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Personal tax

Compensation for loss of share rights (Lecture P1401 – 18.26 minutes)

Summary – Money received was taxable under the employment related securities rules, meaning that the £30,000 exemption on termination of employment was not in point.

Peter Hemingway was an IT specialist employed by Broadcom UK Ltd and in June 2006 and May 2007, he was granted options over shares in his employer's US parent company.

Following a takeover in 2016, all stock options were cancelled and employees received a cash payment representing the value of their lapsed options.

Peter Hemingway's payslip included gross earnings of just over £35,000, described as a "Notional Share Gain", with £16,000 of tax and national insurance deducted. He left his employment.

In April 2016 Peter Hemingway submitted a voluntary 2015/16 tax return reporting the payment as taxable income.

A few months later, in August 2016, he amended his return claiming he was entitled to relief under s.401 ITEPA 2003 meaning that the first £30,000 of the payment was exempt from tax. He claimed that he had received a voluntary payment in connection with the loss of employment rights.

HMRC disagreed and argued that the payment was linked to his loss of share options.

Peter Hemingway argued that HMRC's closure notice denying the exemption was invalid as he had submitted a voluntary return and was not in Self Assessment. HMRC asked him to treat the initial return as having been made under a valid notice, but when he declined to do so, HMRC issued a second return, which HMRC amended to exclude the £30,000 exemption.

Peter Hemingway appealed.

Decision

The First Tier Tribunal found that s.476 ITEPA 2003, the employment-related securities rules, took precedence over s.401 ITEPA 2003 covering payments and benefits on termination of employment.

Further, the Tribunal was confident that the receipt fell within s.477(6) ITEPA 2003 as a benefit in consideration or in connection with failing to acquire securities. Consequently, it was taxable in full as earnings from the employment.

The appeal was dismissed.

Peter Hemingway v HMRC (TC08929)

Formula 1 lawyer's appeal **(Lecture P1401 – 18.26 minutes)**

Summary – The receipt of some £40 million in payments from the Ecclestone family was taxable income and not gifts, as contended by the taxpayer.

Stephen Mullens was both lawyer and adviser to the Ecclestone family from whom he received a number of payments:

In 1999/2000 he received £1.2 million, which the First Tier Tribunal found to be part of his remuneration package for his services to the Ecclestone family interests.

In 2000/01 he received two further payments (£750,000 and £300,000) into an offshore account, which were also found to be financial rewards for his services.

In 2006/07 he received $38 million and in 2012/13 he received $19.5 million and £5 million, all which he claimed to be gifts from Mr Ecclestone's wife but once again the First Tier Tribunal found to be financial rewards for his services.

HMRC issued discovery and penalty assessments, some of which were under the extended time limits for making an assessment (six years for careless conduct and 20 years for fraudulent or deliberate conduct). The First Tier Tribunal found that the penalties were correctly raised on the basis of the taxpayer's deliberate failure to declare the payments in his Self Assessment tax returns.

This appeal concerned two separate matters:

- the taxability or otherwise of the six payments made to or for the benefit of Stephen Mullens; and
- whether penalties were correctly assessed as a result of his failure to declare those payments in his Self Assessment returns as his income.

Decision

The Upper Tribunal confirmed that where Stephen Mullins' behaviour was either careless or deliberate, HMRC can make a discovery assessment for the loss of tax under s.29 TMA 1970 and that the time limit for such assessments is extended by s.36 TMA 1970 for culpable conduct.

The Upper Tribunal confirmed that all of the payments made were taxable income and that Stephen Mullens knew that they should have been disclosed on his tax returns, but he deliberately chose not to do so.

Stephen John Mullens v HMRC [2023] UKUT 00244 (TCC)

HICBC – ignorance of the law **(Lecture P1401 – 18.26 minutes)**

Summary – The taxpayer had a reasonable excuse for failure to notify chargeability to the high-income child benefit charge, which he remedied once he received the nudge letter, without unreasonable delay.

Waseem Shahid worked offshore and earned a salary of £42,000 plus overtime.

In 2019, having received a nudge letter from HMRC regarding the High-Income Child Benefit Charge (HICBC), he contacted HMRC who subsequently assessed him to the charge for the years 2014/15 through to 2017/18 and imposed penalties for failure to notify.

Waseem Shahid accepted the charge but appealed the penalties arguing that his wife:

- claimed the child benefit relating to their children;
- knew only of his basic salary which was below the £50,000;
- never saw any of the paperwork relating to his employment, such as P60s;
- had a separate bank account into which he put her housekeeping money.

Waseem Shahid is paying the HICBC by instalment but challenged the penalties.

Decision

The First Tier Tribunal considered Waseem Shahid to be a reliable witness and accepted his evidence. The issue to decide was whether ignorance of the law could be a reasonable excuse in this case.

The Tribunal highlighted the many HICBC cases that have been heard, with only a handful determined in the taxpayer's favour, a number of which have been determined by Judge Popplewell.

Usefully, this case summary highlights when Judge Popplewell is likely to find that the taxpayer has a reasonable excuse. This is when they were:

(1) not under an obligation to complete a tax return for the tax years prior to that in which the HICBC applied because, primarily, they were paid through PAYE and had no other income justifying a need to notify;

(2) in receipt of child benefit payments prior to the introduction of HICBC with the consequence that the application itself made no reference to HICBC (the child benefit claim form after the introduction of HICBC clearly sets out when the charge applies);

(3) had not received notification from HMRC directly at any point prior to the contact which led to the issues of the tax assessment; but

(4) acted promptly in ceasing to claim child benefit and engaged actively with resolving the historic tax liabilities as soon as HMRC did make contact.

Together, the couple knew Waseem Shahid was earning more than £50,000 meaning he was liable to the HICBC but "individually each was missing actual knowledge of a crucial part of the legislative jigsaw". The Tribunal stated that it was not for his wife to establish a reasonable excuse nor that collectively they had a reasonable excuse. The penalties were being assessed on him alone and so ignorance of the law could be a reasonable excuse for him.

The facts were that:

- Waseem Shahid's spouse knew that income of over £50,000 for either herself or her spouse would mean that the HICBC applied as this was contained on her child benefit forms but she did not know that her husband's adjusted net income was more than £50,000.

- Waseem Shahid was only aware of the issue when he received the nudge letter which gave the detailed criteria which would render him liable to the charge. The Tribunal concluded that this was a reasonable excuse for having failed to notify chargeability until then.

Did it matter that it took a further four months to remedy the failure? The Tribunal thought not. He contacted HMRC within a week of receiving the letter and then sought to clarify the situation. Once the facts were clear, he accepted liability and has been paying the charge by instalments since that time. It was 'clear that he was a busy man and needed to digest this information'.

The appeal was allowed.

Waseem Shahid v HMRC (TC08906)

Reimbursing business mileage (Lecture B1403 – 23.50 minutes)

Reimbursing an employee for using their own vehicle for business mileage

Where an employee uses their own car, van, motorcycle or bicycle, for business mileage they can make a claim for reimbursement from their employer. Records should be maintained of miles travelled and purpose of journey. Other motor expenses incurred during a business journey such as parking or tolls or subsistence can be paid in addition to the mileage reimbursement and would be tax free subject to evidence/receipt.

The sum reimbursed for mileage can be paid tax free if the employer uses the rates set by HMRC – see below. Should the employer decide to pay at a higher rate there will be tax and NIC implications. HMRC set the rates for "Approved Mileage Allowance Payments " (AMAP) back in 2011 - the rate has not increase since then.

Tax Exempt Amount – AMAP

Car or Van	45p per mile for first 10,000 business miles in a tax year (Includes electric) 25p a mile thereafter
Motorcycle	24p per mile
Bicycle	20p per mile
Passenger	5p per mile per passenger on business journey (own car, van or company car or van only)

To be tax free the reimbursed amount paid to the employee should be calculated as the business miles travelled multiplied by AMAP set out above. Employers need to reduce the rate used for cars and vans where the employee has travelled more than 10,000 business miles in the tax year from 45p to 25p a mile.

Where an employee receives payments from 2 or more associated employments all business travel is treated as relating to a single employment when calculating the 10,000 business miles limit.

Passenger payment

Should an employee take a number of colleagues with them on a business journey they can claim the 5p a mile passenger payment per passenger. For example, if the driver takes 3 passengers they can claim, tax free, a further 15p a mile.

The same applies where an employee with a company car or van on which they are chargeable to a car or van benefit takes passengers. The tax-free passenger payment can also be paid but the employer would not use the AMAP for the actual miles as they only apply to employer owned vans or cars.

Using a lower rate than AMAP

Some employers may decide to reimburse employees at a lower rate than the AMAP. In such cases the employee can claim the tax relief on difference on their Self Assessment tax return.

Paying higher rates

Some employers may decide not to use HMRC tax free rates but to pay at rates that exceed the approved amount. In this case the *excess* over the AMAP must be reported in Section E of the P11D form for tax to be collected by HMRC. Any national insurance due would be calculated through the payroll but this would depend on mileage rate used – see below.

National Insurance

The rules vary from above. Class 1, payroll NIC, is ONLY payable where the reimbursement of mileage is paid above the 45p figure. Where the employer uses the HMRC approved rates no NICs would be due.

To calculate the figure subject to NIC the employer must first calculate the amount being paid, known as relevant motoring expense, (RME). From this they deduct or disregard what is known as the qualifying amount (QA). This is calculated by multiplying the employee’s business miles in the earnings period by the applicable AMAP rate listed above, except that the 45p rate is not reduced for over 10,000 miles.

If the RME paid to an employee in the earnings period exceeds the QA the excess should be added to earnings for that earnings period for NIC calculation BUT not PAYE. Where the RME paid is below the QA there is nothing to report.

Example

In October 2023 an employee travels 1,250 business miles in the earnings period. They have already exceeded the 10,000 miles threshold. The employer reimburses at 50p per mile.

