- access any financial incentives and reliefs you may be eligible for;
- access other HMRC specialists, services and guidance that are relevant to you.

The service will not be able to give general business advice or tax planning advice.

www.gov.uk/government/collections/support-with-tax-as-a-mid-sized-business

Spotlight 40 - Income trust schemes: misleading advertising

Spotlight 40 concerns a scheme known as the Knight Wolffe income trust that aims to divert income from a business into a trust. The business sets up a trust for the benefit of its suppliers, who are blissfully unaware that they have become beneficiaries of the trust. The business pays money into the trust that is claimed as a tax-deductible business expense. The trust funds are then loaned, usually to the business owner, their family, or both.

The terms of the loan mean the funds are unlikely to be repaid and eventually the loans are claimed to reduce the scheme user's estate value for Inheritance Tax purposes. As a result, the scheme user has full use of the money, which appears to be tax-free. HMRC's view is that such loans are caught by the disguised remuneration loan charge effective from 2019.

Knight Wolffe's website claims the scheme:

- was 'known and accepted by HMRC since 1994';
- was 'approved by the House of Lords in 2005';
- 'involves no tax avoidance';
- remains effective in a number of ways - including alongside HMRC's logo.

HMRC complained to the Advertising Standards Authority about misleading advertising and the Advertising Standards Authority has ruled that all of these claims and use of HMRC's logo are misleading and must be withdrawn. The ASA has also ruled that the website "misleads by omission", by failing to mention the various government tools and policies aimed at the avoidance promoted by Knight Wolffe. This includes the General Anti-Abuse Rule (GAAR) and the new charge on disguised remuneration outstanding on 5 April 2019 (the loan charge). The ruling shown on the ASA website sets a precedent so other avoidance sellers must not make the same claims about similar schemes.

Knight Wolffe and other sellers of similar planning arrangement must now remove these claims from their advertising.

www.gov.uk/guidance/income-trust-schemes-misleading-advertising-spotlight-40

Spotlight 41: Disguised remuneration: Supreme Court decision in RFC 2012 plc

Spotlight 41 concerns the Supreme Court decision in the Rangers Football Club EBT case. In particular, HMRC will regard the principle set out in the decision, that employment income paid from an employer to a third party is generally taxable as employment income on the employee, as applicable to a wide range of disguised remuneration schemes.

In their decision, the Court agreed that the tax avoidance scheme used by Rangers Football Club does not work. They said that Rangers should have deducted Income Tax and National Insurance contributions from payments they made to the scheme, which was an employee benefit trust (EBT).

HMRC's view is that this principle applies to a wide range of disguised remuneration tax avoidance schemes, no matter what type of third party is used.

This includes:

- EBTs – including variants within these schemes where no loans are made from the EBT but instead the funds remain in, or are invested by, the trust;
- disguised remuneration routed through employer-funded retirement benefit trusts;
- a range of contractor loans schemes.

HMRC intends to use this decision to take action against many of the disguised remuneration schemes using the full range of available tools. They strongly advise withdrawal from the scheme and tax affairs be settled. This will avoid the costs of legal action and minimise interest and penalty charges on the tax that should have been paid.

www.gov.uk/guidance/disguised-remuneration-a-supreme-court-decision-spotlight-41

OTS plans for next year

In the Business tax section of our notes this month, we draw your attention to the capital allowances and depreciation review that has recently been announced but what else do the OTS have planned for next year?

In addition to continuing to look at making tax digital and the gig economy, the OTS has provisionally highlighted four projects planned for next year:

1. how advances in technology might enable simplification to be taken further. They plan to learn about distributed ledgers, robotics, big data analytics and other new technologies;
2. reliefs for investment;
3. taxation of savings/investments;
4. explore and scope the potential for a review of aspects of inheritance tax.

They have said that not all of these will necessarily be taken forward or their scope may be modified on further review.

In the medium and longer term, they also propose to undertake a review of the structure of the tax system in other countries, particularly the US, Ireland, Netherlands. This will explore whether there are structural features of other countries' tax system that would provide simplification opportunities for the UK.

www.gov.uk/government/publications/ots-publishes-outline-of-its-future-work-programme

Making the Taxpayers' Charter work (Lecture P1045 – 18.18 minutes)

Your Charter is important to HMRC and its customers:

- It provides a clear framework for how HMRC staff are expected to act and to deliver services for customers;
- It sets out what customers can expect from HMRC as well as the obligations they are expected to meet.

In January 2016, HMRC refreshed Your Charter and in February 2016, the Charter Committee was inaugurated as a sub-committee of the HMRC Board.

HMRC set out its assessment of how it has performed against its Charter commitments in the HMRC annual report and accounts: 2016 to 2017. This report is the Charter Committee's own assessment of HMRC's progress against its commitments and in supporting customers to meet their obligations.

Taxpayers' rights – what we can expect from HMRC

1.1 Respect you and treat you as honest

- We'll treat you even-handedly, with courtesy and respect. We'll listen to your concerns and answer your questions clearly. We'll presume that you're telling us the truth, unless we have good reason to think otherwise.

1.2 Provide a helpful, efficient and effective service

- We'll help you understand what you have to do and when you have to do it. We'll deal with the information you give us quickly, efficiently, and keep any costs to you at a minimum. We'll put any mistakes right as soon as we can.

1.3 Be professional and act with integrity

- We'll act within the law and make sure that you are dealt with by people who have the right level of expertise. We'll help you to understand your rights and we'll be sensitive to any financial difficulties you might have.

1.4 Protect your information and respect your privacy

- We'll protect information we obtain, receive or hold about you and only share information about you when the law lets us. We'll explain why we need any additional information.

1.5 Accept that someone else can represent you

- We'll respect your wish to have someone else deal with us on your behalf, such as an accountant or a relative. To protect your privacy, we'll only deal with them if they have been authorised to represent you, and we'll deal with them courteously and professionally.

