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Personal tax

Old residency rules - Move to Belgium (Lecture P1341 – 17.34 minutes)

Summary – Applying the rules predating the statutory residence test, the taxpayer was resident in both the UK and Belgium. With his 'centre of vital interests' remaining in the UK, he was deemed UK resident under the Belgium/UK double taxation convention.

Prior to 4 April 2006, Kevin McCabe was resident and ordinarily resident in the UK. He was born in the UK, married with two sons and two grandchildren, all of whom lived in the UK. He was a successful businessman in the building trade.

On 7 April 2006, an article in “Property Week” reported that he had relocated to Belgium to create a European Headquarters in Brussels from which he would be responsible for managing the expansion of international business, particularly in Western and Central Europe and overseeing Teesland Development Company Ltd’s European expansion.

Initially, Kevin McCabe rented a flat in Belgium, before buying a property which he moved into in November 2006. Although his wife visited, she largely remained living in the UK with the rest of their family. He took steps to establish a clean break from the UK. He replaced some UK bank accounts with accounts in Belgium. He resigned from various boards and clubs and changed his address with various contacts and organisations. He had a permanent office in Brussels and joined a local gym. He spent regular time in Brussels.

However, he returned regularly to the UK for Christmas, to watch a good number of Sheffield United football matches (home and away) and attend key social events including the Player of the Year dinner. Outside of this, time with his wife was mostly spent at La Manga, but also on short holidays and longer business trips. Kevin McCabe was owner of the Scarborough Group, incorporated and resident in the UK. He continued to be director of the holding companies and some of the other companies within the group. He retained significant influence both as owner and director. He conducted a wide range of activities in the UK.

HMRC argued that Kevin McCabe remained UK resident for tax purposes. He did not need to be in Brussels at all as he was working predominantly with people in the UK, there were fewer face-to-face meetings in Brussels compared to those on days he was in London and those that were in Brussels had nothing to do with Belgium.

The First Tier needed to determine whether Kevin McCabe ceased to be resident in the UK on 4 April 2006, and if he did not, as he was resident in Belgium, whether he was entitled to be treated as non-UK resident under the terms of the Belgium-UK Double Taxation Convention for the whole or part of 2006/07 and 2007/08.

Decision

The First Tier Tribunal found that Kevin McCabe remained UK tax resident. His wife remained in the UK family home, he visited the UK regularly to see family and friends but also to attend sporting fixtures. Further, the Tribunal were not convinced that he had handed over responsibility for running the UK businesses. His UK visits were frequent and there was no clean break with the UK.

With the First Tier Tribunal concluding that he was UK resident, the application of the Belgium-UK Double Taxation Convention became relevant. Article 4 defines residence and sets out how to determine the residence status where an individual is resident in both the UK and Belgium.

The First Tier Tribunal found that under the double tax treaty, both his personal and economic interests remained in the UK, which was his centre of vital interests.

Kevin McCabe v HMRC (TC08609)

SEIS relief denied (Lecture P1341 – 17.34 minutes)

Summary – Although a qualifying company that passed the risk to capital condition, it only did so as a result of 'disqualifying arrangements' being in place.

Coconut Animated Islands Ltd was incorporated to exploit the intellectual property rights to a pre-school animation programme called Coconut Bay, and related spin-offs. The programme had been conceived by Mr Fenna in the 1990s. At the time when Coconut Animated Islands Ltd acquired the rights to the programme, Mr Fenna was the creative director of CHF Entertainment Limited, a member of a group of companies headed by CHF Media Group Limited.

In 2017, Coconut Animated Islands Ltd sought and received advance assurance on its qualifying status under the seed enterprise investment scheme (SEIS).

True to their word, HMRC issued compliance certificates for shares issued prior to 15 March 2018 but then refused to authorise later share issues.

HMRC initially refused on the basis that the company failed the "risk-to-capital condition" requirement stating that, taking into account all of the circumstances at the time when the relevant shares were issued, the company did not have "objectives to grow and develop its trade in the long-term".

HMRC later advanced two further arguments:

1. The company was not a qualifying company as it failed to meet the trading requirement for the three-year period commencing with the date when the shares were issued. For this purpose, "excluded activities" included receiving royalties or licence fees unless these were from intellectual property that it had created.

2. The relevant shares failed to meet the "general requirements" condition which requires there to be no "disqualifying arrangements". HMRC argued that there were arrangements in place to secure a "qualifying business activity" to obtain SEIS relief.

Decision

On the first argument, the First Tier Tribunal found that on balance, the company did have objectives to grow and develop its trade in the long term. The use of sub-contractors in the animation sector was normal and so it was not significant that the company had no plans to increase the number of employees. Further, the fact that there was an exit strategy for the investors had no bearing on the company objectives.

Turning to HMRC's point that the intellectual property had not been created by the company, the Tribunal stated:

> 'where the act of creation by the person doing the work takes place in circumstances where the right to exploit the asset when the work has been completed vests in the relevant company, then the relevant company is to be regarded as having “created” the intellectual property itself'.

This was the case here. The company had commissioned the work, with company deriving the right to exploit the intellectual property. The company was not undertaking excluded activities.

Finally, the First Tier Tribunal found that the relevant shares had been issued, and the money raised was used in connection with, 'disqualifying arrangements' so the taxpayer failed the general requirements condition. The Tribunal stated that the arrangements involved the incorporation of Coconut Animated Islands Ltd, with the subsequent acquisition of Mr Fenna’s intellectual property. Coconut Animated Islands Ltd raised funds by the issue of shares to the investors in the CHF group so that Coconut Animated Islands Ltd would be able to carry on its “qualifying trade”. The Tribunal concluded:

> “the whole or a majority of the money raised was, in the course of the arrangements, paid to or for the benefit of a person which was a party to the arrangements or a person which was connected to a party to the arrangements (s. 257CF(3) ITA 2007).”

The Tribunal went on to say that it could:

> “not see how it is possible to assert that no member of the CHF Group was a party to the “arrangements” as so described. On the contrary, the fingerprints of the CHF Group are all over every step in the “arrangements”.

The appeal was dismissed.

Coconut Animated Islands Ltd (TC8575)

Capital taxes

Incorrect BADR claims (Lecture P1342 – 9.57 minutes)

In FA 2020, the Chancellor changed the name of the main CGT relief for companies and unincorporated businesses to business asset disposal relief and reduced the maximum lifetime limit for qualifying disposals taking place on or after 11 March 2020 from £10,000,000 (where it had stood since 6 April 2011) to £1,000,000.

It should be emphasised that the current ceiling considers previous disposals and so an individual who had made an eligible disposal of £2,500,000 in 2019 would have no business asset disposal relief capacity remaining in 2022. However, that claim of £2,500,000 is not disturbed merely because the limit was subsequently reduced. If the individual's 2019 gain had been £350,000, he would only have relief of £650,000 still left in 2022.

HMRC are known to be checking tax returns for 2020/21 with a view to seeing whether taxpayers have exceeded their available business asset disposal relief entitlement. They are sending out two slightly different letters to affected taxpayers.

Letter 1 is aimed at people who had made claims (under what was then entrepreneurs' relief) in excess of £1,000,000 for pre-11 March 2020 disposals. It reads:

> 'Our records show that you have exceeded the lifetime limit of £1,000,000 prior to submitting your self-assessment return. This means that your (latest) claim is unlikely to be accepted and you will need to pay tax on the capital gain at the normal rate of CGT.'

This suggests that HMRC have checked the taxpayer's CGT records from 6 April 2008 (when entrepreneurs' relief came into being) through until 10 March 2020 and have aggregated the individual's claims during that 12-year period. However, it is quite possible that this calculation may be wrong. Indeed, Letter 1 goes on to say:

> 'If you think your current claim is correct and you have not exceeded your lifetime limit of £1,000,000, you can contact us using the details above.'

Letter 2 targets those whose latest claim has apparently caused them to exceed the £1,000,000 ceiling. This says:

> 'We are writing to you because you included a business asset disposal relief claim in your 2020/21 self-assessment return. Business asset disposal relief was previously known as entrepreneurs' relief. Our records show this claim for business asset disposal relief has taken you over the lifetime limit of £1,000,000.'

On receipt of either letter, taxpayers should amend their business asset disposal relief claims or respond to correct HMRC's figures. HMRC give them a deadline by which this must be done (normally 30 days). Interest will be charged on any additional CGT due because of the amendment to the return, but the letters imply that penalties will not be charged in these circumstances.

Of course, if the taxpayer (or their adviser) does not react to Letter 1 or Letter 2 promptly, HMRC will open a tax enquiry. If HMRC's figures are correct, this is likely to result in penalties being imposed for the tax return inaccuracies in addition to the interest which will be charged.

Contributed by Robert Jamieson

A CGT trust uncertainty resolved **(Lecture P1344 minutes – 24.46 minutes)**

The Court of Appeal's decision in The Quentin Skinner 2015 Settlements v HMRC (2022) examines the relationship between entrepreneurs' relief and the disposal of shares in a qualifying trading company held in an interest in possession trust. Subsequent to the events in the case, entrepreneurs' relief has been renamed business asset disposal relief, but the findings of Sir Launcelot Henderson and his two fellow judges would be unaffected by this change.

If an asset such as a shareholding in a family trading company is held in a discretionary or accumulation trust, a sale of those shares by the trustees can never qualify for entrepreneurs' relief or business asset disposal relief. The trustees' CGT will always be at the full rate of 20% (or 28% for tax years prior to 2016/17).

However, the sale of shares held in a life interest trust where there is a 'qualifying beneficiary' (as defined in S169J (3) TCGA 1992) can attract this valuable relief so that the 10% tax rate will be in point. This is subject to the caveat that the life tenant is prepared to surrender the relevant part of his personal relief entitlement to the trustees.