The NIC position would be:

RME 1,250 miles @ 50p	625.00
QA 1,250 miles @ 45p AMAP	562.50
Excess subject to NIC via payroll	£62.50

BUT the tax position would be:

RME 1,250 miles @ 50p	625.00
QA 1,250 miles @ 25p AMAP	312.50
Excess subject to TAX	£312.50

The £312.50 is reported to HMRC on the 2023/24 P11D section E

General Round Sum Allowance paid to Employee for using Own Vehicle

Where an employer pays an employee a round sum cash allowance for using their own car for business purposes the allowance should be dealt with through the payroll and subject to deduction of PAYE and NIC. It should be treated as a round sum allowance as it can be spent as the employee wishes. However, the employee can make a claim, on their tax return, for tax relief on business mileage using the AMAPs above, for expenses incurred wholly, exclusively and necessarily in the performance of employment duties.

Paying an Allowance to An Employee instead of providing a Company Car

Due to rising costs many employers may consider offering an employee a car allowance rather than providing them with a company car. From the company's view they do not have company funds tied up in the purchase or lease of a car. Nor do they have to pay the costs of insurance, servicing, repairs, roadside recovery and depreciation.

Instead, they pay the employee a sum each month, as a car allowance, which is processed through the payroll so subject to tax and NIC. The employee receives the funds through net pay and can use the money as they wish, towards the cost of buying or leasing a car or to repay their mortgage. It is important the employee understands that a car allowance of say £750 is a gross figure and they will receive a lower figure after deductions.

When reimbursing business mileage, the employee should be treated as using their own car and not a company car. Therefore, business miles are reimbursed at AMAP rates and not the advisory fuel rates below.

If the rates paid by the employer are less than AMAP rates they can claim tax relief on business mileage through their Self Assessment tax return.

Taxable Benefit (Fuel Scale charge) for Company Car available for private use

Where the employer pays all the fuel costs for an employee with a company car, whether the fuel is used on business travel or private, a taxable benefit arises – known as the fuel scale charge. This taxable benefit is reported on the form P11D.

For 2023/24 tax year the taxable benefit for fuel is calculated by multiplying a fixed figure by a percentage. From 6 April 2023 the fixed figure is £27,800, increased from £25,300. The percentage figure is the same used to calculate the car benefit charge for the year and ranges from 2% to 37% depending on the CO_2 emissions and electric range.

Reducing fuel benefit to NIL

To reduce the fuel benefit to Pranav Agrawal zero, the employee must either be required to “make good” the cost of private motoring, including home to work travel, or the fuel must only be supplied for business journeys.

When “making good” the cost of private travel the employee can replace the fuel used for private purposes by buying fuel from their own pocket or by direct payment to the employer. The employee must keep accurate mileage records to identify both business and private journeys.

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

Reimbursing Business Mileage for company car where fuel not paid for by employer

Where an employee has a company car but pays for fuel personally they can claim for business mileage undertaken in their company car. Records should be maintained of miles travelled and purpose of journey.

The sum reimbursed for mileage can be paid tax free if the employer uses the advisory fuel rates set by HMRC – see below. HMRC set these rates each quarter so employers must ensure they are using the correct rates in each quarter.

Advisory Fuel Rates for business miles where employee is provided with a company car

Engine Size	Petrol	LPG	Diesel
Current fuel costs per HMRC	£1.462	87.3p	£1.482
From 1 September 2023			
1,400cc or less	13p	10p	
1,401 to 2,000	16p	12p	
Over 2,000	25p	19p	
1,600cc or less			12p
1,601 to 2,000			14p
Over 2,000			19p

From 1 June 2023 to 31 August 2023

1,400cc or less	14p	10p	
1,401 to 2,000	17p	12p	
Over 2,000	26p	18p	
1,600cc or less			14p
1,601 to 2,000			17p
Over 2,000			22p

See HMRC guidance for rates for earlier quarters

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

Fully Electric Cars

The advisory rate for a fully electric car is 10p per mile from 1st September 2023 previously 9p from 1 March 2023 to 31 August 2023, 8p from 1 December 2022 to 28 February 2023.

Opting out of fuel benefit for company car

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

Tax position for paying for charging electric cars

Company car - car owned or hired by employer:

Employer pays to charge car - there is nothing to report – no benefit regardless of whether business or private mileage.

Employee pays to charge car – employee can claim for business miles at tax free rate 10p a mile.

Employee pays to charge car and employer reimburses:

- Business and private use - treat total reimbursement as earnings and employee can claim tax relief for business mileage at 10p
- Only business miles at 10p - nothing to report
- Only private use – treat reimbursements as earnings through payroll

Employee car – car owned or hired by employee

Employer pays to charge car at workplace or near workplace – taxable benefit on total cost of electricity and employee can claim AMAP for business miles *at 45p a mile.*

Employer pays to charge elsewhere:

- business mileage only - cost of electricity is reported as a benefit and employee should claim for AMAP for business miles at 45p
- private journeys only – cost of electricity is reported as a benefit
- both business and private journeys – cost of electricity is reported as a benefit and employee should claim for AMAP at 45p for business miles

Employee pays to charge car - they can claim AMAP at 45p re business miles

Employee pays to charge car and employer reimburses per mile:

- Only business use - there is nothing to report if miles claimed at AMAP 45p
- Only private use – treat reimbursements as earnings so payroll
- Business & private use - treat total reimbursement as earnings and employee claims business mileage relief at 45p

Employee pays to charge car and employer reimburses a flat rate per month:

- Only business use – treat flat rate as earnings and employee claims business miles relief at 45p per mile
- Only private use – treat reimbursements as earnings so payroll
- Business & private use - treat reimbursement as earnings and employee claims business mileage relief at 45p a mile

Company Vans

Class 1A NIC due – BOX G of the P11D Form

Vans available but not for private use **-** the scale charge is **NIL** where both conditions are satisfied for all of the tax year:

- Only be available to employee for business travel and commuting – must not in fact be used for any other private purpose except to an insignificant extent
- Be available to employee mainly for use for the employee’s business travel

Private use is “Insignificant” if it is:

- A few days in the tax year as a whole
- Insignificant in quality – a week’s private use is not insignificant
- Intermittent or irregular
- The exception in terms of pattern of use

For example – a trip to the dentist on the way to work, stopping at the newsagents, trip to the tip would count as insignificant. Whereas doing the weekly shop, going on holiday in the van, using the van for social activities would create a taxable benefit.

Vans available for private use – for 2023/24 the cash equivalent of a company van available for private use is £3,960 increasing from £3,600 for 2022/23. There is no reduction for the age of the van. A zero-emission van is, per HMRC, "one that cannot emit CO2 by being driven" and for tax years 2021 to 2022 onwards the cash equivalent is NIL.

The scale charge can be reduced:

(a) when the van is unavailable for 30 consecutive days or more,

(b) if the van is shared with other employees or

(c) payments are made for any private use.

For shared vans the taxable benefit is calculated and then the benefit is apportioned in a reasonable basis between those employees who have concurrent use. The total charge for a shared van should be the same as if one employee has used it.

In order to reduce the benefit by the payments made for private use there must be a requirement to pay and the employee must be paid before the 6th July following the end of the tax year.

Fuel scale charge for company van – A separate fuel scale charge applies where fuel is provided for private motoring in a company van. The cash equivalent for 2023/24 is set at £757 and was £688 for 2022/23**.** This can be reduced to NIL if the employee is required to either pay for the cost of fuel for private motoring and does so or replaces the fuel used.

Contributed by Alexandra Durrant

Charging company cars and vans at home (Lecture P1401 – 18.26 minutes)

Certain payments and benefits like road tax, insurance and repairs, when related to taxable company cars and vans, are exempted from being taxed as a benefit in kind (s.239 ITEPA 2003).

Previously, HMRC maintained that the reimbursement of costs relating to charging a company car or van at a residential property was not covered by this exemption but it has revised its position.

Reimbursing part of a domestic energy bill, which is used to charge a company car or van, will fall within the exemption. However, the exemption will only apply where it can be demonstrated that the electricity was used to charge the company car or van. Employers will need to make sure that any reimbursement made towards the cost of electricity relates solely to the charging of their company car or van.

https://www.gov.uk/government/publications/employer-bulletin-october-2023/october-2023-issue-of-the-employer-bulletin#electric-charging-cars-vans

Residence: Common Misconceptions (Lecture P1402 – 21.14 minutes)

Recently in the press, there were reports about a member of the House of Lords who was looking to pay himself a large dividend whilst being non-resident in the UK: therefore, saving a substantial amount of tax. According to the press reports, this plan was defeated because as a member of the House of Lords, he is automatically resident in the UK. This may give his advisors or their professional indemnity insurers some sleepless nights!

It is now over ten years since the Statutory Residence Test (SRT) was introduced in the UK after 200 years without one. It is useful to remind oneself of some of the issues and common misconceptions.

It is often asked whether the old rules are still relevant after more than ten years of the SRT. They are because the deemed domicile test looks at 15 years out of the last 20 resident in the UK. Therefore, in order to test for deemed domicile, you need to look at the resident test under the old rules as well as the new.

There is still case law going through the courts which relates to the old residence rules. Most notably, the Charman case; but also, a case involving an Australian entertainer who was found to be UK resident under the old rules and consequently had a large UK capital gains tax liability. The old rules required that there needed to be a significant break in the pattern of life and a weakening of the taxpayer's ties to the UK. This requirement was not met in cases such as Gaines- Cooper and Peck.

Some taxpayers believe that becoming non-resident does not mean that one says goodbye to UK tax liabilities. That is not the case and non-residents remain subject to UK tax on most:

- UK source earnings
- UK property gains
- Temporary Non Residence rule

It is noteworthy that non-residents have been subject to UK gains on residential property since April 2015 and on commercial property since April 2019. Whenever they make a disposal of UK property, they are required to file the HMRC property return within 60 days of the date of the completion of the transaction. This is the case even if no CGT is payable.

The temporary non-resident rules catch remittances and chargeable gains within the 5 year period if the taxpayer resumes residence in the UK. For example, if the taxpayer left the UK in March 2023, made a chargeable gain in March 2025 and returned to the UK in March 2027, the chargeable gain made in 2025 would be reactivated in March 2027 and would therefore be a gain in the 2026/27 tax year.