1.6 Deal with complaints quickly and fairly

- We'll deal with your complaints or appeals as quickly as we can. You can also ask someone else to look into an issue on your behalf. If we can't resolve matters between us, you can ask us to work with someone who's not been involved in your dispute.

1.7 Tackle those who bend or break the rules

- We'll identify those who are not paying what they owe or are claiming more than they should and recover the money. We'll charge interest and penalties where appropriate and be reasonable in how we use our powers.

Taxpayers' obligations – what HMRC expect from taxpayers

2.1 Be honest and respect our staff

- Please be truthful and act within the law. Give us all the relevant facts and information about your taxes, entitlements, and any additional information we ask you for. Treat our staff with the respect that you would expect from us.

2.2 Work with us to get things right

- Please work with us to make sure that your tax and payment affairs are right and that you're paying and claiming the correct amount of money. Talk to us if there is anything you're not sure about.

2.3 Find out what you need to do and keep us informed

- Please make sure that you know how to pay your tax and claim payments and get in touch with us as soon as possible if you need help. Tell us straight away if you're having trouble meeting your obligations.

2.4 Keep accurate records and protect your information

- Please make sure that you, or your representative, keep accurate financial records that support what you tell us. Do not share confidential information with others and tell us straight away if you think someone else knows your identification details, such as passwords.

2.5 Know what your representative does on your behalf

- Please make sure that you know what information and payments your representative sends us. Make sure that the information and payments are accurate and on time.

2.6 Respond in good time

- Please send us returns and pay any amounts you owe on time and pay any interest on late payments or penalties promptly.

2.7 Take reasonable care to avoid mistakes

- Please take care to avoid mistakes when you send us information, pay your taxes and claim any payments or reliefs.

Call for evidence

From your perspective, are HMRC living up to the aims of the Charter? The Charter Committee are looking for evidence, both positive and negative.

They are particularly interested in evidence relating to HMRC obligation 1.2 "**Provide a helpful, efficient and effective service"** where they say that they will 'deal with the information you give us quickly, efficiently, and keep any costs to you at a minimum and put any mistakes right as soon as we can.

If you are able to help, please email Chris Jones, a member of the Committee, in confidence at Chris-Jones@LexisNexis.co.uk

https://www.gov.uk/government/publications/your-charter-annual-report-2016-to-2017/your-charter-annual-report-april-2016-to-march-2017

Business Taxation

Income earned by company or individual

Summary – The locum GP ran his business as a sole-trader and so income tax and class 4 national insurance contributions were payable.

On 1 April 2006 Dr Baloch commenced work as a self-employed locum with Harmoni, the Agency through which he obtained work. The bank account that he used was the personal account that he held jointly with his wife.

In 2008, on the advice of his accountant, he set up a company, KSM Medics Limited, with Dr Baloch and his wife as the shareholders and directors.

Neither Dr Baloch's nor the company's compliance record was good:

- The personal tax returns for the years ending 5 April 2009, 2010, 2011 and 2012 were all submitted on 6 November 2012, so the first three returns were significantly late.

- The personal tax returns for years up to 2011-/2 did not show any dividends although they did show salary.

- The company accounts showed an overdrawn participator's loan account, but no corporation tax had been paid under s 455 Corporation Tax Act 2010. His accountants claimed that they were proposing to re-write the company accounts and that they should have shown that drawings paid out as dividends and salary, and there would then be no overdrawn loan account.

Payments from the Agency were made into Dr Baloch's personal account and invoices for expenses such as indemnity insurance, course fees and BMA membership were addressed to Dr Baloch personally and paid by him out of his personal account.

HMRC believed that the company had never traded and had no taxable profits. Instead, Dr Baloch traded in his own name and was entitled to the income received from the Agency for his locum services. Therefore, he should be pay income tax and class 4 NIC on this income rather than corporation tax. HMRC issued assessments accordingly.

The taxpayer appealed.

Decision

The First-tier Tribunal agreed with HMRC. A taxpayer is entitled to carry on business through whatever medium he wishes. However, it was not enough for a person to form a company and tell his accountant that 'all income should be declared in the company', as was the case here. The business had to be carried on by the company, not the individual in his personal capacity. He could carry out the work as an employee of the company but the entity providing the services had to be the company.

In this case, nothing changed after the taxpayer formed the company. All arrangements in connection with the payment of remuneration were consistent with the taxpayer working as a self-employed person. The tribunal found that he provided his services to the agency as a self-employed GP.

The taxpayer's appeal was dismissed.

Dr Maqbool Baloch v HMRC(TC6092)

The future of disincorporation relief (Lecture B1041 – 18.05 minutes)

On 26 July 2017, the Office of Tax Simplification (OTS) published a focus paper on disincorporation relief to stimulate debate about whether this FA 2013 relief has been achieving its intended purpose and to draw attention to the fact that, if no action is taken, the regime will cease to apply after 31 March 2018.

Disincorporation relief was enacted in order to help address the problems faced by small businesses which had chosen, at a later date, to go down the route of a corporate structure but which now wanted to return to a simpler legal form. The provisions in FA 2013 helped them to do so, and with a lower tax cost.

The legislation allows transfers of goodwill and interests in land to be made at cost or written down value (unless market value is lower) so that no gain is chargeable on the company. However, the relief is limited to companies with qualifying assets valued at £100,000 or less at the time of this transfer.

The focus paper highlights the fact that the take-up of the relief has been low since its inception. In their response to this paper, the CIOT agree with the OTS that the time is right to investigate what, if anything, can be done to make disincorporation relief more useful and effective if it is to continue.

The main reasons for this insignificant take-up include the following:

1. a lack of awareness of the relief on the part of advisers;
2. the meanness of the £100,000 asset limit;
3. the personal tax charge on the value of any assets transferred to shareholders;
4. the fact that unrelieved corporate losses cannot be transferred to shareholders (unlike the equivalent position on incorporation when relief under S86 ITA 2007 may be available);
5. the fact that the relief only covers certain chargeable assets (although, in this context, it should be pointed out that the ATT's concern about possible balancing charges on plant or machinery can usually be negated by making an election under S266 CAA 2001); and
6. the prospect of an SDLT liability if the shareholder purchases the business premises from the company.