For there to be a 'qualifying beneficiary' where a pre-FA 2019 sale of shares is concerned, three separate conditions set out in S169J (4) TCGA 1992 must be satisfied throughout a period of one year ended in the three years up to the date of the trustees' disposal:

- the company to which the shares relate must have been a trading company or the holding company of a trading group;
- the life tenant must have been an officer or employee of the company (or, where the company is a member of a group, of any other member of its group); and
- the life tenant must have personally held at least 5% of the company's ordinary share capital and voting rights.

Note that there is no requirement for the trustees themselves to pass the 5% test.

Where the requirements above are satisfied and where the life tenant is willing to assign the benefit of the relevant part of his lifetime limit to the trustees, the trustees can claim relief of up to (currently) £1,000,000 so that their gain will only be chargeable at 10%.

As a result of what has always been assumed to be an oversight, there is no rule in TCGA 1992 which states that the life tenant must have been a 'qualifying beneficiary' for at least a one-year period. Thus, it was possible for, say, a discretionary trust to 'parachute in' a suitable beneficiary as a life tenant for a short period, during which time the shares are sold. Because the trust has been converted to a life interest one, it meets the conditions set out in S169J TCGA 1992. As a result, an appropriate claim can be made. If the life interest is subsequently revoked, it is argued that this does not cause the claim to fail.

At a meeting of the Capital Taxes Liaison Group in 2017, the minutes of which were published by the CIOT on 19 September 2018, HMRC indicated that, in their opinion, such a planning ploy would not work. This followed, they said, from the words of the statute which is written in terms of a ‘qualifying beneficiary’, and not simply of an individual. Interestingly, HMRC had previously given advice which contradicted this standpoint. However, they were now arguing that the technical adviser who had provided that guidance was wrong. A senior HMRC official confirmed that he had asked his technical colleagues to withdraw the advice and clarify the situation.

With hindsight, this official position has been shown to be incorrect. The Court of Appeal refuted HMRC’s contention that relief was not available. In doing so, the judges backed up the decision of the First Tier Tribunal which was given in 2019.

Case facts

Three settlements were made on 30 July 2015. The principal beneficiary of each settlement was one of the settlor’s three sons.

The initial settled property was £10 per trust, but, on 11 August 2015, the settlor gave 55,000 ‘D’ ordinary shares in a trading company called DPAS Ltd to the trustees of each settlement. The business of this company involved the administration of insurance services for dentists.

Because each beneficiary had a present right of present enjoyment of the income from the DPAS Ltd shares, they had an interest in possession in the trust assets (see Pearson v CIR (1980) which was a decision on the meaning of ‘interest in possession’ for the purposes of CTT (later IHT), but, per Sir Launcelot Henderson, no-one has suggested that this expression should have a different meaning for the purposes of CGT).

DPAS Ltd had been the personal company of each of the three beneficiaries since 2011 under the pre-FA 2019 definition of this term in S169S (3) TCGA 1992. They had each owned 32,250 ‘C’ shares in the same company, and it was common ground that such a holding was sufficient to make DPAS Ltd the personal company of the three beneficiaries.

Each of the three beneficiaries was an officer of DPAS Ltd.

On 1 December 2015, the trustees disposed of the shares in DPAS Ltd (i.e., less than four months after they acquired them).

On 31 January 2017, the trustees (together with each of the three beneficiaries) made claims for entrepreneurs’ relief in accordance with the provisions set out in S169M TCGA 1992.

The Court of Appeal agreed that it was only necessary for the three key ingredients in S169J (1) TCGA 1992 to be present throughout the requisite one-year period. Nowhere does it say that the beneficiary’s interest in possession must be in place on the date of the disposal and throughout the above one-year period. In Sir Launcelot Henderson’s words:

‘It would in my judgment be wholly foreign to this carefully delineated statutory scheme if the reader then had to extract from S169J(4) and (5) TCGA 1992 a further condition, nowhere expressly articulated and conspicuously absent from S169J(3) TCGA 1992 itself, to the effect that the qualifying beneficiary’s interest in possession must subsist not only on the date of disposal but also throughout the one-year period when the “relevant condition” is met.

If that had indeed been the statutory intention, one would expect the additional requirement to have been expressly included in the definition of a qualifying beneficiary.'

Given that this was not the case, it was logical to conclude that HMRC's arguments were misconceived. The trustees won their case and, in doing so, apparently saved CGT of some £1,750,000. Remember that, in 2015/16, the entrepreneurs' relief cap was £10,000,000 and the main CGT rate accruing to the trustees of a settlement was 28%.

Those advising on business asset disposal relief and trusts should study this decision with care. Indeed, anyone with an interest in how the Courts interpret difficult pieces of legislation will find plenty here to interest them. Sir Launcelot Henderson's comments about the drafting techniques used as a result of the Tax Law Rewrite Project are particularly worth reading.

Contributed by Robert Jamieson

NRB discretionary trusts and will planning (Lecture P1345 – 13.00 minutes)

It used to be common to find that nil rate band discretionary trusts were found in wills of married couples or civil partners. Note that the remainder of the narrative below will refer to spouses for ease of writing, but this applies equally to civil partners.

A nil rate band discretionary trust refers to a trust with value entering the trust equal to the nil rate band existing at the time of death.

The idea was that a nil rate band discretionary trust was created on the first death with the balance of the estate being left to the surviving spouse. No inheritance tax (IHT) would be due as the inter-spouse exemption would remove any charge on the assets above the nil rate band. More creative planning was sometimes used where the main asset was the family home but that is not considered further in these notes.

Such planning became less relevant when FA2008 introduced a new provision which enabled any unused nil rate band to be transferred to a surviving spouse so that there was not the loss of the nil rate band when the entire estate was left to the spouse on the death of their partner. It applies for a second death on or after 9 October 2007 regardless of when the first spouse died. It works on the basis of the percentage of the nil rate band used on the first death with the remaining percentage being applied to the nil rate band at the date of the death of the second spouse.

For example, if an individual died at a time when the nil rate band was £200,000 who left an amount of £50,000 in a non-exempt transfer on their death, they would have used 25% of their nil rate band. If the second spouse died at a time when the nil rate band was £325,000, they would a nil rate of £568,750 being £325,000 plus (£325,000 x 75%).

It was perhaps prematurely suggested at this stage that nil rate band will trusts would become obsolete but are there any occasions when they can still be useful in the context of IHT planning?

Some examples of situations where it may still be useful to use these are as follows:

- To hold assets where increase in value may be greater than increase in value of NRB
    - Particularly relevant currently where no increase in NRB for significant period, and frozen until at least 2026
- To protect assets, particularly against care costs or other third parties
- To reduce estate of spouse so no restriction of RNRB
- Where either party is entitled to a transferrable nil rate band from a former spouse
- Have assets eligible for BPR or APR where that relief may be lost (either by change in use or by change in legislation)
- Where complex situations such as second marriages and stepchildren

It should be noted that in each of these situations, the same could be achieved by leaving assets to other individuals but it is acknowledged that this may not always be appropriate to do as there are circumstances where trusts are more flexible or useful to a family in the context of forward planning.

Example where increase in value

A husband has estate worth £500,000 including land he owns solely that is worth £100,000 which is likely to get planning permission although this is not certain at the time of death. The wife also has an estate which is worth £500,000. The husband dies leaving the land into a discretionary trust with the balance of the estate going to the wife.

By the time the wife dies, whilst she has not seen any increase in the value of the assets that she has inherited (or that she held in her own right), the land is now worth £2m.

At both deaths, the nil rate band is £325,000 and the residential nil rate band is £175,000. It is assumed that there is a residential property in the estate which can benefit from the residential nil rate band.

On the first death, no IHT would arise. This is also true if the entire estate was transferred to the wife, so no tax saving is achieved on the first death.

On the second death, if all the estate had gone to the wife, she would now have an estate of £2,900,000 (being £500,000 of her own assets plus £400,000 from her husband plus £2m for the land). She would not benefit from her own nil rate band as her estate is more than £2m. Her nil rate band would be £325,000 x 2 (as she would get the full nil rate band transferred from her husband) but would lose all the residential nil rate band due to the size of the estate. The total nil rate band would be £650,000 and the IHT due on the balance would be £900,000.

If £100,000 had been left to trust, her estate would have been £900,000. Her nil rate band would be £325,000 (own NRB) plus £225,000 (transferred from husband) plus 2 x £175,000 (the two residential nil rate bands), totalling £900,000. No IHT would be due.

Although the trust has its own IHT to pay, the land could be extracted without tax to pay if this can happen before the 10-year charge is due, on the basis that the initial value is less than the nil rate band and that any capital gain could be held-over under s260 TCGA 1992.

Example with former spouses

Tim is currently married to Susan but was previously married to Sarah who died whilst they were still married. Sarah left the whole of her estate to Tim so that he is entitled to her nil rate band on his death.

There are potentially three nil rate bands, but any one person can only claim a maximum of two nil rate bands:

1. Tim's nil rate band from Sarah

2. Susan's nil rate band

3. Tim's nil rate band (which can be transferred to Susan if he does not use it)

If Tim leaves his entire estate to Susan, then she will only get her own nil rate band and Tim's nil rate band, but Sarah's nil rate band will have been wasted.

If Tim left a nil rate band legacy into a discretionary trust, that would use the nil rate band from Sarah but still leave the whole of his nil rate band to be transferred to Susan. This is because we do not start with £650,000 available, £325,000 used so only 50% of his nil rate band available to transfer. Instead, we start with the fact that he has unused nil rate band of £325,000 meaning that he has 100% of the normal nil rate band unused.

If Tim had not been married before, but Susan had (and was entitled to a transferrable nil rate band from her previous husband) and Tim dies before her, the same route would be beneficial. He uses his nil rate band by using a discretionary trust as Susan already has the maximum nil rate band by inheriting the nil rate band from her first husband.

In both cases, you get the use of all three nil rate bands.