Another common misconception is that when an individual is not resident in the UK that they do not need to be concerned if they exercise options over non-tax advantaged share schemes. Since April 2015, any gain is time apportion for the time of residence in the UK as a percentage of the total period, normally to the vesting date. So, for example, Kirsty was granted options and spends 1 year in the UK, 1 year in Germany, 1 year in Singapore. She then exercises her options making a gain of £30,000, she will be chargeable to UK tax on £10,000 of the gain. If the shares are readily convertible assets, then any tax would need to be collected under PAYE.

Another common misconception is that tax and National Insurance work in the same way, but this is definitely not the case. Liabilities to tax are governed by residence rules, double tax treaties, and a liability can be apportioned between two countries. National Insurance, on the other hand, is normally only payable in one state and is on a strict receipts basis; whereas tax may be calculated on an earnings basis.

So, if I take an example of Ralph, a Ruritanian national (for this example a country in the European Economic Area with a Double Tax Treaty with the UK) national spends two days working in the UK and three days in Ruritania per week for the same employer. Under the treaty, the UK will tax 40% of his earnings, assuming that he does not qualify under Article 15.2 for complete exemption. Under the social security agreement, 100% of the income would be subject to National Insurance in Ruritania.

Under a bilateral arrangement, such as the UK has with the United States, a UK person could remain subject to UK National Insurance for 5 years after leaving the UK.

Where there is no social security agreement, the UK would normally impose National Insurance on outbound persons for the following 52 weeks and would normally give an exemption for inbound assignees for 52 weeks when they come to the UK.

A further common misconception is that the tax year is always split in the year of departure and arrival into UK resident and non-resident periods. This is only the case where either an individual has left to work full-time abroad or is accompanying a partner to work full-time abroad or has abandoned their residence in the UK. One of the peculiarities is that non-residence only starts when the full-time working abroad starts. Therefore, if one has a gap before starting work abroad, then the date of departure from the UK would not necessarily trigger non-residence.

Finally, IHT liabilities are not determined by residence. Domicile is the important factor. If one dies domiciled in the UK, then one’s worldwide assets are subject to UK IHT. If one dies non-UK domiciled, then only UK situs assets are subject to IHT. Residence is not relevant, although periods of residence either in the UK and outside may affect the domicile position.

Contributed by Jeremy Mindell

Capital taxes

PPR: Demolished and rebuilt dwellings (Lecture P1403 – 11.19 minutes)

Background

Principal private residence (PPR) relief broadly applies to gains accruing to individuals on the disposal of (or of an interest in) all or part of a dwelling house which has (or has at any time during their period of ownership) been their only or main residence (s.222(1) TCGA 1992).

No part of a gain to which PPR relief applies Is a chargeable gain if the dwelling house has been the individual's only or main residence throughout their period of ownership, or throughout their period of ownership except for all or any part of the last nine months (s.223(1) TCGA 1992).

Period of ownership

Establishing an individual's 'period of ownership' for PPR relief purposes can be problematic.

For example, suppose that someone buys a dwelling house, has it demolished, and builds a new dwelling house on the same land as the old one. For PPR relief purposes, does the 'period of ownership' relate to the land on which both houses were built, or to the period during which the new house existed? This distinction can be very important when calculating the amount of PPR relief:

- If the period of ownership relates to the land, there will be a period between the old house being demolished and the new house being built when there was no residence as such, and therefore no occupation as an only or main residence, which is a prerequisite for PPR relief, resulting in a potential restriction in the amount of PPR relief available on a future disposal.

- If the 'period of ownership' for PPR purposes relates to the newly built dwelling, then if it was occupied as the individual's only or main residence until its eventual disposal, PPR relief shouldn't be restricted on that basis.

Which interpretation of 'period of ownership' is correct in this context - does the period run from when the land is acquired, or from when the new dwelling is built after the old one has been demolished?

Starting over

This point was recently considered by the Upper Tribunal in *Revenue and Customs v Lee & Anor* [2023] UKUT 242 (TCC).

On 26 October 2010, Mr and Mrs Lee jointly purchased a freehold interest in land for £1,679,000. Between October 2010 and March 2013, the original house was demolished, and a new house was built.

The new house was completed on 15 March 2013. On 19 March 2013, Mr and Mrs Lee took up residence in their new house. On 22 May 2014, they sold the dwelling for nearly £6 million. HMRC opened an enquiry into Mr and Mrs Lee's tax returns for 2014/15.

HMRC noted that the period between acquisition and the appellants moving into the rebuilt house was 29 months (i.e., from October 2010 to March 2013), and the total ownership period was 43 months (i.e., between acquisition on 26 October 2010 and sale on 22 May 2014). HMRC considered that the PPR relief available should be 18/43rds of the gain, being the PPR relief available at the time for the last 18 months of ownership. The First-tier Tribunal (FTT) allowed Mr and Mrs Lee's appeal, concluding that the natural reading of the legislation was that 'period of ownership' meant the period of ownership of the dwelling house being sold. HMRC appealed to the Upper Tribunal.

The central issue for the Upper Tribunal was statutory interpretation. HMRC's case was that the First Tier Tribunal made an error in deciding that the 'period of ownership' referred to ownership of the new house, as opposed to the plot of land. However, the Upper Tribunal pointed out that the difficulty with HMRC's interpretation was there was no reference in this context to any asset other than the dwelling house. The whole focus of the PPR relief provisions was on there being a dwelling house. The Upper Tribunal considered that an ownership interest in a dwelling house required that a dwelling house existed. HMRC's appeal was dismissed.

Other cases

The Upper Tribunal also rejected HMRC's submission that the First Tier Tribunal made an error in its treatment of the case law, in particular *Higgins v HMRC* [2019] EWCA Civ 1860 and *Henke v HMRC* [2006] STC (SCD) 561.

In *Higgins*, on 2 October 2006, the taxpayer entered into a contract to lease an apartment. However, the apartment did not exist in 2006; the area which was to become the apartment was simply a space in a tower. Work on the area that became the apartment began in November 2009. The apartment was completed in December 2009. The purchase was legally completed on 5 January 2010. The taxpayer had no right to occupy the dwelling prior to completion. He occupied the apartment as his principal private residence from 5 January 2010 until 5 January 2012. He entered into a contract to sell the apartment on 15 December 2011, and the sale was completed on 5 January 2012.

HMRC considered that the taxpayer's period of ownership commenced at the date of the contract to acquire the lease of the apartment and ended at the date of the agreement to sell. The time of disposal and acquisition was determined under s.28 TCGA 1992. In HMRC's view, the taxpayer's period of ownership began in October 2006 and ended on 15 December 2011. The case reached the Court of Appeal, where the main issue was the meaning of 'period of ownership' in s.223 TCGA 1992. In the court's view, the mere fact that someone contracted to buy a property would not give them 'ownership' such as could allow him to possess, occupy or even use the property, let alone to make it their 'only or main residence'. Allowing the taxpayer's appeal, the court concluded that the taxpayer's 'period of ownership' of the apartment for PPR relief purposes did not begin until the purchase was completed.

Returning to the *Lee* case, whilst acknowledging that the earlier cases were not the same in context, the First Tier Tribunal stated that *Higgins* lent credence to the view that 'period of ownership' was unlikely to start before the asset in question existed, notwithstanding the differentiation between land and a space in a tower.

In *Henke*, the period of ownership was held to start when the land was purchased, not when the dwelling was constructed. A married couple had purchased the land in 1982 with planning permission for the construction of a house, which commenced in December 1991. The couple took up residence in the house in June 1993. The Special Commissioner held that the 'throughout the period of ownership' condition in s.223(1) TCGA 1992 was not met. An apportionment was therefore required, limiting PPR relief to the period of ownership from the first occupation of the house as the taxpayers' PPR in 1993.

However, the First Tier Tribunal in *Lee* stated:

> "The fact that the definition of 'land' includes dwelling houses upon that land does not operate in reverse to mean that 'dwelling house' should be read to include the land."

The Upper Tribunal subsequently held that the First Tier Tribunal was correct to depart from the reasoning in *Henke.*

The last word?

HMRC's guidance in the Capital Gains Manual (at CG64923) states that where a dwelling-house is purchased and disposed of by way of contract, the period of ownership for PPR relief purposes will generally commence on completion of the contract to acquire the dwelling and cease on completion of the contract to dispose of it, and that PPR relief should be computed on that basis.

However, HMRC's guidance does not deal specifically with the demolition of an old dwelling and the building of a new dwelling on the same plot of land. At the time of writing, it is not known whether HMRC intends appealing the Upper Tribunal's decision in the *Lee* case, so it may not be the last word on this matter.

Contributed by Mark McLaughlin

Geographical scope changes of IHT reliefs (Lecture P1404 – 11.29 minutes)

Agricultural relief

For IHT purposes, agricultural relief is available for transfers of agricultural property at rates of 100% or 50% under Ss115 – 124C IHTA 1984. Unlike business relief which operates on a worldwide basis, agricultural relief is restricted to farmland located in:

- the UK;
- the Channel Islands and the Isle of Man; and
- any state which is part of the EEA at the time of the transfer.

Woodlands relief

If any part of the value of a person's estate immediately before his death is attributable to the value of land in the UK or an EEA state on which trees or underwood are growing (but which is not agricultural property), an election can be made to exclude the value of the woodlands in determining the value transferred on the death. In that case, IHT is chargeable on a later disposal of the trees or underwood.

These rules are found in Ss125 – 130 IHTA 1984.

The impact of FA 2009

In order to ensure compatibility with EU law, action was taken in FA 2009 to widen the scope of the agricultural and woodlands reliefs to include property located in the EEA.

FB 2024 changes

Now that the UK has left the EU, the Government has decided to reverse those earlier measures so that property located in the EEA will again be treated in the same way as property located in the rest of the world.