Considerations for retaining the relief are:

- the FA 2016 changes to the taxation of dividends which took effect on 6 April 2016 – many shareholders will not fully appreciate the impact of the £5,000 dividend tax allowance until 31 January 2018 when their final 2016/17 tax bills fall due (and this allowance is set to reduce to £2,000 for 2018/19 onwards);

- if the Government decide to increase the dividend tax rates further (which was widely suggested when the 7.5% rate came into being), it seems likely that the disincorporation relief take-up numbers would escalate, especially if the £100,000 limit was also made more generous;

- recent changes to the personal service company legislation (eg. the travel and subsistence expense restrictions in FA 2016), along with the new rules for personal service companies in the public sector which will be extended to private sector personal service companies, may mean that a company structure is no longer appropriate for such individuals; and

- administrative simplifications such as the increase in the cash basis threshold and the extension of the cash basis to property letting landlords from 6 April 2017 – which are not available to companies – could encourage a movement away from a corporate set-up.

The CIOT's conclusion is:

> 'We think that there is a place for a form of disincorporation relief within an overall strategy for the taxation of small businesses. We would not wish to see the current relief lapse without the Government considering how it could be improved and made more effective.'

Finally, it is worth noting that HMRC appear to be sending out mixed messages concerning disincorporation. The targeted anti-avoidance rule (TAAR) in S35 FA 2016 has created a great deal of uncertainty over the tax treatment of distributions in a liquidation, particularly where the taxpayer is carrying on the same sort of business as would invariably be the case where he is disincorporating in order to continue in business as a sole trader (or partnership). Clarification is urgently needed that a straightforward disincorporation would not fall within the new TAAR.

Article contributed by Robert Jamieson

Accounting standards and the law **(Lecture B1042 – 6.33 minutes)**

The decision in Ball UK Holdings Ltd v HMRC (2017) highlights what may well turn out to be an uncomfortable truth for many professional advisers, namely that accounting standards are matters to be determined by lawyers rather than by accountants.

This case required the First-Tier Tribunal to establish whether a company's accounts had been prepared in accordance with GAAP. The details do not really matter for this purpose – what is important is the principle, given that there is a statutory obligation in s.46 CTA 2009 for trading profits to be computed in line with GAAP, 'subject to any adjustment required or authorised by law in calculating profits for corporation tax purposes'.

FRS 23, which dealt with the effects of movements in foreign exchange rates, was the appropriate accounting standard. This set out how companies should include foreign currency transactions and foreign operations in their financial statements. It was issued by the ASB in December 2004 and replaced SSAP 20. FRS 23 was withdrawn for reporting periods starting on or after 1 January 2015. Foreign currency translation is now covered by FRS 102 under what is known as 'new UK GAAP'.

The company believed that their accounts were prepared in accordance with the provisions of FRS 23 and therefore complied with GAAP. HMRC stated that they did not. It is reasonable to point out that the company had good grounds for their belief. PwC said so, Deloitte had prepared a report which supported that contention and there were two expert witnesses from KPMG who gave evidence on behalf of the company. This sounds like a fairly formidable team, but alas it was not enough. The First-Tier Tribunal did not agree with any of these accountants. They concluded that 'no accountant could reasonably have read FRS 23' in the manner explained by these experts. This is an interesting point of view, having regard to the wealth of knowledge of these highly experienced accountants.

The judges went on to say that 'the fact a number of accountants have misapplied an accounting standard does not mean that the accounts are in accordance with UK GAAP'. In other words, they were all wrong!

It is difficult not to have considerable sympathy for the taxpayer company. They arranged for some of the most prestigious accountants in the land to confirm that the accounts were prepared in accordance with best practice, but HMRC and the First-Tier Tribunal rejected their expert knowledge.

It is of course correct that, when a dispute occurs, it is the Courts that are the ultimate forum for adjudication. However, it is something else when professional expertise on this scale is dismissed quite so comprehensively.

Keep your eyes open for the next instalment.

Article contributed by Robert Jamieson

OTS capital allowances and depreciation review

During the OTS's corporation tax computation review, capital allowances were highlighted as an area of complexity. The report concluded that to reduce the current burden, and to create a simpler system, it is important to address the uncertainty regarding what qualifies and for which allowances. One suggestion was to replace capital allowances with a deduction for depreciation to align the tax position with the accounts, removing the need for separate calculations.

The Chancellor has asked the OTS to undertake a review exploring the impact and challenges of replacing capital allowances with accounts depreciation This is the work to which this document relates and the OTS aims to publish its report in Spring 2018.

The review will consider evidence already available, and commission and publish new analysis and data to encourage an informed debate on the issue.

This will include consideration of a combination of technical and administrative questions and related non-tax issues including:

- The nature of accounts depreciation and the role of judgement in its quantification;
- The current practices of companies in deciding on rates of depreciation and typical rates used for different types of assets;
- The industry/sectoral impact of adopting accounts depreciation and whether this impact varies on region or size of a company;
- The potential to mirror the effect of certain existing tax reliefs, like the Annual Investment Allowance, within the new model;
- The legislative, administrative and exchequer impacts of the options proposed, including in response to avoidance risks;
- The transition arrangements required to move to a new system and their impact;
- To what extent the proposed changes would impact unincorporated taxpayers;
- The impact on administration burdens on business;
- The operational impact on HMRC;
- International considerations and comparisons.

The nature of this project means that the emphasis will be on data analysis and testing and evaluating potential impacts.