If Susan died first, in both scenarios she should also leave a legacy to a nil rate band discretionary trust. In the first situation, Tim cannot use her nil rate band as he already has the top-up from his first wife. In the second situation, it is the same position as in the first scenario but from Susan's perspective.

Example: protection against care costs

An individual has an estate of £500,000 but has a spouse who has been diagnosed with Alzheimer's disease and will therefore need care if he dies first. The spouse has low levels of personal assets as the affairs have been arranged in such a way due to the illness of the wife. The estate is well within the combined nil rate bands of the couple and so it may seem that no planning is needed to save IHT.

However, if he leaves £325,000 into a nil rate band discretionary trust, that value will be protected from care home costs for the surviving spouse and the surviving spouse can be beneficiary of that trust so they can benefit if necessary.

This has been seen in practice on a number of occasions and allows subsequent generations to benefit from part of the parents' estate.

Contributed by Ros Martin

Joining terraced properties (Lecture P1341 – 17.34 minutes)

Summary - The purchase of a property, later connected to an existing main residence, was the purchase of an additional property and so chargeable to a higher rate under Welsh Land Transaction Tax.

At some point in the past, three terraced properties had been a single dwelling. However, for many years they had been partitioned, with access between the properties bricked up, with each having separate legal titles.

Mr and Mrs James owned the end-of-terrace property and lived in it as their main residence. On 25 October 2019, the couple bought the adjoining house for £80,000 (with exchange and completion taking place on the same day). Mr and Mrs James immediately set about removing the partition between the properties so that there would be a single property.

A Land Transaction Tax return was filed on the basis that the higher rate of LTT was not due because the same main residence exception applied. The couple stated they intended to:

- contact the local authority to arrange for the property to be classed as one dwelling for council tax purposes;
- notify all service providers that the property is a single dwelling; and
- arrange the house insurance on the basis that the property is a single dwelling.

The Welsh Revenue Authority opened an enquiry, later issuing a closure notice and raised penalties on the basis that the taxpayer had acted carelessly. Broadly, it stated that the transaction must be assessed according to the position as at the effective date and it should be assessed based on intention. In their view the property was a separate dwelling to the main residence at the time of purchase and so was liable to higher rates.

Decision

The First Tier Tribunal found that the purchase of the property was a higher rate transaction because at the end of the day of purchase, the taxpayer held a major interest in another dwelling worth in excess of £40,000. The newly purchased property did not form part of the main residence prior to its purchase.

The Tribunal confirmed that the LTT return was inaccurate and had been completed carelessly.

The only consolation for the couple was that the penalty had been calculated on the wrong basis and should be amended.

The appeal was allowed in part.

Carl James v The Welsh Revenue Authority (TC08563)

Discovering officer could not be named (Lecture P1341 – 17.34 minutes)

Summary – The discovery of discrepancies between a Stamp Duty Land Tax return and Land Registry forms was valid, even though no specific discovering officer could be named.

In 2008 David Wilby, a well-respected King's Counsel, bought a property in North Yorkshire. His SDLT return reported consideration of £120,000, meaning that no SDLT was payable.

HMRC had had concerns about schemes being used to reduce SDLT. Although there were a number of variations, the common theme was that the schemes involved sub-sales through gifts or assignments which were not, in HMRC's view, effective to avoid a charge to SDLT. As a result, a team was established to investigate cases where there was a possibility that an ineffective scheme had been used.

David Wilby's return was one of those cases. HMRC identified that the Land Registry Form TR1 stated consideration of £542,000, rather than the £120,000 used for SDLT purposes. HMRC raised a discovery assessment.

This case was not concerned with the SDLT due but rather the validity of the discovery assessment. As a team effort, HMRC could not name a specific officer who was responsible for the discovery. David Wilby challenged the validity of the assessment.

Decision

The First Tier Tribunal found that the discovery assessment had been raised by an officer and it was not necessary to identify the specific officer who had made that discovery.

If it is evident that an officer must have made the discovery, then the officer does not need to be identified. In this case, HMRC's procedures highlighted the discrepancies between Land Registry and Stamp Duty Land Tax returns and an officer viewing David Wilby's case must have made the discovery.

The Tribunal also found that the other requirements for validity were met,

The appeal was dismissed.

David Christopher Wilby v HMRC (TC08589)

Administration

The £1 costs award to the taxpayers (Lecture P1343 – 9.09 minutes)

Background

In most First Tier Tribunal cases, taxpayers and HMRC pay only their own costs (or 'expenses' in Scotland), regardless of whether the appeal is won or lost. Normally, the losing party can't be made to pay the costs of the other party.

First Tier Tribunal cost awards

The primary legislation for the award of costs (the Tribunals, Courts and Enforcement Act 2007, s 29) provides that the costs of proceedings in the First Tier Tribunal and Upper Tribunal shall be in the discretion of the relevant tribunal. In addition, secondary legislation (in the Tribunal Procedure (First Tier Tribunal) (Tax Chamber) Rules, SI 2009/273) states (at rule 10) that the First Tier Tribunal may only make an order for costs in certain limited circumstances.

One such circumstance is if the tribunal considers that a party or their representative has acted unreasonably in bringing, defending, or conducting the proceedings. Another instance might be if HMRC persistently failed to comply with the rules and the tribunal's directions to the detriment of the taxpayer. The First Tier Tribunal can make a costs order on an application by one of the parties, or on its own initiative.

Another of the circumstances in which the First Tier Tribunal may award costs is where the proceedings have been allocated as a 'Complex case' under the tribunal rules, and the appellant has not given a written notice to the tribunal within 28 days of being informed about the case being allocated to the Complex category requesting that the proceedings be excluded from potential liability for costs or expenses. Alternatively, the First Tier Tribunal can make a 'wasted costs' order against a party where their representative has acted improperly or unreasonably or has been negligent if the tribunal considers it unreasonable to expect the other party to pay their resulting costs.

How much?

The general rule (in the Tribunal, Courts and Enforcement Act 2007, s 29(2)) is that the tribunal shall have full power to determine to what extent a party's costs are to be paid.

Before the tribunal makes a direction as to costs, the other party will be given the opportunity to make representations, and if that other party is an individual, the tribunal must consider the individual's financial means (SI 2009/273, r 10(5)). The amount of costs to be paid by a tribunal order can be arrived at in one of three ways:

1. By a decision of the tribunal;

2. By agreement between those who are paying and receiving; or

3. Where an agreement isn't reached, by an assessment of all or part of the costs incurred by the receiving person.

The First Tier Tribunal does not necessarily need to award an amount equal to the costs actually incurred. This point was illustrated very strikingly in the case.

“Arrogant” behaviour by HMRC

For example, In G C Field & Son Ltd & Ors v Revenue and Customs [2022] UKFTT 314 (TC), the appellants had used stamp duty land tax (SDLT) avoidance schemes. HMRC had not opened enquiries into the appellants’ SDLT returns within the statutory enquiry window but had raised discovery assessments instead. HMRC had also issued determinations on the basis that SDLT was payable on notional transactions (under the SDLT general anti-avoidance rule in FA 2003, s 75A). The appellants appealed.

The First Tier Tribunal ([2021] UKFTT 297 (TC)) had to consider the validity of the discovery assessments. As such, HMRC bore the burden of proving that they had made a ‘discovery’. HMRC also had to establish that the inaccuracy or insufficiency purportedly discovered came about due to the fraudulent or negligent conduct of the purchaser or a person acting on the purchaser’s behalf. The First Tier Tribunal concluded that HMRC hadn’t discharged that burden of proof.

The appellants subsequently claimed costs under the First Tier Tribunal Rules. The unreasonable conduct relied on was a failure “to make any attempt to satisfy their burden of proving that the appellants or [the promoter] acted negligently”. The tribunal then went on to consider whether there had been unreasonable conduct by HMRC. The tribunal stated HMRC had been “arrogant” in assuming that they’d be offered latitude on the basis that the tax insufficiency arose as a consequence of engagement in an accepted and unsuccessful attempt to avoid SDLT. That was not a reasonable explanation.

HMRC’s decision to call no evidence to support their case on negligence essentially rendered the hearing pointless, which had put the appellants to the unnecessary costs of preparing for and attending a hearing that had only one possible outcome. Thus, the First Tier Tribunal considered it just and fair to make an award for costs against HMRC.

“Lucky strike”

However, the First Tier Tribunal stated that the appellants had benefited from a “lucky strike”, because relief to which they knew they weren’t entitled had been secured. The tribunal considered that an award of substantive costs in such a situation would be to compound their luck and to doubly jeopardise the general body of taxpayers for HMRC’s failure. Consequently, the taxpayers’ application was allowed, but the quantum of costs was assessed at only £1.

HMRC’s procedural failure in G C Field had resulted in a tax benefit for the taxpayers amounting to well over £1.3 million, to which the taxpayers acknowledged they were not otherwise entitled. So, costs estimated by the taxpayers at over £80,000 would have been the icing on the cake. But the tribunal refused it.

Contributed by Mark McLaughlin

CJRS information notices (Lecture P1341 – 17.34 minutes)

Summary – Bank statements are statutory records and so there was no appeal against a notice requiring their production. Further, they were reasonably required for checking the company's tax position.

Fresh Consulting and Support Limited operated an IT consultancy business, which deregistered for VAT in 2014 and had not made any Corporation Tax returns since 2016.

The company made claims under the Coronavirus Job Retention Scheme (CJRS) totalling some £73,000 in relation to its sole director and two employees said to have commenced employment on 16 March 2020.

With no tax returns submitted for some but claims made under the CJRS, HMRC undertook a compliance check, later issuing an information notice in relation to the CJRS payments, requesting copies of bank statements, information about the company's business and details of how the grant claims were calculated.

The company appealed, having supplied only heavily redacted bank statements.

Strangely, the IT consulting company stated that it did not have the capability to participate in a video hearing. Further at the face-to-face hearing the company did not attend nor send representation.

