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Personal tax

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Summary – A bonus that was effectively reinstated as part of a compromise agreement was taxable as earnings in 2011/12, the year in which the bonus was earned.

Thierry Lucas worked for a large international bank but on 18 July 2012 his employment was terminated by mutual agreement.

It seems that there was some disciplinary action taken against him that, under his employment contract, would have meant he lost his entitlement to a bonus payable in respect of the year to October 2011. However, he regained that entitlement by virtue of a Compromise Agreement that was signed in 2012. The bonus was subsequently paid as several amounts during 2012/13.

The main issue to decide in this case was whether the payments received by Thierry Lucas were termination payments or general earnings. If the payments were general earnings, did they fall to be assessed in 2011/12 or 2012/13?

HMRC argued that the bonus payments were earnings taxable under s 62 ITEPA 2003 and that they were earned in October 2011 and so taxable in 2011/12. Terminating his contract by mutual consent, the Compromise Agreement simply preserved his bonus entitlement for the previous tax year. There was no new or additional payment as a result of his termination.

Thierry Lucas argued that the bonus payments received under the compromise agreement were termination payments within s401 ITEPA 2003 and so qualified for full exemption under s413 ITEPA 2003 due to his work abroad. His entitlement to the payments arose from signing the Compromise Agreement with his former employer and so the amounts fell into 2012/13.

Decision

The First Tier Tribunal acknowledged that until the compromise agreement was reached Thierry Lucas' bonus was lost. However, the reality of the matter was that he was paid nothing by way of compensation for loss of office. The Compromise Agreement simply preserved his employment bonus from when he was employed by the company.

The Tribunal noted that the bonus was paid over a number of years and assessed to tax in those years. However, they found that the bonus was earned in October 2011 and so the payments were for the tax year ended 5 April 2012.

Thierry Lucas v HMRC (TC07809)

Tax code correctly applied (Lecture P1216 – 21.04 minutes)

Summary – The Company had acted with reasonable care and correctly applied a new employee's tax code, even though the full amount of tax was not withheld.

Sci-Temps Limited is an employment agency that began operating PAYE in 2003 and has an exemplary record. Since 2014/15 the Company has complied with its PAYE obligations under RTI.

In 2015/16, a new employee joined Sci-Temps Limited. This was the employee's only employment for the rest of 2015/16 and throughout 2016/17.

On 8 April 2016, HMRC issued the Company with a coding notice for the employee for 2016/17. The notice stated that a tax code of 303T should be used. Sci-Temps Limited correctly operated this code from April 2016.

In September 2016, HMRC changed the employee's code again, which the Company correctly implemented. At the end of the notification letter was the heading 'Previous Pay and Tax Details' followed by 'Previous Pay' of £3,144 and 'Previous Tax' of £0. These figures related to an earlier employment, before the employee joined the Company.

The Company assumed the 'previous pay' figure referred to the employee's earnings from her employment with the Company during the current tax year. Sci-Temps Limited did not include these figures in its deductions working sheet as the employee had begun work for the Company in the previous tax year, and so the Company was not expecting HMRC to provide it with earnings figures for an earlier employment, and to require that those figures be added to its deductions working sheet for the current year.

HMRC later established that the employee had underpaid tax of £629 in 2016/17 and sought to collect this sum from the Company, by way of a determination made under Reg 80 of the Pay As You Earn Regs 2003 for a failure to comply with Reg 68.

Sci-Temps Limited appealed.

Decision

The First Tier Tribunal concluded that the determination issued to the Company was invalid. Reg 68 is headed 'Periodic payments to and recoveries from HMRC: non-Real Time Information employers'. The First Tier Tribunal confirmed that Reg 68 only applies to employers who are not required to operate Real Time Information (RTI)) but the Company was an RTI employer.

In case the Tribunal were wrong, they went on to consider if the Company had failed to comply with the PAYE Regulations but concluded that the Company had not. The Company had operated the tax code issued by HMRC. 'Code' is a defined term, being 'a combination of letters, numbers or both' or 'one of the special codes, whether expressed in words or represented by a combination of letters, numbers or both'. The information about previous pay is not part of the code. The Tribunal stated that the employer did not have a legal obligation to include in its deductions working sheet the employee's pay and tax for a previous tax year.

Finally, the Tribunal stated that, even if the determination had been valid, and the Company had failed to comply with a legal obligation, the Company had acted in good faith and taken reasonable care. The Company would not have been liable to pay the excess.

The appeal was allowed.

Sci-Temps Limited v HMRC (TC07796)

Employees not reported (Lecture P1216 – 21.04 minutes)

Summary – Immigrant workers paid in cash should have been reported on the company's PAYE returns. HMRC's calculations on the basis of the hours required to operate the restaurant and a payment of minimum wage was acceptable.

Indian Deluxe Limited ran Indian restaurant. In January 2016, HMRC made an unannounced visit to the restaurant. Following the visit, HMRC claimed that the three staff reported on payroll plus Mr Chowdhury, each working 24 hours per week, were insufficient to cover the opening hours of the restaurant and that not all staff had been reported for PAYE purposes. The owner and manager admitted that not all payments to staff had been reported under PAYE because they had not worked for long and payments were often made in cash at or below the National Minimum Wage. These workers ceased working once they were asked to produce the relevant work-related documents, as they were Bangladeshi immigrants seeking work without work permits.