The OTS has published a call for evidence as it starts its review with the review covering tangible fixed assets only and looks at whether providing relief for capital expenditure through accounts depreciation, rather than capital allowances, would simplify the preparation of tax returns for incorporated and unincorporated businesses. Responses should be sent by 30 November 2017.

www.gov.uk/government/publications/ots-starts-new-review-on-capital-allowances-and-depreciation

www.gov.uk/government/consultations/ots-depreciation-and-capital-allowances-review-call-for-evidence

FRC proposes accounting amendments for gift aid payments

The Financial Reporting Council has issued FRED 68 responding to the significant differences in accounting treatment that arise in relation to the accounting for gift aid payments made by a subsidiary to its charitable parent.

The Financial Reporting Council is proposing amendments to FRS 102, which would allow the tax effects of gift aid payments made by subsidiaries to their charitable parents to be taken into account at the reporting date, where it is probable that the payment will be made in the nine months following the reporting date.

They argue that this will improve the consistency of reporting between entities and the relevance of the information provided to users.

The proposed effective date is accounting periods beginning on or after 1 January 2019, with early application permitted provided all of the amendments are applied at the same time.

www.frc.org.uk/news/september-2017/frc-proposes-amendments-to-frs-102-for-gift-aid-pa

New criminal offences for companies and partnerships

The Criminal Finances Act 2017 came into effect on 30 September. The Act has introduced two new criminal offences that apply to evasion of:

1. UK taxes; and
2. Foreign taxes.

The offences hold corporations and partnerships criminally liable when they fail to prevent their employees, agents, or others who provide services on their behalf from facilitating tax evasion.

This is a significant change from previous law, under which they could be found liable for criminally facilitating tax evasion only if the most senior members of the organisation — typically the board of directors — were aware of the transgression.

Andrew Tuson, partner, commercial dispute resolution, at Berwin Leighton Paisner, said: 'Given the introduction of the new corporate criminal offences follows the Bribery Act offences, firms should expect that the Financial Conduct Authority will not wait long before assessing whether firms have in place appropriate systems and controls to manage the new offences.

'HMRC has made clear that it expects firms to have conducted detailed risk assessments and it would seek to compare a corporate's state of readiness against the benchmark of corporates that have conducted detailed risk assessments and already stress-tested procedures introduced to mitigate against the risks of facilitation of tax evasion.'

David Sleight, a criminal litigation partner at Kingsley Napley LLP, considers the legislation to be far reaching and that it is HMRC's answer to criticism that it had not done enough to tackle tax evasion by large corporations.

He said: 'In the past, HMRC has encountered difficulties in prosecuting corporates for facilitating tax evasion due to the problem of attributing criminal liability to a company. The new legislation has dispensed with the need to prove that the controlling mind of a company — senior management — was aware that tax evasion had been facilitated. All that now needs to be demonstrated is that a tax evasion offence has been facilitated by an employee or agent associated with a company and that the company failed to prevent it.'

Further, the offence has a global reach, so an entity that fails to prevent UK tax evasion can be held liable, regardless of where in the world the offence took place or whether that company is incorporated or based in the UK.

Mr Sleight added: 'HMRC will be desperate to demonstrate that the new legislation has teeth and will be looking for unsuspecting scalps. Companies and partnerships should be urgently considering HMRC guidelines and critically assessing the adequacy of their existing systems and controls now. Failure to adopt appropriate safeguards could render the company liable to a criminal conviction, unlimited fines and confiscation of its assets.'

Taken from Taxation Magazine (5 October 2017)

European Union – Freedom of establishment

The first applicant company (Eqiom) formerly Holcim France, successor in law to Euro Stockage, was a subsidiary of the second applicant company, Enka SA, a company governed by Luxembourg law, and was 100% owned by the latter. Enka was itself owned for more than 99% by Waverley Star Investments Ltd, a company governed by Cypriot law, which was itself wholly controlled by Campsores Holding SA, a company established in Switzerland.

In 2005 and 2006, Euro Stockage paid dividends to its parent company, Enka. Following the audit of Euro Stockage, the French tax authorities imposed on that company the withholding tax provided for in art 119a(2) of the French General Tax Code (the GTC).

Those two companies (together, the applicants) applied for the exemption from withholding tax provided for in art 119b of that code. The authorities however refused their application on the basis of art 119b(3) of that code which provided that such an exemption did not apply where the distributed dividends were received by a legal person controlled directly or indirectly by one or more residents of states that were not members of the European Union, unless that legal person provided proof that the principal purpose or one of the principal purposes of the chain of interests was not to take advantage of the exemption (the legislation at issue).

The applicants brought an action before the Administrative Court, Montreuil, France, for exemption from the withholding tax at issue. Following the dismissal of their action, they appealed to the Administrative Court of Appeal, Versailles, France, which confirmed the dismissal.

The applicants lodged an appeal before the Council of State, France (the referring court), claiming that the tax legislation at issue was incompatible with EU primary law and with Council Directive (EEC) 90/435 (the Parent-Subsidiary Directive).

In those circumstances, the referring court stayed the proceedings and referred certain questions to the Court of Justice of the European Union for a preliminary ruling.

The issues concerned art 1(2) of the Parent-Subsidiary Directive and art 49 or art 63 of the Treaty on the Functioning of the European Union (TFEU). Should they be interpreted as precluding national tax legislation which subjected the grant of the tax advantage provided for by art 5(1) of that Directive, namely, the exemption from withholding tax of profits distributed by a resident subsidiary to a non-resident parent company, where that parent company was directly or indirectly controlled by one or more residents of third states, to the condition that that parent company establish that the principal purpose or one of the principal purposes of the chain of interests was not to take advantage of that exemption.

Enka held the entire capital of its French subsidiary, Euro Stockage. It should therefore be concluded that such a holding granted Enka a certain influence over the decisions of Euro Stockage, allowing it to determine its activities. Therefore, the national provisions applicable to those holdings had to be examined in the light of freedom of establishment, which art 49 TFEU granted to EU nationals.

All measures which prohibited, impeded or rendered less attractive the exercise of freedom of establishment, had to be considered to be restrictions on that freedom. Such restrictions were permissible only where they related to situations that were not objectively comparable or if they were justified by overriding reasons in the public interest recognised by EU law. It was further necessary, in such a case, that the restriction be appropriate for ensuring the attainment of the objective that it pursued and did not go beyond what was necessary to attain it (see [54], [57] of the judgment).