Decision

The First Tier Tribunal confirmed that payments under the CJRS can lawfully be the subject matter of an information notice.

The Tribunal stated that bank statements are statutory records which the company could not withhold nor redact. Further, the statements were reasonably required for checking the company's tax position.

The Tribunal stated that even though the company had closed before the start of the lockdown:

> "the redactions on the bank statements are extremely extensive, with only a very few transactions (being payments out to employees) unredacted. That indicates that the appellant was still undertaking or engaged in many banking transactions at the time…."

The First Tier Tribunal struck out the appeal and ordered that it be complied with, in full, within 30 days of the release of the Tribunal's Decision.

Fresh Consulting and Support Limited v HMRC (TC08606)

Late appeal allowed and disallowed

Appeal allowed

In 2005/06, Barbara De'roy Badejo disposed of a rental property but did not disclose a gain on her tax return.

In 2013, following an enquiry, HMRC issued an assessment for capital gains tax and penalties.

The taxpayer made a late appeal in October 2017, which HMRC refused to admit.

On appeal to the First Tier Tribunal, the taxpayer stated that her agent had confirmed that they had submitted the appeal in time. On discovering the appeal had not been received by HMRC, she asked her agent to resend it. She was unable to submit the appeal herself due to medical problems.

The Tribunal agreed that the delay was 'serious and substantial' However, the taxpayer reacted quickly to remedy the situation. Further, she brought a ‘suitcase' of medical notes to the hearing, with the Tribunal accepting that her conditions were serious enough to have a 'debilitating effect' on her ability to work and run her life. Finally, the Tribunal concluded that HMRC had contributed to the delay by its slow progress in dealing with the case.

The late appeal was allowed.

Barbara De'roy Badejo v HMRC (TC08527)

Appeal disallowed

Dominic Kiernander applied to make a late appeal against an assessment, which HMRC refused. Dominic Kiernander lived abroad and claimed that he had mental health problems, made worse by the COVID pandemic.

The appeal by his adviser was seven months late which was 'serious and significant'. The First Tier Tribunal rejected the appeal stating that the pandemic was not a reasonable excuse for the delay and found that there was no evidence 'to demonstrate any specific circumstances or detailed effects of the pandemic that gave rise to this delay'.

The taxpayer was not granted permission to appeal out of time

Dominic Kiernander v HMRC (TC08594)

Reasonable excuse upheld

Summary – It was reasonable for her to believe that she had filed on time until she received the reply to her penalty appeal from HMRC but then rectified the failure swiftly.

The taxpayer had previously submitted paper tax returns, but HMRC informed her that she should submit her 2019-20 return online.

In September 2020, she went online and spent about 80 minutes completing her return. She got to the 'check your results' section and viewed the tax calculation. She did not see the 'your tax return is 90% complete' message on the tax calculation or notice that it was stated to be estimated. She printed the payslip and paid the tax shown in the calculation in good time for the 31 January deadline.

She received a penalty notice in March 2021 because HMRC had not received her return. She was also sent a self-assessment statement showing that her account was in credit and the payment she had made for 2019-20 was shown as unallocated.

She logged into her personal tax account and saw a message which said 'you paid the right amount of tax. There is nothing more to pay this year'.

She appealed promptly against the penalty but did not receive a reply from HMRC for four and a half months which told her, for the first time, that she had not completed the final step to submit the return. She rang HMRC to find out what had happened but did not receive a clear answer. The system would not let her complete her return online and so she submitted a paper return. By this time the total late return penalties had built up to £1,300.

Decision

Not surprisingly the First Tier Tribunal found that she had a reasonable excuse. It held that it was reasonable for her to believe that she had filed on time until she received the reply to her penalty appeal from HMRC in August. She had rectified the failure swiftly.

The Tribunal was not impressed by HMRC's argument that she should have checked that the return had been received, saying where a taxpayer fills in a paper return for the first time and sends it to HMRC it did not think it reasonable to expect such a taxpayer to always then check with HMRC that it has been received if the taxpayer believes it has been sent. The same logic applied to filing online – where a taxpayer believed the return had been sent, in the tribunal's view, the taxpayer was not required to check that the return had been received simply because it was their first time using the system.

Lucy Anne Watt (TC08590)

Adapted from the case summary in Taxation (6 October 2022)

Dealing with the opening full letter (Lecture B1344 – 21.15 minutes)

This session will consider a practical example of an opening enquiry letter for a full enquiry and provide advice on how to deal with such a letter.

Sample letter

The following letter is typical of the type of correspondence an individual taxpayer may receive when HMRC starts a full enquiry.

Indv and Small Business Compliance HM Revenue and Customs, BX9 1LE

Phone 03000 xxxxxx
Email xxx.xxx@hmrc.gov.uk

Web www.gov.uk

Date 28 January 2022

Our Ref

UTR

Dear xxxxxx

Check of Self-Assessment tax return for the year ended 5 April 2020

Thank you for your return for the year shown above, which we received on 29 January 2021.

Every year we check a number of returns to make sure they are correct and that our customers are paying the right amount of tax. I am checking your tax return. I can do this under Section 9A of the Taxes Management Act 1970.

What I am checking

I am checking the whole of your return to check it is accurate and complete.

My colleague has also written to the company, xxxxxxxx Limited, of which you are a director and shareholder, to advise that HMRC has decided to undertake an enquiry to check that recent returns for the business are complete and correct.

This follows a review of information that HMRC holds for the business and its owners. The enquiry will be a full review of accounting and tax records across the whole of the business and its owners for all taxes and duties.

What I need from you

To help me with my check, please let me have the items lists on the enclosed schedule.

Please send what I have asked for by 28 February 2022. If you need help or more time to do this, please phone me on the number shown at the top of this letter.

Completing my check

When I have finished my check, I will tell you if there is any additional tax to pay, or

Content issues

Where there are issues in the content of the enquiry letter, including, for example, the date of issue, advisers should challenge the investigating officer, and ask them to clarify, or justify, any points as necessary. This is particularly important where it is considered that the enquiry notice may not be valid (including where it is considered that HMRC have missed the statutory deadline for the issue of an enquiry notice).

It is not possible to deal with every potential scenario in this session, and letters received from HMRC may, for example, include a request for a meeting with the client or a visit to the business premises.

Advisers should undertake various basic checks to satisfy themselves that the enquiry notice is valid.

The principles discussed in the previous session referenced above apply to a full enquiry. In practice, opening enquiry letters will also include any relevant factsheets, and standard information regarding the disposal of documents sent to HMRC.

Information request

I have also included a sample information schedule with the enquiry letter. The following document is typical of the type of correspondence an individual taxpayer may receive when HMRC requests information and documents a part of an enquiry.

Schedule of information and documents needed to carry out our check

Customer name: xxxxxxxxxxxx

Our reference number: xxxxxxxxxx

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

Information and documents

Please provide the following documents and information for the period 6 April 2019 to 5 April 2020 inclusive. If there is no information/documents available or the question is not applicable, then please explicitly state this in your response.

1. Bank, building society, savings, loans, credit cards and store cards

For all your bank, building society, savings, mortgages and loans, credit cards and store card accounts, and all other financial assets and liabilities such as trusts and pension schemes held in the UK or abroad in your name, or in joint names, and/or those over which you had the power to operate and/or beneficial control, please provide:

(a) The financial institution you held the account with

(b) The date the account was opened

(c) The sort code

(d) The account number

(e) The name(s) of the account holder

(f) The name(s) of any signatories on the account

(g) The name(s) of the beneficial owner(s) of the funds held in the account

(h) The source of the capital

(i) The gross interest

(j) Statements

(k) Passbooks

(l) Cheque book stubs

(m) Paying-in slips

(n) Any other documents that are held which show any transactions into or out of those accounts

For the avoidance of doubt, this request covers all accounts held anywhere in the world by you personally or held on your behalf by another person.

2. Cryptoassets

(a) Please provide details of any cryptoassets held or disposed of, for example, bitcoin or ether. Please include full details of all cryptoassets held personally or in any other capacity.

(b) In the event of any disposals, including disposals for other cryptoassets, please give full details of the relevant transactions, which should include:

The date of purchase

The original purchase price

The source of funds for the purchase

The date of disposal

The consideration received on disposal

3. **UK and overseas land and property**

(a) A schedule showing the full address of all UK and overseas properties and land owned either solely or jointly during the period.

(b) For each property detailed under point (a), please provide a copy of the completion statement in respect of the property purchase and sale.

(c) For each property detailed under point (a), provide the following details:

a. Acquisition date
b. Acquisition cost
c. Sale date, if applicable
d. Sale value, if applicable
e. A schedule of incidental expenditure linked to the purchase and sale of the property. Please send the documentary evidence to support the items listed on this schedule

f. A schedule of all enhancement expenditure incurred on the property showing the amount, date and a description of the expenditure. Please send the documentary evidence to support the items listed on this schedule

g. An explanation as to how the property purchase was funded, supported with the relevant documentation such as mortgage or loan schedules and statements

h. If you received rental income from the property, please provide a statement showing the amount received

i. If you occupied the property as a residence at any time during your period of ownership, please confirm the dated you occupied the property and provide documentary evidence to prove you were resident

4. Investment and dividend income

Please provide details of all investments, including, but not limited to, shares, securities, bonds, held in any capacity either in the UK or abroad and any income received during this period.

This should include:

(a) A list of all investments held

(b) The date the investment was purchased

(c) The source of funds used to purchase the investment

(d) The type of investment

(e) The amount(s) of income received

(f) The date(s) the income was received

(g) All dividend vouchers/counterfoils held

(h) Full details of any apportionment of income and from which accounting periods they are derived

(i) Details of any waivers made

5. Non-taxable income

Please provide details of any income received such as windfalls, inheritance, gifts and loans received that is believed to be non-taxable. Please provide any supporting evidence for each item, for example, loan agreement.