In addition, these proposals make a further change to remove the anachronistic expansion of agricultural relief in FA 1975 to farmland located in the Channel Islands and the Isle of Man. The purpose of this 1975 provision was to reflect changes to the domicile legislation which had just been introduced and which meant that those moving from the UK to the Channel Islands or the Isle of Man were deemed to be domiciled in the UK. As a result, their worldwide estate would fall within the scope of what was then CTT in the event of their death.

However, these deemed domicile provisions were removed from the statute book a decade later and so the estates of those who had relocated from the UK to the Channel Islands or the Isle of Man were no longer subject to this tax treatment. Although it is somewhat late in the day, the extension of agricultural relief to farmland in the Channel Islands and the Isle of Man is therefore no longer needed. FB 2024 will withdraw this relief and ensure that agricultural property is aligned in geographical scope with woodlands relief.

These changes take effect for transfers and other chargeable occasions falling on or after 6 April 2024.

Contributed by Robert Jamieson

Reservation agreement prior to acquisition (Lecture P1401 – 18.26 minutes)

Summary - Agreement to reserve an apartment within a residential property was not an option for SDLT purposes, meaning that the agreement fees and ultimate purchase price were chargeable at the SDLT residential rate.

In these two lead appeals, a potential purchaser entered into a reservation agreement, expressing the wish to purchase a specified apartment in a new-build residential property development for a specified price. Under the agreement the potential purchaser would pay a specified reservation fee (0.2% to 0.3% of the purchase price). Each agreement stated that the reservation period was for a specified number of days, after which the agreement would be automatically extended until ended by the vendor on giving 5 days’ notice.

Each appellant subsequently acquired a 999-year lease of the apartment, submitting an SDLT return indicating that that transaction was chargeable to SDLT at the residential rate. This was later amended to reclassify the transaction as chargeable at the non-residential rates on the basis that the:

1. Reservation agreement was an option and/or right of pre-emption within the meaning of s 46(1) FA 2003 falling outside the definition of residential property meaning that the non-residential SDLT rates applied;

2. Subsequent acquisition of the residential property was a linked transaction to the non-residential option; with mixed use the non-residential rates therefore applied.

HMRC disagreed, issuing closure notices on the basis that the original return had been correct.

Decision

The First Tier Tribunal found that:

- under the reservation agreements the vendor was obliged not to negotiate with anyone other than the potential purchaser;

- the agreement was neither an option nor a pre-emption agreement over land as it did not confer any right on the prospective buyer and imposed no legal obligation on the vendor to sell the apartment to the prospective purchaser.

Consequently, as the reservation agreement was not a land transaction, it could not be a linked transaction with the acquisition of the 999-year lease of the apartment and the appeal failed.

Further, the Tribunal found that even if the reservation agreement were an option over land that was linked with the subsequent lease acquisition, the residential rate of SDLT would have been chargeable as the apartment was residential land. It would have made no difference if at the time of the agreement construction had not yet begun.

The Tribunal commented that:

> 'If the appellants' arguments in these appeals had been accepted, that might have led to the question whether any purchaser of any residential property could avoid having to pay SDLT at the residential rate, through the simple device of entering into a reservation agreement shortly before contracts are exchanged.'

Landmaster Investment Limited and another v HMRC (TC08919)

Adapted from the case summary in tax Journal (22 September 2023)

Dilapidated property was a dwelling (Lecture P1401 – 18.26 minutes)

Summary – At the time of the purchase, the property was suitable for use as a dwelling, meaning that SDLT had been correctly paid using the residential rates and no refund was due.

Henderson Acquisitions Ltd bought and renovated domestic houses for resale.

In August 2016, following the death of its former owner and occupier, the company acquired a property in Letchworth, Hertfordshire, which had been vacant whilst probate was obtained.

The company paid SDLT in the basis that the property was residential and, having been bought by a company, the higher rates of SDLT applied.

Prior to purchase, the company considered the property to be a suitable property for renovation; it appeared “sound but needed modernising”.

However, shortly after purchase, the kitchen ceiling had collapsed due to a leaking water pipe in the central heating system. This limited safe access to the kitchen, dining room, bathroom and one bedroom. Looking at a floor plan, the damage affected less than half of the property’s floor area.

Further, the whole property needed rewiring as over the years there had been “multiple DIY alternations … [using] incorrect cable sizes and types, termination points in inaccessible locations and numerous potential fire hazards from incompetent workmanship”.

The work needed was all undertaken without needing to demolish any part of the building which, at all times remained sound.

However, the company was later advised that following the decision in PN Bewley Ltd v HMRC where the property had needed to be demolished, the company should seek an SDLT refund as the property was not “suitable for use as a dwelling” meaning that non-residential rates of SDLT applied.

Following an enquiry into the claim, in March 2020, HMRC rejected the claim arguing that the replacement of central heating systems, damp proofing, replacing flooring etc were not sufficient to render the property unsuitable for use as a dwelling (Fiander and Bower v HMRC).

The company appealed.

Decision

The First Tier Tribunal noted that prior to purchase, the property had been occupied as a dwelling by its former owner.

The Tribunal found that the property was 'structurally sound', had all the required facilities for living and less than half of the floor area was considered to be unsafe. In its view, the renovation work required was all of a type which might have been needed in order to make a dwelling into a habitable residence meeting modern building standards.

The First Tier Tribunal concluded the company had renovated the dwelling “into a beautiful house ready for immediate occupation. They did not take a non-residential building and make it into a dwelling.”

The appeal was dismissed.

Henderson Acquisitions Ltd v HMRC (TC08922)

Rented garage

Summary – Despite the taxpayer renting out a garage from the date of completion of a property purchase, residential rates of SDLT applied.

On 12 January 2022, Thomas Kozlowski bought a property in Esher, Surrey for £2.1 million that consisted of two property titles registered at HM Land Registry:

1. The "main house" that included an integral garage and extensive gardens with an outdoor swimming pool;

2. The "garage land" which was a small strip of land adjoining the garden of the main house with a separate garage accessed through a door opening onto the garden. On the day of completion, Thomas Kozlowski let this garage to a company to use for storage charging £50 a month.

Both titles had been in common ownership since at least 1987 and were purchased together under a single contract from the previous owner.

Thomas Kozlowski initially submitted a stamp duty land tax return on the basis the whole property was residential and, as this was his second property, the higher residential rates applied.

However, a few days later, he amended the return on the basis that the purchase was mixed use and HMRC issued a refund.

Following an enquiry, HMRC issued a closure notice on the basis that the property was wholly residential and that £134,250 of SDLT was repayable.

HMRC claimed that:

- The lease was entered into after the time of completion, so at the instant of completion, the property was wholly residential.

- In any event, the garage fell within the definition of residential property in s. 116(1)(b) and the use of the garage was irrelevant.

Thomas Kozlowski appealed arguing that it was necessary to consider the status of the property "at the date and not the time of a transaction". Given that at the end of the effective date there was a commercial lease over the garage in place, the property was mixed use.

Decision

The First Tier Tribunal found that there was nothing in the legislation that stated it was necessary to consider the nature of the transaction on the effective date rather than at the time of completion.

Following the principle in Ladson Preston v HMRC, an SDLT multiple dwellings relief case, one should consider the position at the time a property is acquired. At the time of completion, the interest was wholly residential.

That was enough to decide this case, but given that the remaining issues were fully argued, the Tribunal went onto consider them. S.116(1)(b) includes within the definition of residential property land that is or forms part of the garden or grounds which is used as a dwelling, including any building or structure on such land.

Although the property comprised two title numbers, both titles had been in common ownership for many years and were acquired by the taxpayer in a single transaction. Prior to acquisition, they had been used as a single residential property at the time of the sale and were marketed as such. Indeed, Thomas Kozlowski continued to store his own possessions in the garage as well as those of his tenant. The Tribunal concluded that the garage was not used for a separate non-residential purpose but was part of the garden or grounds.

Thomas Kozlowski v HMRC (TC08902)

Administration

Failure to take reasonable care (Lecture P1401 – 18.26 minutes)

Summary – Having carried out no background checks on his agent prior to appointment and having failed to review the tax returns submitted on his behalf, HMRC's penalties were upheld as the taxpayer was found to have acted carelessly.

Sunil Joseph worked as a social worker, with tax and national insurance deducted under PAYE.

Through emails from his trade union, he learned about his 'entitlement' to expense claim and approached an agent who claimed to have previously worked for HMRC, which Sunil Joseph 'took his word for, carrying out no background checks of his own.

Using only the P60s supplied by Sunil Joseph, the agent submitted Self Assessment returns for 2013/14 to 2017/18 on his behalf, which included:

- deductions for travel, subsistence and professional fees;
- trading losses for 2013/14 to 2016/17 on the basis that he had been self-employed and the losses had been set off sideways against his employment income.

This resulted in tax repayment claims for the five tax years totalling just under £23,000.

Later, HMRC raised discovery assessments to recover the income tax repayments and imposed £3,412.56 of penalties for inaccuracies in his tax returns.

The tax liabilities and related interest amounts were accepted and are being settled by way of a payment plan. However, Sunil Joseph appealed the penalties.

Decision

The First Tier Tribunal found that Sunil Joseph had not taken reasonable care as he had failed to:

- carry out any kind of due diligence relating to his agent.
- check his tax returns before they were submitted.

Further, the expenses claimed were not supported by any receipts. These checks did not require any specialist tax knowledge.

His appeal was dismissed.

Sunil Joseph v HMRC (TC08895)

Penalties for inaccuracies in EBT PAYE returns

The scheme in this case involved an employment benefit trust (EBT) but its structure was significantly different to the 'standard' EBT model. Under the scheme:

- The company implementing the scheme paid a very large sum to a remuneration consulting firm for advice;
- That advice invariably led to the consultants recommending the use of an EBT
- The consulting firm, after deducting its fee, set up the EBT using the balance of the money paid to it by the company and loans were made by the EBT in the usual way to the directors of the company which had implemented the scheme.