In the present case, France contended that the legislation at issue was justified both by the objective of combating fraud and tax evasion and by seeking to safeguard a balanced allocation of taxation powers between the member states. In that regard, first, the objectives of combating fraud and tax evasion and of seeking to safeguard a balanced allocation of taxation powers between the member states were connected and, second, because they constituted overriding reasons in the public interest, they were capable of justifying a restriction on the exercise of freedom of movement guaranteed by the Treaty (see [63] of the judgment).

However, the objective of combating fraud and tax evasion, whether it was relied on under art 1(2) of the Parent-Subsidiary Directive or as justification for an exception to primary law, had the same scope. Therefore, the legislation at issue not only undermined the objective of the Parent-Subsidiary Directive, namely the prevention of double taxation of profits distributed by a subsidiary to its parent company, but also undermined freedom of establishment. Therefore, the objective of combating fraud and tax evasion invoked by the French Republic in the main proceedings could not justify an impediment to the freedom of establishment (see [64], [65] of the judgment).

Consequently, art 1(2) of the Parent-Subsidiary Directive and art 49 TFEU had to be interpreted as precluding the legislation at issue.

Epiom SAS and another company v Ministre des Finances et des Comptes publics

Guidance on 'self-reporting' tax evasion facilitation offences

From 30 September 2017, companies and partnerships will be liable if they fail to prevent individuals acting on their behalf from criminally facilitating tax evasion. They can use the defence that it had reasonable procedures in place to prevent its representatives from criminally facilitating tax evasion.

Criminal facilitation of tax evasion involves a person deliberately and dishonestly helping another person to evade tax. This doesn't include the accidental, ignorant or negligent facilitation of tax evasion. This is referred to in the Criminal Finances Act 2017 as a 'Tax Evasion Facilitation Offence', which is defined in Section 45(5) in Part 3 of that Act.

HMRC has published guidance for authorised representatives of relevant corporate bodies on the procedure for self-reporting to HMRC where those bodies have failed to prevent

the facilitation of UK tax evasion, giving rise to an offence under the Criminal Finances Act 2017.

'Self-reporting' doesn't guarantee that a relevant body won't be prosecuted, but could form part of its defence.

www.gov.uk/guidance/tell-hmrc-about-a-company-helping-people-to-evade-tax

EC rules against Luxembourg and refers Ireland

Amazon in Luxembourg

EU State aid rules help to ensure that companies can compete on the merits within the Single Market. The rules prevent Member States from giving unfair advantages only to selected companies. For example, a Member State cannot give tax benefits to multinational groups, which are not available to local businesses. That distorts competition. It is illegal under EU State aid rules.

A tax ruling granted by Luxembourg has reduced Amazon's tax bill for more than eight years, between May 2006 and June 2014. The EC has concluded that Amazon's tax benefits in Luxembourg are illegal under EU State aid rules. Amazon now has to repay tax benefits worth around €250 million, plus interest.

The decision concerned the tax treatment of two Amazon group companies in Luxembourg.

- The first is an operating company called "Amazon EU" that ran Amazon's European retail business and pays tax in Luxembourg;

- The second is its direct parent "Amazon Europe Holding Technologies". This company is a holding company with no employees, no offices and no business activities and does not pay tax in Luxembourg.

The operating company used certain intellectual property to run Amazon's European retail business, including software, trademark and brand names developed by Amazon in the US. As intermediary, the holding company received a royalty from the operating company. It passed on part of this money to Amazon in the US, as annual contribution to the development costs of the intellectual property.

Tax rulings cannot endorse a royalty between one company to another company in the same group that does not reflect economic reality. Doing so would disadvantage all the stand-alone companies that are not part of a group. They are taxed on their actual profits because they pay market prices for the goods and services they use. The EC investigated whether the method to determine the royalty paid by the operating company to the holding company corresponded to market conditions.

The royalty exceeded, on average, 90% of the operating company's profits. This was significantly more than what the holding company needed to pay to Amazon in the US. It reduced the operating company's taxable profits to a quarter of what they were in reality.

The Commission concluded that this level of royalty could not be justified for two reasons:

1. the holding company was an empty shell that simply passed on the intellectual property rights to the operating company. It did not, and could not, perform any activities to justify the level of payments received;

2. the operating company adapted the technology and software behind the Amazon e-commerce platform in Europe. It invested in marketing and gathered customer data. This means that it managed and added value to the intellectual property.

That is why our decision concludes that the Luxembourg tax ruling endorsed an unjustified method to calculate Amazon's taxable profits in Luxembourg. It enabled Amazon to shift almost three quarters of its profits from the operating company to the holding company. In other words, from a company that is subject to tax in Luxembourg to a company that is not. As a result, almost three quarters of Amazon's profits from all its sales in the EU remained untaxed.

Luxembourg's selective tax treatment of Amazon is illegal under EU State aid rules. It gave Amazon a significant competitive advantage compared to other businesses. Luxembourg must now recover about €250 million in unpaid tax from Amazon, plus interest.

Apple in Ireland

The EU rules give Member States four months to recover illegal aid.

In August 2016, the Commission adopted its decision requiring Ireland to recover up to €13 billion in illegal aid from Apple. However, Ireland has still not recovered any money, not even in part.

The Commission is to refer Ireland to the Court of Justice for delaying recovery of €13bn in illegal state aid from Apple, following this decision.

europa.eu/rapid/press-release_STATEMENT-17-3714_en.htm

BEPS – successes and setbacks (Lecture B1045 – 10.08 minutes)

What aspects of Base Erosion and Profit Shifting (BEPS) have been most successful in winning government support, gaining an international consensus and delivering on their objectives? What aspects remain work in progress? What do these 'successes' and 'setbacks' for the implementation of BEPS say about the likely future shape of the international tax landscape, and the resulting challenges ahead for your business?