6. Companies, business and directorships

Please provide full details of each of the companies and/or businesses (including sole trader businesses, partnerships and limited liability partnerships) in which any interest was held in any capacity worldwide. This should include:

(a) The name of the company and/or business

(b) The capacity in which the interest was held, for example, director, shareholder, partner, trustee, etc

(c) A detailed explanation of the roles and responsibilities

(d) Amounts of income received from each company/business specifying whether they were final or interim payments

(e) The date the income was received

(f) Details of any waivers made in respect of dividends

(g) The amount originally invested, and the source of funds used

(h) A full breakdown of all director's loans made and received, to include opening and closing balances, and all movements throughout the period with a narrative description for each transaction along with evidence of all credits made

(i) Confirmation of any other transactions between you and any of the companies of which you were a participator of during the period which have not entered the director's loan account and details thereof

(j) Details of any shareholdings in companies of which a directorship is held or was held during the period

7. Trusts

Please provide details of all involvement with any trust either in the UK or worldwide. Please include:

(a) The title and reference number (or UTR) for each trust

(b) A description of the role within the trust, for example, settlor, trustee, beneficiary

(c) A copy of each trust deed, or will, that created each trust and any amendments thereafter

(d) If you were a settlor in any trust, please provide:

a. A detailed description of each asset transferred into the trust
b. The date each asset was transferred
c. The value of each asset on the date of transfer
d. Details of any later additions to the initial settled assets

Notes

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

Before considering the information request

The adviser should establish that the enquiry letter is valid, as noted above, before considering the information request.

The accompanying information schedule is extensive, but not uncommon, and I have seen many such schedules which are far longer. It is important for the adviser to review each information request in the context of the client. The adviser needs to consider whether the items requested are relevant and reasonably required by HMRC to check the taxpayer's position.

It is not possible to cover every scenario, and the information schedule received by your client may, or may not, cover all the areas included on the sample document. In addition, other areas which are specific to your client's circumstances may be included.

Advisers should remember that an essential part of dealing with an enquiry letter is to discuss the position with the client, before sending any response to HMRC. Where the client indicates that there is a disclosure to be made, it will not usually be appropriate to simply provide the information requested by the enquiry officer. In such circumstances, reference should be made to my session on making a voluntary disclosure. Advisers should proceed with extreme caution where a client indicates that they have a substantive disclosure to make, and to also refer to the session on the Contractual Disclosure Facility. Failure to do so may result in their client facing a criminal investigation.

In these sessions, I frequently refer to advisers seeking input from an investigations' specialist. That is equally important when dealing with an opening enquiry letter. The recommendation comes from many years of dealing with situations where advisers have, for example, missed that an enquiry notice was invalid, or failed to robustly challenge an information request.

Contributed by Phil Berwick, Director at Berwick Tax

Deadlines

1 November 2022

- Corporation tax for periods to 31 January 2022 for SMEs not paying by instalments

2 November 2022

- Filing date for form P46 (Car) for quarter ended 5 October 2022

5 November 2022

- Specified employment intermediaries to file return for tax quarter to 5 October 2022

7 November 2022

- VAT returns and payment for 30 September 2022 quarter (electronic payment)

14 November 2022

- Quarterly instalments for large companies depending on accounting year end
- Monthly EC sales list (paper return) – if selling goods and based in Northern Ireland

19 November 2022

- PAYE, NIC, CIS and student loan liabilities for month to 5 November 2022 (by cheque)
- File monthly CIS return

21 November 2022

- File online monthly EC sales list – relevant only to a business selling goods based in Northern Ireland.
- Submit supplementary intrastat declarations for October 2022 – arrivals only for a GB business, arrivals and despatch for a business in Northern Ireland.

22 November 2022

- Pay PAYE, NIC, CIS and student loan liabilities for month to 5 November 2022 (online)

30 November 2022

- File accounts at Companies House:
  - private companies with 28 February 2022 year ends
  - public limited companies with 31 May 2022 year end
- File CTSA returns for companies with accounting periods ended 30 November 2021

News

Government's latest plan (Lecture P1341 – 17.34 minutes)

Following the appointment of Jeremy Hunt as Chancellor of the Exchequer, many of the announcements contained within the Government's Growth Plan that was announced in September have now been reversed.

Here is a summary of what has been reversed:

- The corporation tax rate will increase to 25% from April 2023 as originally planned.
- Both the basic rate of income tax (20%) and additional rate (45%) will be maintained.
- On dividends, each income tax rate band will retain the extra 1.25% added from April 2022 (basic: 8.75%, higher: 33.75%, and additional: 39.35%);
- The off payroll working rules have been reinstated.
- VAT tax free shopping for non-UK visitors will not go ahead.
- The freezing of alcohol duty has been scrapped.

The government has confirmed that:

- workers will still benefit from the reversal of the1.25% increase in NICs from 6 November.
- the increase in the Annual Investment Allowance to £1 million will go ahead as will the changes to the seed enterprise investment scheme and company share option schemes rules;
- the SDLT changes announced in the mini-Budget will go ahead as originally announced so that the:
    - SDLT threshold will increase to £250,000;
    - SDLT threshold for first-time buyers will increase to £425,000;
    - maximum value of a property on which first-time buyers' relief can be claimed will increase to £625,000.

The government has announced that, rather than the medium-term fiscal plan scheduled for release on 31 October 2022, a full Autumn Statement will be announced on 17 November. This will be given alongside forecasts from the Office for Budget Responsibility.

Scottish Budget

The 2023/24 Scottish Budget will be published on 15 December 2022.

It will set out the Government's proposals for the year for:

- devolved income tax rates and bands;
- land and buildings transaction tax;
- Scottish landfill tax.

The Scottish Government's spending plans for the next financial year will also be published at that time.

HMRC raises interest rates

Following the Bank of England interest rate rise, the rate of interest HMRC charges on late tax payments is increasing.

- From 11 October 2022, the late payment interest rate will increase to 4.75% and the repayment rate to 1.25%.
- From 3 October 2022, interest charged on underpaid quarterly instalment payments of corporation tax will be 3.25% and interest paid on overpayments will be 2%.

https://www.gov.uk/government/publications/rates-and-allowances-hmrc-interest-rates-for-late-and-early-payments

Business Taxation

Landscape gardener and landlord (Lecture B1341 – 19.17 minutes)

Summary - A self-employed landscape gardener and landlord failed to provide sufficient information to displace tax assessments, suffering 60% penalties as a result.

Anthony Calcutt was a landscape gardener who had been self-employed since 2005.

On 3 October 2016, HMRC opened a section 9A enquiry under TMA into his 2014/15 Self-Assessment Tax Return.

On 15 November 2016, HMRC visited Anthony Calcutt at his home. During that meeting Anthony Calcutt confirmed that he believed his tax return to be complete and correct and that he had no rental income during the 2014/15 tax year. His only other source of income had been office work for which he was ultimately not paid since it had not worked out. He had received no loans in 2014/15 but he had re-mortgaged his property in November 2014.

Subsequently, HMRC queried various amounts that had been received in his bank account, which Anthony Calcutt later confirmed represented income from a short-term property rental.

Anthony Calcutt's supporting evidence regarding both his gardening business and property rental provided to be contradictory and misleading.

Following a review of bank statements, HMRC established that the property had been let out for three years and further concluded that he should have been VAT registered for at least 4 years

HMRC issued discovery assessments to reflect the discrepancies identified, which were back dated to previous years, under the presumption of continuity. Further, HMRC raised penalty notices reduced to 60% for telling, helping and giving.

Anthony Calcutt appealed both the assessments and related penalties.

Decision

The First Tier Tribunal found that:

- the discovery assessments were valid. Anthony Calcutt had inaccurate records. There were both false invoices and unrecorded cash;
- HMRC's analysis confirmed that similar errors were made in prior years and that adopting the presumption of continuity was appropriate.

Anthony Calcutt failed to produce any credible evidence to displace the presumption of continuity.

The Tribunal confirmed that the penalties were appropriate as the rental income had been deliberately hidden and he had provided HMRC with invoices that he knew were inaccurate.

The fact that HMRC reduced the penalties by 60% for telling, helping and giving was generous.

Finally, the Tribunal concluded that Anthony Calcutt should have been VAT registered for the period 1 April 2011 to 31 July 2015. Although the VAT assessments which followed from this decision were not an appealable decision before this Tribunal because of the lack of returns, for Anthony Calcutt's benefit, the Tribunal confirmed that that it was made to best of judgment.

The appeal was dismissed.

Anthony Calcutt v HMRC (TC08582)

Deliberate suppression of purchases (Lecture B1341 – 19.17 minutes)

Summary – Over a number of years the company deliberately suppressed purchases and related turnover, resulting in assessments for Corporation Tax, VAT and s.455 charges over a number of years

Bobby Khan Enterprises Ltd had four directors: Mohammed Asif Ali, Motia Begum and their two sons Mohammed Paris Khan and Mohammed Harrise Khan. The company ran four convenience shops.

On 22 November 2012, HMRC opened enquires into the company's corporation tax return for the accounting period to 31 January 2012 as well as Mr Ali and Mrs Begum's Self Assessment returns. From information received from the company's suppliers, HMRC became aware that a significant volume of purchases had not been declared.

HMRC:

- raised assessments for CT liabilities and VAT on the basis that Bobby Khan Enterprises Ltd had failed to declare all its purchases and related profits for its shops between 2010 and 2017;

- treated funds misappropriated as outstanding directors loan giving rise to s.455 charges for the company and Income Tax and NICs liabilities for the directors.

- Mr Ali and Mrs Begum were also assessed on undeclared rental income from the shop premises in 2010/11.

The company:

- blamed an ex-employee for making the purchases for his own business, without their knowledge;

- claimed that the missing entries were due to their accountant's carelessness; and

- argued that the Presumption of Continuity should not apply as there was no direct evidence of suppression of purchases in any other year.