It was accepted that the scheme did not work and that PAYE and NICs should have been applied to the amounts involved. The appeal was about whether the conditions for a failure to take reasonable care penalty were met when the:

- company had sought advice from its own accountants, rather than simply relying on the scheme promoter's advice;
- accountants expressed caution about the scheme and advised that the company obtain an independent counsel's opinion;
- company ignored that advice.

The First Tier Tribunal found that it had failed to take reasonable care and confirmed the penalties.

Delphi Derivatives Ltd v HMRC (TC08912)

Taken from Tax Journal (15 September 2023)

Hybrid partnerships with property **(Lecture B1402 – 14.20 minutes)**

In a recent article, we reviewed a Spotlight published by HMRC on a tax avoidance scheme relating to school fees. There is another one (Spotlight 63) on a scheme involving property businesses.

As a reminder, the Spotlight regime was instigated some years ago by HMRC where the department has identified a scheme which they believe does not work. These are schemes which HMRC has not yet had the opportunity to formally challenge but where they are indicating, in advance, that they will enquire into any taxpayer who has utilised the planning. So, these are meant to act as a warning. If someone uses a scheme which has been highlighted by a Spotlight, it is likely HMRC will argue that a deliberate offence has been committed and so penalties will be higher if it is shown not to work.

HMRC contends that the arrangements seek to avoid tax by allowing individual or joint property landlords to transfer their properties to a limited liability partnership (LLP) with a corporate member. The LLP then allocates profits on a discretionary basis to members.

The arrangements claim to work as follows:

1. The individual landlords or their family members, or both, set up a limited company.

2. The individual landlords set up an LLP alongside the limited company – the limited company is considered the corporate member.

3. The individual landlords transfer their properties to the LLP.

4. The members of the LLP (the individual members and corporate member) allocate the LLP profits to themselves on a discretionary basis to make sure that
    a. The individual members remain basic rate taxpayers
    b. The remaining profits are allocated to the corporate member

5. The corporate member claims a deduction for finance costs (such as mortgage interest) relating to the properties.

Landlords are advised that this arrangement results in less tax being payable for the following reasons:

- The transaction relating to the contribution of properties to the LLP has no upfront tax cost and properties' base costs are uplifted to their market value at the date of transfer for CGT;

- The landlords remain basic rate taxpayers meaning they are not impacted by finance cost restrictions;

- The corporate member can claim a full deduction for its share of finance costs as finance cost restrictions do not apply to it;

- The corporate member is subject to Corporation Tax on its net profit share instead of paying higher or additional income tax rates that would apply if the profits had been allocated to the landlords;

- Calculating the capital gain using an uplifted base cost at the date the properties are contributed to the LLP reduces the Capital Gains Tax paid compared to using the original purchase and improvement costs, if the property is sold;

- Business Property Relief (BPR) may be claimed in respect of a hybrid structure carrying on a property rental business resulting in no Inheritance Tax being due, if the landlord dies.

This scheme is seeking to address issues which we have also discussed in previous articles where property landlords are suffering a higher rate of tax due to the interest relief restrictions introduced in 2017.

Whilst transferring into a limited company would remove that problem, there is a CGT cost unless it can be shown that the property rental is a business so that incorporation relief under s162 TCGA 1992 can be claimed and an SDLT cost unless there is a pre-existing partnership (and joint ownership does not mean a partnership exists).

In HMRC's view, there is a long list of reasons why this scheme does not work and it is actually difficult to disagree with the technical analysis put forward by HMRC:

- The mixed member partnership legislation introduced in 2013 attacks excess profit allocation to a corporate member;

- This may be caught by the disposal of income streams anti-avoidance legislation in ITA2007;

- The transfer of assets to a partnership does not result in an uplift in the base cost as the LLP is transparent for CGT purposes so the partners are treated as continuing to hold the property; and

- A property rental business is unlikely to qualify for BPR even if it is conducted via an LLP as it is still an excluded business of 'making or holding investments'.

One interesting aspect of this Spotlight is that HMRC states 'if you think you're already involved in this arrangement and want to get out, HMRC can help. HMRC offers a range of support to get you back on track …'. It is unclear what they propose but it may be that they are willing to allow such arrangements to be unravelled without triggering further tax charges or penalties. The normal warning about what will happen for those who don't choose to stop using these is obviously included.

As someone who advises on this area of tax, it is a scheme which is familiar and one of a number that are currently marketed aggressively by the many property websites available to property landlords.

Further investigation shows that these schemes typically involve declaring a trust over the property in favour of the LLP without actually transferring the property. An added benefit of this is that there is 'no need to tell the mortgage lender'. Although not a tax issue, this is likely to cause a default on the mortgage and may make the property impossible to mortgage.

The HMRC commentary also does not mention the SDLT position. Transfer into a corporate partnership would trigger an immediate SDLT liability since the rules which would normally exclude SDLT applying where property is transferred into an LLP do not apply in the same way where there is a corporate member. Since the SDLT partnership provisions rely on income shares rather than capital shares, this would be triggered. There would also be an SDLT charge every time there is a change in the property sharing as this would be a property investment partnership.

It is important to note that there are other schemes out in the market which are also subject to some debate as to their effectiveness.

One such scheme involves transferring a property into a company in exchange for shares but with the completion being deferred so that the individual remains the registered owner of the property with a trust arrangement put in place instead. This means that the mortgage lender (in the promoter's view) does not need to be notified. Incorporation relief is claimed and it is recommended that this is done by a partnership so that no SDLT is due. The individual continues to pay the mortgage but the company agrees to indemnify the individual against the interest and so reimburses the interest to them. The company claims tax relief on these payments.

It is likely that this puts the individual in default on their mortgage. The likelihood is that the individual is taxable on the indemnity payments but can't claim relief for the interest as they are no longer running a property rental business. The company would not be able to claim a deduction for the interest costs as these are governed by the loan relationship provisions and these payments do not arise from a transaction for the lending of money. HMRC could then potentially disallow them as not being wholly and exclusively for the purposes of the property business.

Finally, another scheme was promoted to a client of mine which involved formation of an LLP into which property was transferred. The LLP was then put into liquidation and the property transferred out of the LLP into a new company. This is done within 12 – 18 months.

The technical analysis by the scheme promoters was that the LLP would get uplift to market value for CGT purposes at the time that the property is introduced into the LLP as it would lose its transparency when it goes into liquidation. It can therefore transfer into the company without any tax being paid (assuming no uplift in value since the LLP is formed) with the amount left outstanding on loan account for the previous individual owner but without tax having been paid on the uplift. The SDLT partnership provisions are not disapplied by the liquidation but the anti-avoidance provisions which would normally stop this being done within 3 years are not relevant due to the circumstances.

The arguments made in this case seemed more plausible but were backed up by lots of statements stating that barrister's opinion had confirmed their technical analysis but was not available for us to see because they could not find them. My advice to the client in the end was that there was scope for HMRC to make arguments which could be difficult to counter. We had been told that HMRC had considered this in other enquiries and agreed it worked but that they could not give us details due to client confidentiality. I could not recommend the client used this scheme as I felt it relied (in my actual words) on a 'somewhat twisty interpretation of the legislation'. In the end, he did not go ahead due to the eye-watering level of fees that they wanted to proceed.

Whilst there is obviously room for tax planning when advising clients, this is obviously an area where there needs to be detailed scrutiny of anything being promoted to clients. As has been said before, if something seems too good to be true, it probably is!

Contributed by Ros Martin

Case study: Worldwide Disclosure Facility (Lecture P1405 – 11.56 minutes)

This article considers a case study involving a submission under the Worldwide Disclosure Facility and highlights some of the pitfalls that await advisers submitting disclosures to HMRC.

Background

The taxpayer, an individual, Mr X, was sent a "nudge letter" by HMRC. The letter referred to overseas income and gains that had not been declared to HMRC. The taxpayer had submitted tax returns to HMRC, but had not disclosed any overseas income or gains.

Mr X's accountant spoke to the client about the letter, and enquired whether there were any sources of overseas income or gains which had not previously been disclosed to the accountant.

After several discussions and exchanges with the client, it was established that there was an offshore source of income that had not been disclosed. The accountant determined that there were amounts which could be offset against the income. The accountant considered that the client had taken reasonable care, such that there was only a liability for four years, and a penalty was not due. The accountant calculated the tax, and interest, that was due, and recommended that the client pay approximately £15,000 to HMRC to cover the liability. The disclosure was submitted to HMRC under the Worldwide Disclosure Facility.

The disclosure was subsequently reviewed by HMRC, who requested various information and supporting documents. The investigating officer subsequently met with the taxpayer, without the accountant present, and raised further queries. After a period of time, the officer concluded his review of the information provided, and sent his own calculations to the accountant.

The HMRC officer determined that Mr X had not taken reasonable care, and sought liabilities going back 20 years, on account of the taxpayer’s deliberate behaviour. In addition, the officer considered that the amounts offset by the accountant against the income were not allowable. The amount sought by the officer was, approximately, £400,000, which included a significant penalty (150%) under the Requirement to Correct regime. It was at this point that I was asked to get involved.

Case review

It was important to establish the facts with the client, and to identify all relevant information and factors, including any not previously uncovered by the accountant, including relating to the client’s health. It was also necessary to consider the technical position in relation to the amounts claimed by the accountant, and which had been offset against the overseas income.

I requested all the correspondence with HMRC, together with the officer’s computations, and the HMRC notes of the meeting with the client, so that I could conduct a comprehensive review of the position. I concluded that the liabilities sought by HMRC were, broadly, correct.

However, there were various representations which could be made in relation to HMRC’s ability to recover certain liabilities. In addition, my review of the meeting notes indicated that the officer had not followed the correct procedures during the meeting with the client. A comprehensive submission was sent to HMRC, including comment on the procedural issues arising from the meeting with the client.

Outcome

After discussion with HMRC, the representations made were accepted, including that a penalty was not due under the Requirement to Correct provisions, and the client’s liability was significantly reduced from that sought by the investigating officer.

The settlement figure was considerably higher than that calculated by the accountant, but reflected the reality of the circumstances and what had transpired.

Ultimately, the client was happy with the outcome, as was the accountant.