Country by country reporting (CbC)

One area that is proving to be successful is CbC which has been adopted by more 100 jurisdictions including China, India, the United States and the EU.

All have signed up for the minimum standards of CbC which is all about transparency and international cooperation on corporate transactions. The EU is forcing this through as something that it considers as incredibly important.

As a result of CbC tax authorities are receiving new information enabling them to carefully scrutinise the tax that companies are paying. Australia and the UK have gone further by

requiring large businesses to disclose their tax strategies and the UK is notable in making disclosure public.

Bigger overhaul

So does the roll-out of CbC mark the beginning of a bigger BEPS-orientated overhaul of how multinational enterprises are taxed? The G20 remains firmly committed to 'a timely, consistent and widespread implementation' of BEPS. Yet progress to date is mixed as implementation of many of the BEPS articles comes up against a combination of difficulties in application and the headwinds of protectionism, local politics and economic priorities. There is even a possibility that BEPS could end up being little more than 'CbC plus' or is implemented so selectively and inconsistently as to undermine the international consensus and collaboration it was intended to foster.

The OECD is keen to ensure that all 15 of its action plans under BEPS get implemented. It has set these out in a number of clear statements often to referred to as the mandatory minimum requirements, desired but voluntary measures covering areas like controlled foreign company (CFC) rules (moving profits to low tax jurisdictions) and disclosure of aggressive tax planning. In addition, there are common approach measures, which call for greater convergence between different jurisdictions in areas such as restrictions on interest rate deductions on intra-company debt and the treatment of hybrid mismatches. Again these common approaches are non-mandatory.

There are a number of countries that are taking very specific action towards BEPS. India has introduced an equalisation levy, South Africa has introduced VAT on electronic services. Both are targeted additional measures that they are bringing in alongside BEPS to ramp up the pace with which they introduce transparency and anti- avoidance rules.

EU Anti-Tax Avoidance Directive (ATAD)

ATAD 1 is bringing key aspects of BEPS into EU and member state law including CbC reporting, restrictions on interest rate deduction, common patent box rules and actions to address hybrid mismatches. Crucially, ATAD 2 takes this further by extending the reach of the curbs on hybrid mismatch to arrangements involving countries outside the EU.

Finance ministers have come under pressure from the European Parliament and the public to enact and fast-track BEPS through ATAD. ATAD 2 was agreed just four months after the Commission put forward the proposal, demonstrating how quickly progress can be made when there is public pressure and political momentum.

Significantly, ATAD builds some of the best practice recommendations (CFC rules) and common approaches (restrictions on interest rate reduction) into its minimum requirements. It also explores the possibility of a public CbC. The company size thresholds being proposed are much lower than the OECD recommendations, raising the prospect that mid-sized businesses may be swept up along with the largest global companies.

Both CFC and restrictions on interest rate reduction would score quite highly in a tax authority cost-benefit analysis of BEPS implementation. And while non-mandatory, these are going to be high up the priority list within many states and regions, if not already in place. Most developed economies already have CFC rules, but restrictions on capitalisation and debt have been unevenly applied in the past. The new provisions on interest represent a major change for businesses and perhaps so begins a new era where corporate debt is regarded as inherently 'bad' compared with equity financing.

Where is BEPS stalling?

Some aspects of BEPS are still subject to international consultation on how they should be applied in practice. Part of the delay lies in the technical intractability of some of the measures – hard-to-value intangibles being a case in point. There is still a lack of clear guidance in key areas of transfer pricing for Permanent Establishments and how profits should be attributed to foreign branches. If the transfer pricing rules are applied correctly, there should be little to be gained from identifying a plethora of extra PEs, as the extra local profit would often be negligible. Unfortunately, however, this won't stop some countries arguing that limited local activity and work done by business travellers can trigger a local tax obligation.

Similarly, measures designed to provide tax rules that are more relevant to the digital economy have lacked both urgency and direction and have, for now, gone into the 'too hard' basket for most countries. The pace of change is so quick. Tax jurisdictions are struggling to find a good way to move forward with the digital economy.

How do you prioritise BEPS when there are so many other things on the go Most governments have political agendas that are short rather than longer term and tax policy can often fall a long way down their prioritised agenda for what to focus their attention on.

Greater consistency

While one of the main aims of the BEPS Action Plan is to bring greater consistency to the tax rules, the architects of the plan recognised the need for flexibility in adapting the measures to local tax policy objectives. But we are already seeing much greater fragmentation than the OECD envisaged. Even in the area of transfer pricing documentation where the master file and local country file concepts are very clear and straightforward, some countries are adding their own tweaks and requirements, which could add unwelcome extra burdens on business. And the US has so far resisted making these changes, arguing that its own current documentation requirements are sufficient and well aligned with the OECD's BEPS recommendations.

While the pack has so far been slow and limited in implementing most aspects of the Action Plan apart from CbC, others have moved out ahead. And the resulting legislation often goes much further than the recommendations. The slower the pack moves, the more countries will break ranks and come up with their own local interpretation of the recommendations. Instead of improved consistency, the actual result could be an even more complex patchwork of local rules. While in line with the BEPS rules, the results of the Multilateral Convention could heighten the divergence and complexity facing your business.

Messages are going back to the OECD to encourage countries to keep to the BEPS plan and to implement it in the way that it was intended before it breaks down into jbeing lots of individual and different rules.

Created from Grant Thornton's document 'Successes and setbacks'

VAT

Notice 48: Extra-statutory concessions (VAT and indirect taxes)

Notice 48 gives details of all of HMRC's Extra Statutory Concessions in force at the time of publication. It cancels and replaces the May 2015 version.

It has been updated to include details of current Extra Statutory Concessions and highlights that Extra Statutory Concessions 3.20, 3.23, 3.28, 3.31 and 6.2 are now obsolete.

www.gov.uk/government/publications/vat-notice-48-extra-statutory-concessions

Can a single prepayment be a multiple supply?