Decision

The First Tier Tribunal found that the company had failed to keep adequate accounting records and did not submit accurate returns. The company knowingly filed incorrect returns in order to minimise tax liabilities.

The directors provided little evidence to support their arguments and what was supplied was unconvincing. The company's accountants proved that they had frequently attempted to obtain accounting details and records from the company.

The Tribunal concluded that HMRC's assessments were made using best and reasonable judgement. With nothing to suggest that the enquiry year was unusual, the Presumption of Continuity could be relied upon. It was perfectly reasonable to assume that the suppression had occurred in the other years assessed. It was also reasonable to assume that the misrepresented profits should be treated as loans, as the company offered no evidence to the contrary.

The First Tier Tribunal found that the tax loss was deliberately created by the company's actions. The discovery and the assessments were valid.

Bobby Khan Enterprises Limited & Ors v HMRC (TC08556)

Distribution on incorporation (Lecture B1341 – 19.17 minutes)

Summary - A distribution arose when goodwill was transferred more than its market value on incorporation, calculated by reference to the sale consideration rather than by reference to the amount of cash received.

Neil and Sharon Pickles originally ran their potato grading and processing business through a partnership but in 2011, they incorporated the business by setting up a new company. The business was transferred to the company, with just under £1.2 million attributed to goodwill, left on loan account. Later, the company entered administration with the Pickles only ever withdrawing £770,000 from the loan account.

Neither Neil nor Sharon Pickles declared any capital gain, with the result that HMRC opened an enquiry into their affairs.

HMRC revalued the goodwill at £450,000 which was liable to CGT and further, assessed the excess of £750,000 as a taxable distribution.

Neil and Sharon Pickles appealed to the First Tier Tribunal who allowed the appeal concluding that:

- The market value of the goodwill was even lower, valued at £270,000;
- The distribution was £501,000 calculated as the actual loan drawn down of £771,000 less the market value of the goodwill, £270,000;
- The balance on the loan account of £429,000 owed to the directors was not a distribution.

HMRC appealed to the Upper Tribunal, with the Pickles cross appealing.

Decision

The Upper Tribunal found that the First Tier Tribunal had erred in law.

The correct approach was to calculate the distribution as the difference between the value of the asset transferred and the amount of the benefit received at the time the Pickles had a contractually enforceable right to receive the benefit which was at the date of disposal. A third-party valuation had calculated this value to be £1.2 million and there was no evidence to support it being any other figure. The full amount of £1.2 million had been recorded in the sale agreement, which was payable in cash or on demand as debt. The Tribunal stated that there was no basis to discount the value of the debt on the basis that the company only ever repaid £771,000.

On this basis, the distribution was valued at £930,000, calculated as the value of the benefit received of £1.2 million less the market value of the goodwill transferred of £270,000.

HMRC's appeal was allowed.

HMRC v Mr Neil and Mrs Sharon Pickles [2022] UKUT00253

Double taxation relief could be claimed

Summary – A company had correctly filed its UK tax return on the basis that it was entitled to unilateral relief under s.793A TA 1988, for the US tax suffered at source

A Ltd (a member of a Japanese banking group) lent $200m to its US subsidiary at 12% interest. It applied to the US authorities to obtain the benefit of the US-UK double tax treaty and hence make interest payments without deduction of tax. The US authorities refused under the limitation of benefits provisions in the treaty and refused to use the discretionary powers to relieve the company of the obligation to deduct tax at source. The payments were therefore made under deduction of tax.

A Ltd filed its UK tax return on the basis that it was entitled to unilateral relief under s.793A TA 1988, for the US tax suffered at source.

HMRC issued closure notices denying relief on the basis that s 793A prevented unilateral relief (where there is an 'express provision' in a double taxation agreement preventing credit relief, unilateral relief cannot be granted).

The First Tier Tribunal allowed the company's appeal.

HMRC appealed to the Upper Tribunal. HMRC said the legislation should be given a purposive construction and that s 793A(3) meant to ensure the balance struck between the parties in a double tax treaty should be respected under domestic law and that it could not be used to circumvent restrictions in treaties

Decision

The Upper Tribunal disagreed. There was no need for a purposive interpretation. There was no express provision in the treaty that relief should not be given. It noted that article 23 of the treaty did not expressly set out the circumstances in which credit relief was not available. It set out the cases in which the benefit of the treaty was available – a different matter.

HMRC had attempted to rely on certain statements made in parliament on the conclusions of the 2000 government review of the double tax system. The Upper Tribunal did not find that these met the Pepper v Hart test for referral to non-statutory materials. It concluded ultimately it is the operation of s 793A(3) that restricts relief and furthermore the fact that a domestic law provision may be inconsistent with a treaty provision does not mean that it is ineffective. It preferred to base its determination on a straightforward interpretation of s 793A(3). HMRC's appeal was rejected and the decision of the First-tier Tribunal in favour of the taxpayer upheld.

CRC v Aozora GMAC Investment Limited, Upper Tribunal (Tax and Chancery Chamber)

Adapted from the case summary in Taxation (6 October 2022)

Double tax treaty issues (Lectures B1342/ B1343 – 19.16/ 19.06 minutes)

Introduction

One function of a double tax treaty is to avoid dual residency if possible. Treaties contain a 'tie-breaker' clause where the national rules of two States are in conflict so that a person (i.e., an entity or an individual is treated as resident in both States under their national laws).

This would normally lead to one State having the overriding authority to tax. However, it may not always prevent a source being taxed in both States if none of the tie-breaker clauses operate.

Corporate residence under a double tax treaty

A company might be UK resident, for example, because it is incorporated in the UK but resident in another jurisdiction under its laws, for example because it is centrally controlled and managed there.

The OECD model treaty tiebreaker talks about the following factor determining residence:

"The place where key management and commercial decisions are made…necessary for the conduct of the business....in substance are made….by directors or senior management"

However, each country can have different factors determining residence.

Place of management	Croatia, Czech Republic, Germany, Switzerland
Day to day management	Denmark
Central control and management	Australia, Canada, Cyprus
Head office location	Japan, Slovenia
Place of effective management	Turkey, Austria, Belgium, France, Italy, Spain, Netherlands, Norway, Portugal

Management office	Poland
Where the main activity occurs	Israel
Where controlling shareholders reside	Guernsey

In determining the residence status of a company, it is therefore vital to understand how each jurisdiction would determine residence. If this results in the company being resident in one of the jurisdictions, then this is its place of residence.

If it would result in the company being resident in both jurisdictions, reference must be made to the double tax treaty to see if the tie-breaker clause can determine a single place of residence. If it does, then the company is said to be 'treaty-resident' in that jurisdiction and 'treaty non-resident' in the other jurisdiction.

Basic principles of a treaty

The country in which the entity is resident normally has the right to tax the entity's worldwide income and the treaty gives credit for tax suffered on income sourced in the other country (or exempts that other source income from tax).

The other country has limited taxing rights which would only be applicable to specific sources of income and gains which arise in that other country.

Income categorisation issues

It is possible that certain items of income might be categorized in one way in Country A but as a different type of income in Country B. In this situation, the country in which the entity is resident may not give credit for the tax suffered on the income in the other country.

For example, Country A might treat a certain finance payment by an entity as a distribution and subject it to withholding tax. If the income is received in Country B by an entity resident in that country, it might treat it as interest income and subject it to tax as such in Country B.

Because Country A treated the amount as a distribution and Country B treated it as interest, Country B might not give credit for the tax suffered by the receiving entity.

Power of double tax treaties

Double tax treaties are international agreements between two jurisdictions. As such, they override domestic law where necessary.

Important words

When reading treaties, it is important to read the wording carefully. If it uses the word 'may' this means the State can tax the income or gain but may not choose to do so (we would need to check the domestic law to see if this is the case).

If the treaty uses the word 'exempt' it means the State cannot subject the income or gain to tax, irrespective of what its domestic law might prescribe. It is not uncommon for countries that grant exemption over certain income in a double tax treaty to tax other income more heavily.

While a lot of treaties look the same (generally they have the same content in identically numbered Articles), they do differ in wording. It is imperative to read the relevant treaty carefully to ensure it is applied properly to the specific client situation

Treaty reliefs must be claimed, they are not automatic, so a claim should be made in the relevant return, if in time, or else separately in a letter to HMRC where it is too late to amend a return.

The UK/USA double tax treaty

This treaty stands out as being more complicated than other treaties. This is partly because US tax law requires all US nationals to return their worldwide income and account for US tax on it, irrespective of their place of residence. We are setting out some of the main provisions of the treaty below, but there is no substitute for reading the relevant articles themselves.