Practical points arising

The case highlights the pitfalls and traps that await accountants submitting disclosures to HMRC, including the following:

- Failing to take specialist advice soon enough (or at all) (earlier input from me in this case could have helped to establish the position without the intrusive enquiries from HMRC);
- Not taking into account, or establishing, all relevant factors in a case;
- Not establishing the correct technical position;
- Not being able to take an objective view of the client's circumstances (when, for example, considering the client's behaviour to determine the appropriate assessing period);
- Not managing requests for meetings with HMRC (there isn't a legal obligation on the client to attend a meeting with HMRC in the circumstances noted above), or pre-empting the possibility with the client;
- Being aware of the potential for the case to be investigated under Code of Practice 9 (the Contractual Disclosure Facility), where HMRC suspect fraud, or, potentially, using HMRC's criminal powers.

Contributed by Phil Berwick, Director at Berwick Tax

Deadlines

1 November 2023

- Corporation tax for periods to 31 January 2023 (SMEs not liable to pay by instalments)

2 November 2023

- Form P46 (Car) for quarter ended 5 October 2023

5 November 2023

- Specified employment intermediaries to file return for tax quarter to 5 October 2023

7 November 2023

- VAT returns and payment for 30 September 2023 quarter (electronic payment)

14 November 2023

- Quarterly corporation tax instalment for large companies depending on period end
- Monthly EC sales list (paper return) – business selling goods based in Northern Ireland

19 November 2023

- Pay PAYE, NICs, CIS return and student loan liabilities for month to 5 November 2023 (by cheque)
- File monthly CIS return

21 November 2023

- File online monthly EC sales list –business selling goods based in Northern Ireland
- Submit supplementary intrastat declarations for October 2023
  - arrivals only for a GB business
  - arrivals and despatch for a business in Northern Ireland

22 November 2023

- Pay PAYE, National Insurance, CIS and student loan liabilities (online).

30 November 2023

- Accounts to Companies House
  - private companies with 28 February 2023 tear end

  - public limited companies with 31 May 2023 year end
- CTSA returns for companies with accounting periods ended 30 November 2022

News

Bernie Ecclestone pleads guilty to offshore fraud

Former head of Formula 1 Bernie Ecclestone has pleaded guilty to a single charge of fraud by false representation after failing to declare a trust in Singapore. He has been sentenced to 17 months in jail, suspended for two years, and has made a payment of more than £652milion covering tax, interest and civil penalties. Part of the payment is a failure to correct penalty for offshore non-compliance charged at the maximum rate of 200%.

Taken from Taxation (19 October 2023)

https://www.mynewsdesk.com/uk/hm-revenue-customs-hmrc/pressreleases/bernie-eccleston-convicted-of-fraud-3279299

Business Taxation

Compensation payments were disallowed (Lecture B1401 – 21.33 minutes)

Summary – Looking at the compensation payments as a whole, they were made in lieu of penalties, making them non-deductible for corporation tax.

The companies in this case were energy providers regulated by the energy regulator, Ofgem.

They entered into settlement agreements with Ofgem in settlement of a number of regulatory investigations into matters such as mis-selling, complaints handling and costs transparency.

The First Tier Tribunal concluded that:

- payments to make good the loss the customer had suffered totalling some £554,000 were allowable as they were paid directly to consumers as <u>compensation</u>, paid wholly and exclusively for the purposes of the trade.

- the remaining £28 million redress payments, although wholly and exclusively incurred for the purposes of the trade, were effectively <u>penalties</u> and therefore not tax deductible.

The case moved to the Upper Tribunal.

Decision

The Upper Tribunal considered the First Tier Tribunal had been wrong to distinguish between punitive payments and compensatory ones.

On the redress payments, the First Tier Tribunal had held to be non-deductible, the Upper Tribunal agreed that it was entitled to find that the agreements were entered into under the threat of penalties and therefore the payments were made in lieu of the penalties. They were therefore penal in nature and not deductible.

Turning to HMRC's appeal, the Upper Tribunal agreed that the First-Tier Tribunal had made an error of law in concluding that £554,000 was tax deductible. The facts indicated the £554,000 payment was clearly part of a package of payments, negotiated as part of an overall deal, put together under the threat of penalty and was so also paid in lieu of a penalty.

The Upper Tribunal remade the First Tier Tribunal decision to the effect that none of the payments were deductible.

Scottish Power Ltd and others v HMRC [2023] UKUT 218 (TCC)

S.455 when withdrawing suppressed funds (Lecture B1401 – 21.33 minutes)

Summary - Supressed turnover resulted in the sole shareholder/director being personally liable for VAT and corporation tax penalties but this did not mean that the resultant s.455 charges had been deliberately unaccounted for.

Prutish Gopaul was the sole shareholder and director of Gopaul Limited, a company trading under the name "Milano Pizza".

In June 2017, HMRC issued the company with "best judgement" assessments for £74,000 of VAT relating to suppressed turnover. Further, HMRC issued deliberate behaviour penalties on the company and a personal liability notice for the same amount on the basis that the inaccuracies were attributable to the director.

HMRC then opened enquiries into the company's corporation tax returns, subsequently issuing discovery and amended assessments for the years 2014 through to 2017 relating to corporation tax on undisclosed profits and s.455 charges relating to the undisclosed profits effectively withdrawn from the company by Prutish Gopaul, as loans to him as a participator.

HMRC also issued the company with a £71,000 penalty being 56% of the total extra corporation tax, on the basis that the behaviour had been deliberate as well as a personal liability notice of the same amount.

In February 2018 the Company went into liquidation and was finally struck off on 19 August 2020.

Prutish Gopaul appealed the personal liability notices for both VAT and corporation tax.

Decision

The First Tier Tribunal found that the company had acted deliberately by suppressing its turnover for both VAT and Corporation Tax. With an 80% difference between till data and figures included on the VAT returns, this was not a minor discrepancy caused by the occasional human error. Prutish Gopaul had deliberately failed to manage his company's tills and business records and was unable to provide information requested by HMRC.

As a result, the penalties and personal liability notices in respect of VAT and corporation tax were upheld but they were reduced for the lack of deliberate behaviour in relation to the s.455 charges. The Tribunal found that HMRC had not proved that the company acted deliberately by not including the s.455 charges on its returns. Taking money from the company did not mean that the company/ director knew about the potential s.455 charges that arose as a result of HMRC assuming that the missing income had been withdrawn from the company and effectively debited from the director's loan account. The Tribunal reduced the penalties and personal liability notice for corporation tax to take this into account.

Prutish Gopaul v HMRC (TC08917)

Goodwill and customer-related intangibles (Lecture B1405 – 14.00 minutes)

The intangible fixed asset (IFA) regime for companies came in from 1 April 2002 and is complex in the way that it operates. The underlying principle is that a company can claim a deduction for corporation tax purposes for amortisation and impairment of their IFAs. If the company owns the IFA for trading purposes, the debits and credits are dealt with in computing trading profits, if the asset is held for non-trading purposes, the debits and credits are netted off to give a single non-trading IFA credit or non-trading IFA debit.

One area of particular confusion relates to the treatment of goodwill and other customer-related intangible fixed assets.

The legislation refers to these as 'relevant assets' which means:

- Goodwill in a business;
- An IFA consisting of information relating to customers or potential customers of a business;
- An IFA consisting of a relation (contractual or otherwise) between a person carrying on a business and customers of that business;
- An unregistered trademark or other sign used in the course of a business;
- A licence (or other right) in respect of an asset within any of these categories.

The complexity of these rules lies mainly with the number of changes we have had in the provisions.

Created or acquired before 1 April 2002

This is a capital asset for corporation tax purposes with no relief for amortisation or impairment. On disposal, a capital gain or capital loss will arise.

Acquired between 1 April 2002 and 3 December 2014

The basic principle is that amortisation and impairment relief is available (or the 4% straight-line deduction as an alternative). However, where the asset was acquired from a related party, the asset will be treated as a pre-FA2002 asset (i.e. subject to capital gains rules) unless the related party created it on or after 1 April 2002 or acquired it from an unconnected party on or after 1 April 2002. For these purposes, the asset is treated as created on the date that the original business commenced.

Acquired after 3 December 2014 but before 8 July 2015

Amortisation relief and impairment relief is available only where the asset is acquired from an unconnected party.

Acquired on or after 8 July 2015 and before 1 April 2019

No amortisation or impairment relief available regardless of who the vendor was and whether any connection existed between the parties. Where a debit is generated on the realisation of a relevant asset, this will always be treated as a non-trading debit. This is likely to be a provision designed to remove the possibility of creating significant trading losses on sale of IFAs although this has now been superseded to an extent by the 2017 rules on corporate losses.

1 April 2019 onwards

Amortisation relief of a fixed annual rate of 6.5% is available for relevant assets acquired as part of a business acquisition which also involves the acquisition of qualifying IP assets. However, this fixed rate of amortisation relief is restricted to an amount equal to six times the value of the qualifying intellectual property (IP).

Any debit on the realisation also has to be split along the same proportions between trade and non-trade debits.

There are exceptions where the asset is acquired under certain related party transactions or where the asset is a pre-FA2019 asset. These are anti-avoidance provisions and will not be covered here in detail as they will mainly relate to historical transactions.

Qualifying IP in the context of these rules means an IFA that meets the following two conditions:

1. The asset is (or is equivalent under non-UK law to) a

    a. Patent

    b. Registered design

    c. Copyright

    d. Design right

    e. Plant breeders right

    f. Right under the Plant Varieties Act 1997

    g. A licence in respect of any of the above

2. The asset is not to any extent an excluded asset, a pre-FA 2002 asset or computer software. Excluded assets are covered in changes in FA2020 and not included here but are mainly acquired from connected parties.

In simple terms, the value of the relevant assets are compared with the value of the qualifying IP and the amortisation relief calculated accordingly.

Example

A business is acquired on 1 May 2019 with £100,000 being incurred on qualifying IP assets and £1,000,000 on relevant assets.