Summary – A prepayment was a single supply where the customer paid for the right to access all three parts of the course, even if they never accessed them.

RED is a VAT registered company and forms part of a VAT group with its parent company. One of its core activities is to run courses to train driving instructors and this appeal concerned the VAT treatment where the customer has prepaid for the three different Parts of the course in advance but then failed to progress through to the end of the course.

The course consists of three parts.

Part 1 - Online home study modules, unlimited mock theory tests and a hazard perception test. Telephone and study support;

Part 2 - 10 hours of practical training behind the wheel on a one to one basis;

Part 3 - 42 hours of practical and online theoretical training.

Where a customer prepaid for the whole course at the start, RED accepted that the prepayment from each trainee/customer was standard rated because it was recognised that that payment, "at that time", represented advance consideration for the subsequent delivery of the different Parts of the Course. However, RED argued that if a trainee did not progress to Parts 2 or 3 within the period allowed, RED was not obliged to deliver those Parts and therefore any prepayment made by the trainee, having been forfeited, did not represent "direct consideration for the provision of any (taxable) supply by RED". In those circumstances it was argued that RED should be entitled to treat the monies forfeited as outside the scope of VAT and reclaim the output tax previously accounted for when the prepayment was originally received. RED argued that the analogy was with the hotel sector when a guest cancels a booking and loses their deposit.

Decision

The First Tier Tribunal said that the relevant hotel analogy is not where the customer cancels and loses a deposit, as argued by RED, but rather where a customer chooses a prepayment rate for a stay for which cancellation is not available, pays that and then does not turn up. When payment is made, the supply is made. The customer has paid for the right to access a bed for that stay.

They held that sections 1(2) and 6(4) VATA read together make it explicit that the supply for which the trainee makes payment shall be treated as taking place at the time the payment is made. Whether or not the trainee continues to Parts 2 and/or 3 cannot change that.

The Tribunal held that the trainee is supplied with the right to embark on all three Parts of the Course that is a single supply.

The appeal was dismissed.

RDS Driving Services LTD v HMRC (TC06087)

Applying the Halifax principle to land transactions

Summary – the granting and cancelling of leases before sale of the leases to a third party was abusive and should be redefined so as to re-establish the situation that would have prevailed in the absence of the abusive transactions

Mr Cussens, together with two associates, had built 15 holiday homes in Ireland. They had granted a long lease but then cancelled it a month later. The properties were then sold but no VAT was payable as VAT was only due on the original first disposal, the long lease. Subsequently, the Irish tax authority held that the first disposal, the long-term lease, was an artificial construct and abuse of rights. The lease should be ignored for VAT purposes and VAT should be charged on the subsequent sale to third parties, as if it had been the first disposal. That would result in the taxpayers paying significantly more VAT. The main issue was whether these transactions were abusive and came within the scope of the *Halifax* principle.

Decision

The first part of the test is that the transactions must have resulted in 'the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions'. The advocate general noted that there is 'no legal obligation to pay the maximum tax possible' and that only the purpose of specific provisions of the applicable directive needs to be considered. He observed that the purpose of the Sixth VAT Directive, 77/388/EEC, Arts 4(3) (a) and 13(B)(g) was the application of VAT when immovable property enters the commercial circuit for the first time. The lease had been granted to an entity controlled by the taxpayers, so that the properties had never left their control but effectively cancelled after a very short time. The transactions were therefore contrary to the purpose of the relevant provisions.

But 'was the essential aim to obtain a tax advantage?' — If the transactions may have some economic justification other than a tax advantage, the test is not fulfilled. The advocate general said that only the pre-sales transactions should be considered as looking at the entire life of the property would always result in a commercial rationale and prevent the second condition from being fulfilled.

Finally, the advocate general suggested that the transactions be redefined so as to re-establish the situation that would have prevailed in the absence of the abusive transactions.

E Cussens and others v T G Brosnan (Case C-251/16) (7 September),

Tax Journal (15 September 2017)

Avon ladies - Direct selling derogation

Summary – By choosing the 'direct selling model' the Avon ladies accepted the derogation without modifications so denying them the right to recover input tax.

Avon sells its beauty products in the UK to 'Avon ladies', who make retail sales to customers in their own homes. The problem of 'lost VAT' is typical of direct selling models as here; many such ladies are not registered for VAT. Consequently HMRC has obtained a derogation allowing it to charge VAT on the retail price. However, the way the derogation is applied does not take into account the costs incurred by the Avon ladies on products purchased for demonstration purposes. The issue was whether this inability to recover input tax meant that the derogation infringed general principles.

Decision

The advocate general observed that the:

- derogation does not mention input tax incurred by non-taxable resellers, so that any adjustment for input tax is not allowed. This means that the application of the derogation cannot be modified, as any other interpretation would raise issues of legal certainty;

- ladies could choose which model to adopt. They could register for VAT on a voluntary basis but that freedom did not allow opting for a particular business model and then having 'à la carte access' to the VAT rules applicable to other models.

The advocate general said that:

- if the amount of disregarded input tax was so significant as to breach the principle of proportionality, the solution would be to cease applying the derogation to Avon;

- the inability of Avon ladies to recover input tax did not infringe the principle of neutrality; equal treatment between different business models was not achievable.

Avon Cosmetics v HMRC (Case C-305/16)
Tax Journal (15 September 2017)

Proposals for definitive EU VAT system

In April 2016 the VAT action plan was published followed by digital single market proposals published in December 2016.

The European Commission has now published its proposals to create a definitive EU VAT system based on a single EU VAT area. The Commission estimates that such changes could reduce EU VAT fraud by as much as 80%.

This legislative proposal will be sent to the Member States in the Council for agreement and to the European Parliament for consultation. The Commission will follow this initiative in 2018 with a detailed legal proposal to amend the so-called 'VAT Directive' at technical level so that the definitive VAT regime proposed today can be smoothly implemented.

europa.eu/rapid/press-release_IP-17-3443_en.htm

Post-Brexit customs, VAT and excise regimes

These are set out in a new white paper outlining the approach to legislation in the forthcoming Customs Bill. The paper also contains preparations for a 'contingency scenario', where the UK leaves the EU without a negotiated outcome. The approach in the new paper reflects feedback received from businesses and stakeholders on the 'future partnership paper' published in August, which contained two main models: a 'highly streamlined' customs arrangement, continuing some existing procedures; and a new customs partnership with the EU.