Corporate residence tiebreaker

- Both States must endeavour to determine the status by mutual agreement
- If they cannot, the person cannot use the benefits of the DTT (apart from the DT relief, non-discrimination, and mutual agreement Articles)

Permanent establishment (PE)

- Follows OECD model

Income from immoveable property

- May be taxed in the State where the property is located

Business profits

- Only taxable in State where the enterprise is resident unless conducted through a PE in the other State
- The other State may tax the PE profits on the assumption it is a separate and distinct entity – this can lead to interest disallowance where the PE is deemed to have notional capital
- There is specific reference to US excise tax on insurers
- Income attributable to a PE can be taxed where it was situated, notwithstanding that it has ceased to exist
- Profits from international travel are only taxable in the State where the entity is resident (e.g., British Airways plc profits are only taxed in the UK, even though it has flights departing from US airports and has offices in the US)

Associated enterprises

- If transactions take place other than at arms’ length, adjustments to an arms’ length basis can be made by either State

- If the profits are taxable in both States and arms' length adjustments are made in the second State, the other State must make an 'appropriate' adjustment to the tax it charges on the profits

Dividends

- Residents of one State are taxable on dividends derived from the other State
- Up to 5% WHT can be charged where the recipient is a company owning at least 10% of the votes of the payer
- Up to 15% WHT can be charged in other cases
- 0% WHT where the company has owned 80%+ of votes since 1998 and throughout the year before the dividend is declared, and is not disqualified by the 'limitation of benefit article' (see later)
- Special rules apply to dividends paid by pooled investment vehicles investing in financial assets (Art 10(4))
- Art 10(7) discusses income from a PE in another State and 'dividend equivalents' that can be subject to additional WHT of up to 5%
- No anti-avoidance rule in this Article but there is a general limitation on benefits from the treaty (see later)

Interest

- Residents of one State are taxable on dividends derived from the other State
- Up to 5% WHT can be charged where the recipient is a company owning at least 10% of the votes of the payer
- Up to 15% WHT can be charged in other cases
- 0% WHT where the company has owned 80%+ of votes since 1998 and throughout the year before the dividend is declared, and is not disqualified by the 'limitation of benefit article' (see later)
- Special rules apply to dividends paid by pooled investment vehicles investing in financial assets (Art 10(4))
- Art 10(7) discusses income from a PE in another State and 'dividend equivalents' that can be subject to additional WHT of up to 5%
- No anti-avoidance rule in this Article but there is a general limitation on benefits from the treaty (see later)

Royalties

- Generally, only taxable in country of residence of the recipient, unless connected to a PE in other State

- If excess royalties are paid, the excess amount can be taxed in both States
- No WHT is mentioned

Capital gains

- Gains on land and buildings can be taxed by the State where they are located
  - Also applies to UK unlisted shares, partnership or trust deriving more than 50% of their value from UK land and buildings
  - Applies to a US 'real property interest'
- Gains on assets forming part of a PE can be taxed by the State where the PE is established
- Gains on ships, aircraft or trains operating international routes only taxable where the owner is resident
- Any other gains only taxable in the State where the owner is resident
- If a person has been resident in a Contracting State for the past 6 years, that state can also tax any gains arising on that person

Limitation of benefits

- Companies are generally only able to benefit from the DTT if
  - Listed (and regularly traded) or
  - More than 50% of the voting power and value is owned by 5 or fewer listed companies
- Unlisted companies can benefit if at least 95% of voting power and value is owned by 7 or fewer "equivalent beneficiaries" and less than 50% of the gross income for a period is paid to non-equivalent beneficiaries which are tax deductible
  - Equivalent beneficiary = resident of EEA or member of NAFTA subject to conditions
- Art 23(4) indicates that other companies that have a trade in one of the States (not investment companies other than banks, registered securities dealers, and insurance entities) can also benefit from the DTT
  - If it trades in the other State, its trade in the first State must be 'substantial' (not defined)
  - Include partnership trades in which the company is a partner and connected parties (a more than 50% test)
- Benefits of the DTT not be available if the main purpose or one of the main purposes of the creation or existence of a resident or of the transaction undertaken by him, was to obtain benefits under this Convention

- If a company or its parent has a class of shares with terms entitling the holders to a portion of income or gain derived from the other State than without the entitlement and 50% or more of the voting power and value is owned by non-equivalent beneficiaries
    - The benefits of the DTT only apply to the proportion of income or gains that would apply in the absence of those terms
- A resident will be able to benefits from the DTT if the competent authority of the other State determines that the establishment, acquisition or maintenance of such resident and the conduct of its operations did not have, as one of its principal purposes, the obtaining of benefits under this Convention
    - i.e., it is written in a positive sense unlike other treaties

<u>Other articles</u>

- Double tax relief is specifically provided for, though there is a restriction on PRT double tax relief (Art 24(3))
- There is a non-discrimination clause (so the US is a qualifying territory for certain corporation tax provisions such as the late-paid interest rules in Part 5, CTA 2009)

Contributed by Malcolm Greenbaum

VAT and indirect taxes

Private ambulance services (Lecture B1341 – 19.17 minutes)

Summary – Non-emergency ambulance services provided to the NHS were zero-rated and not exempt from VAT.

E-Zec Medical Transport Services Ltd provides non-emergency patient transport on behalf of various NHS trusts in England. Their vehicles transport patients to and from hospital and doctor's appointments.

Their vehicles were configured to be able to transport patients and their mobility aids, including wheelchairs. Typically, each vehicle could carry eight patients plus their wheelchairs. A floor tracking system allowed the vehicle to be easily reconfigured daily depending on the needs that day.

The issue in this case was whether the company's services were zero-rated, enabling the company to recover input tax, or exempt, so restricting this ability. Both parties agreed that if the services qualified for zero-rating, this would take precedence over the exemption.

For zero-rating to apply, normally vehicles must be designed or adapted to carry ten or more passengers. However, the number of passengers can be reduced if the vehicle would normally be capable of transporting 10 passengers but has been designed or adapted to carry two or more persons in a wheelchair.

Decision

The First Tier Tribunal concluded that if the vehicle modifications, including the floor tracking system, were removed, the vehicles would have been able to carry 10 passengers. Consequently, zero-rating should apply.

E-Zec Medical Transport Services Limited v HMRC (TC08574)

Assessment out of time? (Lecture B1341 – 19.17 minutes)

Summary – HMRC's assessment had been issued within time, within one year after the date when an officer had 'evidence of facts, sufficient in the opinion of the commissioners to justify the making of the assessment'.

An HMRC officer first visited the premises of Nottingham Forest Football Club Ltd on 16 April 2018, returning on 20 April 2018 to examine invoices and download data from the company's accounting system. On 9 May 2018, HMRC were given a memory stick with data from Sage.

On 29 April 2019, HMRC issued an assessment to collect £345,561 of VAT, which related to the August 2015 return.

Nottingham Forest Football Club Ltd believed that this assessment was out of time as under s.73(6)(b) VATA 1994, an assessment to correct a VAT return must be issued by HMRC by the later of:

1. two years after the end of the accounting period being adjusted; or
2. one year after the date when an officer had 'evidence of facts, sufficient in the opinion of the commissioners to justify the making of the assessment'.

Both Nottingham Forest Football Club Ltd and HMRC agreed that it was the latter of these two dates that was relevant to this case.

Nottingham Forest Football Club Ltd claimed that HMRC had sufficient knowledge to raise the assessment after their second visit, meaning that the assessment should have been issued by 20 April 2019.

HMRC claimed that the relevant date was 9 May 2019 as the back-up memory stick was a key part of the accounting system that needed to be analysed.

Decision

The First Tier Tribunal confirmed that it was for Nottingham Forest Football Club Ltd to prove why HMRC had failed to meet the 12-month deadline.

The Tribunal found that Nottingham Forest Football Club Ltd had failed to prove that the memory stick was not relevant to HMRC's work in calculating how much tax was due for the period in question.

The appeal was dismissed.

Nottingham Forest Football Club Ltd (TC08577)

Reservation service **(Lecture B1341 – 19.17 minutes)**

Summary – The services provided to providers of short-term rentals were standard rated. There was no separate service relating to corporate card handling fees.

SilverDoor Limited provided services to providers of short-term rentals of hotels, serviced apartments and similar properties. The company acted as disclosed agent for its property partners. The accommodation was booked by clients which were generally businesses seeking short-term accommodation for employees on temporary assignments.

SilverDoor Limited charged a commission for advertising properties, handling reservations, and dealing with the payment of client fees. Further, if a client guest paid by a corporate card, they were charged a 2.95% fee to cover the extra charge made by the card company.

HMRC issued an assessment for fees charged in the three-year period between October 2015 and 2018. HMRC argued that SilverDoor Limited was providing a reservation service that was standard rated.

SilverDoor Limited claimed that this additional 'card fee amount' was outside the scope of VAT as it represented a disbursement. SilverDoor Limited did not hold, store, or transmit any credit card data. The amount was revenue neutral as they made no profit on the amount charged. If the fee was not outside the scope, the company argued that it would be exempt as a financial service under Schedule 9 Group 5 Item 5 VATA 1994.

The company appealed.

Decision

The First Tier Tribunal agreed with HMRC that SilverDoor Limited was supplying a standard-rated reservation service.

Payment made by a client using a corporate card did not bring about a change in the legal and financial relationship between the parties. SilverDoor Limited did not carry out a transfer of any money. There was no separate supply of a financial service that could qualify for VAT exemption

The appeal was dismissed.

SilverDoor Ltd v HMRC (TC08554)

Incorrectly addressed invoices

Summary –A property letting business could not recover input VAT on the majority of incorrectly addressed purchase invoices

The partnership, Majid and Miah Properties, was registered for VAT from 20 January 2010 on the basis that it intended to make taxable supplies by letting out a property. On 8 March 2010, the partnership bought a property and exercised an option to tax.

With supplies made in connection with the property now subject to VAT, the partnership later claimed input tax in connection with expenditure incurred on the purchase and refit of their property for use as an Indian restaurant. This refit took some time, and no supplies were made in connection with it for a considerable period during which input tax was claimed.

Finally, on 6 August 2016, the partnership entered a 15-year lease backdated to 3 August 2015:

- The lessee, Mehfil (Preston) Ltd, was a company in which both partners were directors;

- The lease stated that rent of £2,166.67 per month was payable from 1 September 2016.

In July 2016, HMRC visited the business and subsequently identified that input VAT had over-claimed. HMRC also concluded that the rent commencement date in the lease was an error and should have read 1 September 2015. HMRC concluded that output tax had been under declared by the Appellant on rental received.

HMRC issued assessments for the overclaimed input VAT of £30,446 and undeclared output VAT of £8,664.

The partnership accepted that some of the assessed input VAT related to another business and was not recoverable by the partnership but appealed the balance.