Solution

The amortisation at a fixed rate of 6.5% would appear to be £65,000 per annum but the actual allowable amount has to be adjusted.

The maximum amount on which amortisation is allowed is 60% as this represents 6 times the value of the qualifying IP (£600,000 compared to the £1,000,000 actual cost of relevant assets).

The allowable amortisation is therefore £39,000 (60% x £65,000) per annum.

As noted above, there is a calculation to be done when the asset is sold if a loss is made on sale as this has to be split between trading and non-trading debits.

The restriction on relief on realisation is calculated as follows.

The allowable trading debit is calculated as D1 x RA.

D1 is the amount of debit which would (in the absence of any restriction) be allowable in an accounting period.

RA is the relevant amount which is the ratio of expenditure on qualifying IP assets to expenditure on relevant assets.

The non-trading debit equals D2 – TD, where:

- TD is the trading debit;
- D2 is the tax written down value having regard to the restriction on previously allowed debits.

Example (cont)

In the above example, the relevant assets are sold at the start of year 3 for £550,000.

Solution

The asset is sold after two years. The TWDV in each year is £65,000 but only £39,000 is allowed for tax purposes.

The TWDV without regard to the restrictions (D1) is (£1,000,000 – 2 x £65,000) £870,000 and with regard to the restrictions (D2) is (£1,000,000 – 2 x £39,000) £922,000.

The debit on sale ignoring restrictions is (£870,000 - £550,000) £320,000 and the amount of this representing a trading debit is 60% = £192,000. The non-trading debit is the debit on sale with regard to restrictions which is (£922,000 - £550,000) £372,000 less the trading debit (£192,000) = £180,000.

Reconciling those figures:

Purchase cost less sale proceeds = (£1,000,000 - £550,000) £450,000.

This is made up of amortisation debit of £39,000 x 2, plus trading debit on realisation of £192,000 and non-trading debit on realisation of £180,000.

HMRC challenges

Historically we have seen challenges by HMRC where goodwill has been transferred to a limited company on incorporation where HMRC have challenged the valuation of the goodwill. Related party transactions have to take place at market value so they can challenge on that basis. It reduces the ability of the company to claim amortisation relief and also restricts the ability of the individual to create a large loan account which can be withdrawn. Reduction in the business asset disposal relief lifetime limit would probably have limited this planning even if the above provisions for IFA purposes had not been allowed. The outcome of some of these challenges have been seen recently in cases such as *R&C Commrs v Conran & JC Vision Ltd v R&C Commrs* UKUT 00166.

Contributed by Ros Martin

Allocation of consideration to goodwill (Lecture B1401 – 21.33 minutes)

Summary – The value of goodwill should be based on the assets valued at open market value rather than depreciated replacement cost.

Nellsar Limited acquired residential care and nursing homes as going concerns with the relevant purchase agreements stating that an amount of the purchase price for the respective businesses was attributed to goodwill.

Tax legislation used to permit a tax deduction for amortised goodwill to the extent that the expenditure and amortisation are reflected in the company's UK GAAP-compliant accounts.

Under UK GAAP, the goodwill in each case is the difference between the purchase consideration and the "identifiable assets" valued at their appropriate fair values. With the care home properties being the bulk of the "identifiable assets" acquired, the dispute here concerned the valuation of those properties. These values were subsequently used for both SDLT and corporation tax computations.

The company argued that the value of consideration relating to assets acquired should be calculated valued using depreciated replacement cost, rather than open market fair values.

HMRC disagreed, arguing that there was an open market for similar assets and so fair value should have been used. Consequently, the properties had been undervalued, with goodwill effectively overvalued. HMRC raised assessments accordingly.

The company appealed.

Decision

The First Tier Tribunal found it was possible to value the properties by reference to an adjusted operational entity valuation. This could be done using other operational care homes with appropriate adjustments per RICS guidance, so that the property valuations reflected the properties as stand-alone assets, without residents, staff and the like.

Consequently, the company's valuation using depreciated replacement cost did not comply with UK GAAP.

The First Tier Tribunal stated that the correct property valuations required input from professional valuers and if they could not be agreed, should be appealed to the Lands Chamber of the Upper Tribunal.

For SDLT purposes, the Tribunal agreed that a 'just and reasonable' apportionment valuation should be carried out by reference to the agree market values of each property acquired.

Nellsar Limited v HMRC (TC08908)

No deemed salary ruling

Summary - Certain LLP members did not have significant influence over the affairs of the LLP, meaning that the salaried member rules did not apply.

HMRC had issued several determinations that Bluecrest Capital Management (UK) LLP, a UK registered LLP, was liable to pay income tax under the PAYE regime in respect of LLP members who, HMRC maintained, were caught by the salaried member rules.

Bluecrest Capital Management (UK) LLP's appeal to the First Tier Tribunal was allowed in part, holding that while all members of the LLP met condition A of the salaried member rules (that the majority of their remuneration was not linked to the LLP's overall profits/losses), only some members met condition B (i.e., they did not have significant influence over the affairs of the LLP).

HMRC appealed to the Upper Tribunal on the basis that condition B was met by all members, submitting that the First Tier Tribunal had erred in its construction of the condition B test contained at s.863C ITTOIA 2005.

Bluecrest Capital Management (UK) LLP cross-appealed on the grounds that condition A was not met by any of its members, that the First Tier Tribunal had erred in its construction of condition A and accordingly applied the wrong test.

Decision

When considering the First Tier Tribunal's approach to condition A, the Upper Tribunal considered the link required between the remuneration paid to each member of the LLP and the profits or losses of the LLP was essentially a question of construction which should not be considered in the abstract, but rather by reference to the circumstances of the case. Having reviewed the contractual link between discretionary allocations of remuneration and the LLP's profits or losses, the First tier Tribunal had concluded that link was insufficient to place the discretionary allocations outside the terms of condition A. The Upper Tribunal considered that the threshold test in condition A was set fairly widely; however, in the case of the discretionary allocations, the Upper Tribunal held that the LLP had been unable to show the link required to take the discretionary allocations outside condition A, either as a matter of construction or on the evidence.

When considering condition B (pursuant to HMRC's appeal), the Upper Tribunal held condition B was a multi-factorial test, which required a careful analysis of all aspects of the relevant LLP's workings. While the distinction between an employee and a traditional partner may be a useful tool, it is not determinative.

The Upper Tribunal held that, as a matter of construction of the wording condition B, and as a matter of the purpose behind the salaried member rules, the bar would be set too high if the significant influence in condition B was read only to mean significant influence over the entirety of the affairs of the relevant partnership.

The Upper Tribunal therefore dismissed both HMRC's appeal and the LLP's cross-appeal. The Upper Tribunal considered that the First Tier Tribunal had made findings of fact that it was perfectly entitled to make and there was no error of law in its approach to and construction of the legislation, or in its application of the legislation to the facts of the present case, as found by the First Tier Tribunal.

HMRC v BlueCrest Capital Management (UK) LLP [2023] UKUT 232 (TCC)

Adapted from the case summary in Tax Journal (29 September 2023)

Loans and associated companies (Lecture B1404 – 13.41 minutes)

Associated companies became relevant (again) from 1 April 2023 in determining (inter-alia) the profit limits for:

1. Determining the rate of corporation to apply from 1 April 2023; and
2. Whether the company needs to pay its corporation tax by instalments (or accelerated instalments) for accounting periods beginning on or after 1 April 2023.

Previously, we have focused on how shareholdings and voting control impact on determining if two or more companies are associated, but loans to companies, or between two companies can created associated companies as well.

Companies are associated if at any time in the past 12 months, one company controls the other or both are under the control of the same person.

Control

P controls C if P exercises, is able to exercise, or is entitled to acquire direct or indirect control over C’s affairs.

P is treated as controlling C if possesses or is entitled to acquire:

1. The greater part of the share capital or issued share capital of C;
2. The greater part of the voting power in C;
3. So much of the issued share capital of C as would, on the assumption that the whole of the income of C were distributed among the participators, entitle P to receive the greater part of the amount so distributed; or
4. **Such rights as would entitle P, in the event of the winding up of C or in any other circumstances, to receive the greater part of the assets of C which would then be available for distribution among the participators.**

Participators (s454 CTA 2010)

1. A shareholder or holder of rights to acquire share capital or voting rights;
2. **A loan creditor of the company** – defined in s453 CTA 2010 and includes a debt for capital assets acquired as well as a regular loan;
3. A person entitled to (or entitled to acquire a right to) receive or participate in distributions of the company or any amounts payable (in cash or in kind) to loan creditors by way of premium on redemption;

4. A person entitled to secure that income or assets (now or in future) of the company will be applied directly or indirectly for the person’s benefit.

Loan creditors – exception (s18I CTA 2010)

A Ltd is not under the control of B Ltd for these purposes if:

1. B is a loan creditor of A (i.e., B lends to A);
2. There is no other connection between them; and
3. Either
    a. the lender is not a close company, or
    b. If it is, the loan arose in the ordinary course of business carried on by the lender.

Example 1

A Ltd is a family-owned company and is not a member of a group.

B Ltd, a trading company owned by a friend of the family, lends £400,000 to A Ltd, with a floating charge against the company's assets.

A Ltd's assets during the year ended 31 December 2023 ranged from £750,000 to £1,000,000.

There were other unsecured creditors, apart from B Ltd of approximately £50,000 throughout the year.

Are A Ltd and B Ltd associated companies?

Analysis

A and B will be associated if, at any point in the year ended 31 December 2023, B Ltd is entitled to more than half of the assets available to participators (i.e., the loan creditors and shareholders).

The minimum amount available to participators (lenders and shareholders) was (£750,000 - £50,000) £700,000 – because the trade creditors would be entitled to payment before the shareholders.

B Ltd would be entitled to £400,000 in a winding-up in priority to unsecured creditors because of its floating charge, i.e., more than 50% of the assets available.

A Ltd and B Ltd are associated.

If B Ltd was either not a close company, or it was a money-lending company, the companies would not be associated.