After the UK has left the EU, it will need new primary legislation, irrespective of any agreements reached with the EU, to create a standalone customs regime, and to amend the VAT and excise regimes as required. The Customs Bill and associated secondary legislation must be in place with sufficient notice to support the new regime on the day the UK leaves the EU.

The Customs Bill will base customs legislation on the Union Customs Code. Administration of the VAT and excise regimes will remain largely the same as today. However, the Bill will contain delegated powers giving the government the flexibility to deliver certain aspects of a negotiated outcome. It will provide for the UK to implement tax-related elements of the 'highly streamlined' customs arrangement set out in the future partnership paper. Additional primary legislation may be required to implement the new customs partnership.

The Bill will allow the government to:

- create a standalone customs regime if required;
- ensure existing treatments/authorisations of traders or goods can continue under UK law where appropriate;
- accommodate most tax-related negotiated outcomes;
- put appropriate mechanisms in place for the transition of existing trade remedy measures relevant to UK companies; and
- make provision for consequential amendments to the Customs and Excise Management Act (CEMA) 1979.

Regarding VAT and excise, the Bill will give the government the flexibility to:

- give effect to an agreement with the EU on supplies or movements in progress on the day of EU exit and thereafter;
- deal with VAT on movements of goods and services between the UK and EU;

- allow HMRC to adapt IT systems; and
- vary the UK information sharing obligations to allow continued exchange of information with EU member states to tackle avoidance and evasion.

Capital goods scheme **(Lecture B1044 – 17.43 minutes)**

It is a myth that the capital goods scheme only affects partially-exempt businesses. While they can be most affected, a 100% taxable business can also be adversely affected by it.

It applies to land and commercial buildings costing more than £250,000, or to renovation, alteration or extension work costing more than £250,000 where VAT was paid by the acquirer.

The acquirer has to make annual adjustments where necessary to adjust their initial amount of input VAT claimed, where the ratio of taxable to exempt supplies changes over the next 10 years.

For example, if the input VAT paid for a building was £100,000 and at the time the taxable to exempt supplies ratio was 80:20, the business would claim back 80% of the input VAT initially (i.e. £80,000).

If in year 2 the ratio changed to 70:30, HMRC would claw back (80% - 70%) divided by 10 (years) of the £100,000 total input tax i.e. £1,000.

If in year 3 the ratio changed to 50:50, HMRC would claw back (80% - 50%) divided by 10 (years) of the £100,000 i.e. £3,000.

It should be readily discernible that a business that has 100% taxable supplies every year will never have an annual adjustment but the business could well be affected by the adjustment on sale.

Adjustment on sale

If a building is sold with the 10-year adjustment period, there is a final adjustment on sale.

If it is sold as an exempt supply (e.g. it is more than 3 years old and the business has not opted to tax it, or there is an option to tax but it is to be sold to a developer for residential conversion) then it is assumed that the building would have been used 100% for exempt purposes for the remaining number of whole years making up the 10 years in total.

This would lead to a claw back of some of the initial VAT reclaimed.

If it is sold as a standard-rated supply (i.e. it was less than 3 years old, or the business had opted to tax it before sale), it is assumed that it would have been used 100% for taxable supplies for the remaining number of whole years making up the 10 years in total.

For a partially exempt business, this means that there will be an additional reclaim of the original VAT paid, for a fully taxable business it means there will be no claw back of the original VAT claimed.

Example

A fully taxable business buys a new commercial building for £1 million plus £200,000 VAT. It reclaims the £200,000 VAT on its next VAT return. Five and a half years later it sells the property for £1.3 million (net of any VAT charged).

Explain the VAT implications if:

- The business had not opted to tax the building;
- It opts to tax the building just prior to sale and the sale is standard-rated.

If the business had not opted to tax the building it will have made an exempt supply. It will be presumed to have used the building 100% for exempt supplies for the remainder of the adjustment period (4 whole years).

It will need to repay 4/10ths of the original input VAT to HMRC i.e. £80,000.

If it opts to tax the building just prior to sale and sells it as a standard-rated supply, it charges 20% VAT on the sale price (£260,000) but then does not have any claw back of the input VAT originally claimed.

Note that the new owner now begins a new 10 year capital goods scheme period.

Disapplying an option to tax – effect on capital goods scheme

If a building which is not designed or adapted as a dwelling(s) or for a relevant residential use has had an option to tax made over it and the customer certifies (using form VAT1614D) to the vendor, before the price is legally fixed, that it is intended for use as a dwelling(s) or for a relevant residential purpose, the option must be dis-applied if the vendor decides to go ahead and sell to the purchaser.

If the purchaser notifies the vendor between exchange and completion, the vendor can choose to accept the notification and make an exempt supply, or ignore it and charge VAT.

A vendor may not wish to make an exempt supply of the land or building as this could lead to an adverse adjustment under the capital goods scheme (as seen above) if the vendor incurred VAT on the building in the past 10 years.

If this would be the case, the vendor will almost certainly want to negotiate a higher price for the sale in compensation. In the above example, if the vendor agreed to sell to a purchaser who had issued it with a form VAT1614D, it should seek an increase of £80,000 in the price to cover the input VAT it will have to repay.

TOGC and capital goods scheme

If a property is transferred as part of the transfer of a business as a going concern and the transfer qualifies to be treated as neither a supply of goods nor services, the purchaser inherits the capital goods scheme history of the building from the vendor.

It will have to make annual adjustments and a sale adjustment as necessary until the 10th anniversary of the building first falling within the scheme under the vendor's ownership.

Contributed by Malcolm Greenbaum