Decision

The First Tier Tribunal concluded that there was a continuous supply of services under the lease agreement but for the first 12 months there was a rent-free period. The Tribunal found that"

- the assessments in periods 11/15 – 08/16 were not due because of the 12-month rent-free period;

- no VAT was due in period 11/16 because no tax point arose in that period due to the non-payment;

- on the finding that the lease was terminated in February 2017, Majid and Miah Properties would have become liable under the basic tax rules to VAT on the rent which was due on the 6 rental payments which had fallen due after 1 September 2016. For 02/17 VAT on the 6-month's rent which had become due should have been taxed but HMRC only taxed 3-month's rent. The Tribunal directed that the assessment for 02/17 should be increased to £2166.

- no VAT was due for periods 05/17 – 08/17 as the lease had come to an end in February 2017.

Moving on to the input tax recovery:

- Where Majid and Miah Properties recovered VAT on redevelopment and fit-out invoices that were addressed to a non-VAT registered builder who could not reclaim the VAT, it was accepted that the VAT had been incurred as agent for the Partnership and was recoverable.

- There was no evidence as to the VAT status of the other builders, John Oldfield, and RN Builders, to whom invoices were raised, and so it was assumed that these builders may have recovered the VAT. The VAT on these invoices was found to have been properly assessed.

- Input VAT could not be recovered on pro forma invoices, other invoices addressed to Mehfil, or invoices addressed to other third parties.

Majid and Miah Properties v HMRC (TC08588)

Burden of proof

Summary – With the First Tier Tribunal applying the wrong test, the case has been remitted back for reconsideration.

On 30 May 2018, HMRC raised an assessment to collect VAT of £1,929,592 from Zamco Limited. This was issued in respect of under-declared VAT in the periods 02/16 to 08/17 on the basis that Zamco Limited's supplies of alcoholic goods over that period took place in the UK and so were subject to VAT. Zamco Ltd did not appeal the assessment, nor did the company appeal penalties totalling £1,736,632.80 for the inaccuracies in its VAT returns.

Later, HMRC sought to transfer the liability to the company's director, Mohammed Zaman, via a personal liability notice. Mohammed Zaman appealed to the First Tier Tribunal.

The First Tier Tribunal concluded that HMRC had not proved that the place of supply was in the UK and so it had not met the burden of proof. The personal liability notices were discharged.

Decision

On appeal to the Upper Tribunal the decision was overturned with the Upper Tribunal finding that the lower court had applied the wrong test. It found that:

- HMRC had the burden of proving that the personal liability notice was correctly issued;
- the onus of showing that the assessments on which the notice was based were excessive fell onto Mohammed Zaman.

The fact that the appeal was against the PLN and not the underlying assessment did not alter the fundamental principle that once it is shown that HMRC have validly issued an assessment it is for the taxpayer to prove it is wrong.

The Upper Tribunal quoted from the First Tier Tribunal's decision:

> "We thus find that it has not been proven, on the balance of probabilities, that the alcoholic goods in question were removed to the UK by Zamco or under its directions; and so, for the same reason, it is not proved that the place of supply of all Zamco's supplies in the relevant period was the UK, such that its VAT returns in that period contained inaccuracies. <u>Given the burden of proof on HMRC, this means that we must allow the appeal</u>..."

This was sufficient grounds for the Upper Tribunal to overturn the First tier Tribunal's decision. The appeal was remitted back to the First Tier Tribunal to review their conclusions in the light of the correct application of the burden of proof.

HMRC v Mohammed Zaman [2022] UKUT 00252 (TCC)

Sale and leaseback contract

In 2007, to finance the development of some land that it owned in Slovenia, RED d.o.o. entered a sale and leaseback transaction with Raiffeisen Leasing.

Under the sale and leaseback agreement RED d.o.o. charged Raiffeisen Leasing VAT on the sale of the land and Raiffeisen Leasing recovered this VAT.

VAT on the leaseback from Raiffeisen Leasing to RED d.o.o. was included in the sale and leaseback agreement but Raiffeisen Leasing never raised a VAT invoice for these supplies, nor did it declare or pay the VAT sum on its VAT return. However, RED d.o.o. reclaimed the

VAT, arguing that the agreement effectively represented an invoice. The tax authorities denied the input VAT claim.

The CJEU was asked whether a contractual sale and leaseback agreement in this instance could be treated as an invoice, and if so, what details did that agreement need to contain.

The CJEU stated that the leaseback was capable of being treated as a VAT invoice, providing it contained enough information for RED d.o.o. to substantiate its entitlement to recover input tax. It did not matter that the applicable VAT rate was not stated in the agreement as this could be implied from other information included in the agreement. Further, it did not matter that Raiffeisen Leasing never intended the leaseback to be invoiced was irrelevant. As Raiffeisen Leasing had effectively issued a VAT invoice in 2007 when the contract was signed, it should have accounted for output tax at that time.

CJEU: Case C-235/21

Practical VAT registration issues (Lecture B1345 – 23.37 minutes)

Compulsory registration

When considering the £85,000 registration threshold we only consider taxable income, so that's standard rated, zero rated and reduced supplies. Income that is exempt or outside the scope of VAT is excluded.

Non-UK established traders do not have access to the £85,000 threshold. This means that as soon as they have (or expect to have) any taxable income, they must register for UK VAT.

Voluntary registration

Traders are allowed to register on a voluntary basis provided they have, or expect to have, taxable income. So long as HMRC is satisfied that the business is intending to trade and make taxable supplies, it can register on a voluntary basis from the date requested. Registering on a voluntary basis should mean the business can start to recover input tax.

Where a business has only income that is outside the scope but that would be taxable if the supply was made in the UK, it is possible to register on a voluntary basis. B2B consultancy services would fall into this category. Once registered, the services would be recorded in Box 6, but no VAT will be recorded in Box 1. This will enable the trader to recover input tax on UK costs incurred.

Registration and transfers of a going concern (TOGC)

When the trade and assets are sold by a taxable person as a going concern, the buyer will inherit the seller's turnover for registration purposes. As a result, where the seller was registered on a compulsory basis, the buyer will also be registered on a compulsory basis from the purchase date. The transfer will then be outside the scope of VAT as a TOGC.

If the seller is registered on a voluntary basis, the buyer will still inherit the seller's turnover, but they can choose not to register for VAT, particularly if they are dealing with unregistered customers. By choosing not to register, the buyer will breach the TOGC rules, meaning that the seller must charge VAT on the sale of the trade and assets. The buyer must monitor their turnover going forward and must register if they exceed the registration threshold. If at a future date they do register, any input tax on the assets purchased as part of the TOGC may be recovered under to pre-registration input tax recovery rules providing the assets are still held at the date of registration.

Pre-registration input tax

Pre-registration input tax is recoverable on the first VAT return as follows:

- VAT on goods acquired in the previous four years still owned at registration;
- VAT on services incurred in the six months prior to VAT registration with a link to the post-registration period;

When a business registers, it is possible to ask for an earlier date so it is important to think about the most beneficial registration date.

Impact of reverse charges

When a UK established business buys in services from a non-UK established business, the reverse charge mechanism applies. This is even the case if the non-UK established supplier has a UK VAT number.

If this UK business is not VAT registered, the reverse charge income will count as taxable income and be relevant when checking the £85,000 VAT registration threshold.

VAT group registration applications

This has been subject to exceptional delays over the last year, leading to uncertainty over how traders should account for VAT. The Chartered Institute of Taxation has published some guidance from HMRC about action that traders can take while waiting for their applications for grouping to be processed.

The guidance states that businesses should treat their application as provisionally accepted on the date it was submitted. VAT should be charged on sales but not shown separately on the VAT invoice. Once the group VAT number is received, invoices can be re-issued, and the output tax accounted for on the group VAT return. This may well not be practical. Some businesses have continued to invoice clients through their separate group companies and then process a cross-charge through the group once the application process is complete. Although not strictly correct, provided there is no VAT loss, HMRC should be flexible in their approach.

Businesses that are awaiting to receive their group registration number may, in the meantime, receive assessments for failure to submit returns. These should be ignored as HMRC will automatically cancel them once the group registration application is fully processed.

Deregistration

Where a trader expects their next 12 months of taxable income to fall below £83,000, they can apply to deregister for VAT.

Deregistration can also be used in a 'liable not liable' late registration situation. For example, in November 2022, a trader realises that they breached the registration limits at the end of February 2020 and should have been registered from 1 April 2020. The business should notify HMRC of the late registration and apply for deregistration at the same time if they knew they were going to be below the £83,000 threshold going forward. This may well be the case during COVID lockdown.

Misleading HMRC on deregistration

What if a trader deregisters because they think their taxable income will fall below £83,000 but they are still trading at over £85,000, HMRC will seek the trader's consent to restore the old registration.

What happens if the client's consent is not forthcoming? Let us assume that HMRC deregistered the trader from 22 April 2022. If still trading at above the £85,000, if HMRC's request to restore the old registration, the trader would become liable to be registered again from 30 April 2022., triggering a new registration from 1 June 2022. If this is what happens, this could well lead to the business being high up on HMRC's attention list. Is this something that a business would wish for?

Legitimate deregistration

In this case, the trader must continue to monitor their turnover going forward.

When looking back 12 months, they should exclude their turnover when they were previously registered (VATREG18150). That means that you effectively start with a clean slate.

Impact of an opted property

When a trader opts to tax land and/or commercial property, their option to tax remains in place for at least 20 years, with income derived from the property taxable for next 20 years, including rent charged. Obviously, VAT is only charged if the trader is VAT registered.

If the person's taxable income falls below £83,000, they could de-register but remember rental income is still taxable for registration purposes. Taxable income must be monitored going forward for future registration purposes.

Note, it would be unwise to deregister with an opted property, where the trader has recovered VAT on its purchase or construction. There is a deemed supply on assets held at the date of registration, which would result in a large output tax bill

Aggregation

Be wary of aggregation if a person artificially separates one business to avoid one or two VAT registrations.

To be able to register separately, the key is having a commercial reason for keeping the businesses separate and operating the businesses separately.

Where HMRC seek to aggregate businesses, the aggregation direction cannot be backdated

Created from the online session presented by Dean Wootten