Interestingly, the law makes no mention of accruing liquidators' costs, but these would have priority over floating charge holders. It would make sense to deduct estimated liquidators' costs to arrive at assets available to lenders and shareholders, but it is unclear if the law requires this.

Example 2

A Ltd is a family-owned company and is not a member of a group.

B Ltd, a trading company owned by a friend of the family, lends £450,000 to A Ltd on an unsecured basis.

A Ltd's assets during the year ended 31 December 2023 ranged from £1,000,000 to £1,500,000.

There were other unsecured trade creditors of approximately £50,000 throughout the year and secured third-party bank loans of £230,000.

Are A Ltd and B Ltd associated companies?

Analysis

The bank cannot be associated with A Ltd, but it is a participator.

The minimum assets available for distribution amongst the participators (lenders and shareholders) is £950,000 (£1,000,000 - £50,000).

The bank would receive £230,000, leaving £720,000 to pay B Ltd and the shareholders if the company is wound up.

B Ltd is entitled to £450,000, i.e., less than 50% of the assets available to participators (i.e., the bank, B Ltd and the shareholders).

A Ltd and B Ltd are not associated.

Other points

The examples focus on one company lending to another company. Two companies will be associated if there is common control.

For example, if an individual was a majority shareholder in company A, and lent money to company B with an entitlement to more than half the assets in a winding up, A and B would be associated companies.

In practice, would we know the assets available to participators at all times in the previous 12 months….? So how can we carry out the test in practice, according to the letter of the law ('at any time…')?

The same sort of analysis as in the above examples would be needed for someone who is a shareholder and has also lent the company money.

If they do not control the company through their shareholding, do they control it from an entitlement to more than half of the assets available to participators in a winding up – i.e., the amount they would receive from being both a loan creditor and a shareholder?

Contributed by Malcolm Greenbaum

VAT and indirect taxes

Academic work (Lecture B1401 – 21.33 minutes)

Summary – Despite a change in contract terms, the taxpayer was still not acting as agent in relation to its writing services outsourced to third parties, meaning it was required to account for output VAT on the full payment received from its student end users.

All Answers Limited returned to the First Tier Tribunal, having previously lost at both the First Tier and Upper Tribunals. You may remember that the internet-based company used third party writers who were teachers, lecturers or PhD students to supply dissertations, essays, and other pieces of coursework for students.

The company failed in its argument that these writers were supplying services direct to the students, meaning that the company was acting as principal and not and agent. This made the company responsible for charging output VAT on the full fee charged, and not simply the proportion retained by the company.

All Answers Limited had updated terms within its contracts with the writers, effective from October 2016 so that copyright for the work produced remained with the writer. Further, it made reference to a contract between the writer and end customer whereby the writer provided the work to the student. The company argued that this changed the legal basis as well as the commercial reality of the arrangement.

HMRC disagreed and raised VAT assessments for some £419,000 for VAT periods from December 2016 onwards.

All Answers Limited appealed to the First Tier Tribunal.

Decision

Agreeing with HMRC, the First Tier Tribunal found that the changes to the contracts did not affect the commercial and economic reality of the arrangements.

There was no contract at all between the writer and end customer and this could not be implied to exist as a result of clauses inserted within the contract between the company and its writers.

In reality, the academic writers provided completed written answers to the company to enable the company to supply these on to their student customers. All Answers Limited was making direct supplies as a principal rather than an acting as agent.

The appeal was dismissed.

All Answers Limited v HMRC (TC08920)

Intention to make taxable supplies (Lecture B1401 – 21.33 minutes)

Summary – The taxpayer company provided sufficient evidence of an intention to make taxable supplies and in fact provided evidence that it did make supplies.

Heartland House Limited undertook construction contracts using subcontractors to carry out the work.

In October 2018, the company registered for VAT, with that registration backdated to 9 June 2016.

HMRC investigated three repayment claims relating to the periods 09/19, 06/20 and 09/20.

Heartland House Limited accepted that HMRC's assessments for 06/20 and 09/20 were correct, as the VAT had been claimed in error in respect of purchases relating to exempt supplies. Consequently, the dispute in this appeal was the 09/19 £28,000 assessment which related to the input tax reclaimed in respect of a number of projects.

HMRC stated that Heartland House Limited had failed to prove that its input tax claims related to actual or intended taxable supplies, meaning that input tax recovery was blocked.

HMRC commented on the company's lack of credit control, customer due diligence checks and failure to register for the construction industry scheme.

Heartland House Limited appealed providing details of four projects where construction services had been received from subcontractors, and these costs recharged on to the final customer.

Decision

The First Tier Tribunal found in favour of the company and were 'puzzled'. Why would the company have incurred construction-related costs and entered into construction contracts if it did not intend to make taxable supplies?

Provided relevant evidence is supplied, the state of the company's accounting and administrative processes should not prevent it reclaiming input tax suffered. In this case, although poorly managed, the company had produced sufficient evidence to link its construction project sales to the costs it had incurred.

The appeal was allowed.

Heartlands House Limited v HMRC (TC08927)

Repatriation of dead bodies (Lecture B1401 – 21.33 minutes)

Summary – The repatriation of dead bodies was a transport service rather than services supplied in connection with the disposal of human remains. This made the supplies zero-rated rather than exempt for VAT.

UK Funerals On-line Limited repatriated deceased persons' bodies, predominantly from the UK to other countries around the world.

With only 3 or 4 businesses in the UK offering this service, its customers usually found them through either an online search or through word of mouth.

Typically, the next of kin would contact and appoint UK Funerals On-line Limited to repatriate the body and then the company would:

- arrange for an "out of England" form to be granted from the coroner, giving the company permission to transport the body, but with no burial or cremation rights;
- prepare the body and place it in the required zinc-lined coffin or casket ready for transport (not suitable for cremation or burial);
- sort out the required paperwork and arrange the flight through a shipping agent;
- provide the airline with the name and contact details of the person who will take responsibility for the body on arrival in the other country;

Once the body cleared the x-ray at the airport, the company ceased to have any further involvement.

UK Funerals On-line Limited believed they were supplying specialist transportation services that were zero-rated under Item 5(b) Group 8 Sch. 8 VATA 1994.

However, HMRC argued that the supplies fell within Item 2 Group 8 Sch. 9 VATA 1994) which covers:

> "The making of arrangements for or in connection with the disposal of the remains of the dead"

HMRC argued that the company was undertaking services usually provided in a funeral supply, including a coffin, embalming and the use of a chapel of rest.

HMRC also made reference to VAT Notice 701/32 which states:

> "7.2 Repatriation packages supplied by undertakers
>
> If you are an undertaker or business that specialises in repatriation and you supply a repatriation package consisting of goods and services that are normally provided by undertakers, your supply will be exempt from VAT to the extent that it consists of the supply of:
>
> - goods and services covered by paragraphs 3.1 and 3.2 (for example, coffin, embalming, use of chapel of rest);
> - services of obtaining documents and permits necessary to repatriate the deceased;
> - transportation of the deceased to burial ground, crematorium or to another undertaker".

Decision

In interpreting Item 2 Group 8 Sch. 9 VAT 1994, the Tribunal referred to Network Insurance Brokers v HMRC [1998] STC 742 where Judge Moses J focused on the “result” of the exemption.

The First Tier Tribunal accepted there were other parties involved in the arrangements, in this case, including the Consignee at the airline destination and funeral directors in the end country.

However, the result was that each time the company was engaged, there was a deceased person and the reason for engaging the company was ultimately to lead to the disposal of the remains of that person. Consequently, the First Tier Tribunal concluded that the repatriation services were made in connection with arrangements for the disposal of the remains of the dead and so fell within Item 2 Group 8 Sch. 9 to VATA 1994.

However, this was a complex supply consisting of`:

- an exempt supply - disposing of the remains of the dead;
- a zero-rated supply - transporting the body.

Both parties agreed that if the services fell within the definition of both a zero-rated and exempt service, under s.30(1) VATA 1994 the zero-rating provision would prevail.

Citing Gray & Farrar International LLP v HMRC EWCA 121, the Tribunal found that the predominant element of the supplies being made was that of transport. In the Tribunal’s view, the typical customer was looking primarily for a business that could arrange the transport of their deceased relative.

Having reached that conclusion, under s.30(1) VATA 1994, the supplies were zero-rated and the appeal was allowed.

UK Funerals On-Line Limited v HMRC (TC08937)

Withdrawal of downloadable VAT registration paper form

From mid-November 2023 businesses will have to either register online or call HMRC to request a paper form as from that time.

R&C Brief 7 (2023)

This brief sets out a change to the VAT treatment of drugs and medicines supplied under patient group directions but has no impact on drugs and medicines that already qualify for VAT zero-rating under existing provisions.

The Brief reads:

> “The scope of the VAT zero rate for supplies of drugs and medicines dispensed to individuals for their personal use is being temporarily extended to include the supply of drugs and medicines which are dispensed in accordance with a patient group direction issued under the Human Medicines Regulation 2012.

A patient group direction is a written instruction that allows healthcare professionals to supply and administer specified drugs and medicines to a pre-defined group of patients without a prescription.

A temporary VAT zero rate will apply to drugs and medicines supplied under such patient group directions and so bring them into line with drugs and medicines dispensed on a prescription of a registered health professional. The zero rate will apply from 9 October 2023 until 31 March 2027.

The new zero rate applies to supplies made by a registered pharmacist (including a pharmacy technician in Great Britain (England, Scotland and Wales)) or by a General Practitioner practice where a pharmacy is too remote and dispensing is allowed under Note 2D of Group 12 of Schedule 8 to the VAT Act 1994.

The new zero rate does not apply to vaccines and medicines administered by a health professional, for example by injection. These supplies are exempt where the service is provided by a pharmacist or other medical professional listed in paragraph 2.1 of Notice 701/57. This is because such services are regarded as medical treatment and not for personal use. The new zero rate only applies where the goods are administered by the patient."

https://www.gov.uk/government/publications/revenue-and-customs-brief-7-2023-change-to-the-vat-treatment-of-drugs-and-medicines-supplied-under-patient-group-directions