HMRC sought further information from the company but received no reply. As a result, HMRC issued PAYE determinations and a penalty notice covering the tax years 2012/13 to 2015/16. HMRC believed that that the company was aware of their responsibilities with regard to PAYE and considered that the understatement was deliberate rather than careless, and the assessment was made accordingly.

Indian Deluxe Limited appealed arguing that the PAYE assessment was based on incorrect information as some of the information related to people who did not exist and to people who had given false documents when recruited and had left the job after one week. Further, the size of the business did not support the staff alleged by HMRC and that one person was self- employed, and it was not illegal to take on a self-employed person. Finally, the company submitted that it was not reasonable to treat a small Indian restaurant in the same way as a multinational.

Decision

The First Tier Tribunal stated that it is clear from the legislation that any payment of general earnings is subject to income tax, and that the employer is required to deduct tax from such payments in accordance with the PAYE regulations. There was no doubt that there had been an understatement of PAYE in relation to those employees who ceased working at the restaurant within a short period of time without work permits.

HMRCs calculations were undertaken on the basis of the hours required to operate the restaurant and a payment of minimum wage, rather than on the basis of any specific named individuals. The company did not provide any evidence to show that HMRCs assessment of the hours required was excessive.

The Tribunal found that the company's director was aware of the need to comply with PAYE and there was no reason to believe that PAYE did not apply to their cash payments. The Tribunal confirmed that the behaviour should be regarded as deliberate but unconcealed. There was no unprompted disclosure and so the penalty should be assessed on the basis that the information provision was prompted. The Tribunal agreed with HMRC's penalty calculations particularly as no further substantive information was provided to HMRC following the visit.

Without any supporting evidence, the Tribunal considered that the company had not satisfied them that the PAYE determinations were incorrect and the appeal was dismissed.

Indian Deluxe Limited v HMRC (TC07729)

Non-charitable expenditure (Lecture P1216 – 21.04 minutes)

Summary - Money donated by a company to a charity and then loaned back to that company was non-charitable expenditure and was tax avoidance. The company's two tax deductions were disallowed.

Reb Moishe Foundation is and was a registered charity whose main objective was the relief of poverty and advancement of education amongst persons of the Jewish faith.

Gladstar Ltd made several donations to Reb Moishe Foundation over two years and then in 2006, Gladstar Ltd offered further funds. The charity had no immediate use for these funds. Despite this, Gladstar Ltd suggested that it made the donation anyway and then Reb Moishe Foundation could loan the funds back at a rate of 24%. The company was confident that it could loan the money on at a higher rate. This rate was later reduced to 10%. Gladstar Ltd and the charity were closely linked. One of charity's trustees was a director of Gladstar Ltd and another company director occasionally stood in for this trustee at meetings.

HMRC issued closure notices and amendments for the tax years 2006/07, 2007/08 and 2009/10 totalling some £240,000.

Decision

The First Tier Tribunal concluded that it had been agreed that Gladstar Ltd and Reb Moishe Foundation would enter into the loan agreement so that money flowed in a circle, from Gladstar Ltd to Reb Moishe Foundation and then back to Gladstar Ltd. The effect of the transactions was that the money returned to the company within days of the donation having been made. Prior to making the loans, no independent advice had been taken, nor credit checks undertaken on the company. This was understandable given the close links between the entities.

With the company connected to the charity by one of the trustees, the Tribunal found that on the balance of probabilities, the motivation for the transactions was for Gladstar Ltd to avoid tax. This circular arrangement had produced two tax deductions for Gladstar Ltd:

1. A donation to the charity;

2. Interest paid on the loan made by the charity.

The Tribunal concluded that this was ‘precisely the sort of arrangement at which the subsequent “substantial donor” legislation was aimed’.

This was non-charitable expenditure and the tax deductions were disallowed.

Reb Moishe Foundation v HMRC (TC7785)

Charitable donation carried back (Lecture P1216 – 21.04 minutes)

Summary – The High Court would not allow the taxpayer to rectify an error on his return, where he carelessly entered an £800,000 Gift Aid donation as half of that amount.

Following his wife’s death in August 2016, Allan Webster established the Christal Foundation through a charity.

In 2016/2017 he sold shares in two companies and realised gains totalling £5.3 million. The following year, on the anniversary of his wife’s death, he made a donation of £800,000 to the Charity, intending to claim Gift Aid. The Gift Aid Declaration had been annotated to specify that the donation should be treated as carried back to 2016/2017, a time when he had significant income and gains. His position in 2017/2018 was substantially different and insufficient to support such a Gift Aid donation.

He had originally entered a donation of £400,000 into the software that he used to do his tax return and forgot to amend this to the increased amount of £800,000 that he had subsequently decided to pay. He claimed that as his income tax liability would not have been any different, he failed to spot the mistake. Allan Webster subsequently amended his tax return to show the £800,000 donation actually made.

S426 ITA 2007 allows a taxpayer to carry back a donation to the previous tax year and refers throughout to "a gift" and not to part of a gift. The section requires an election to be made:

> "(a) on or before the date on which the individual delivers a return for [the previous tax year]”

As a result, the legislation does not allow carry back figures to be amended after the return is submitted, and also does not permit partial carry back claims, HMRC's denied entirely the carry back Gift Aid claim as the amount of the donation and the original amount entered on the tax return were not the same figure. The £800,000 donation was treated as falling into 2017/18. With insufficient tax in that year to cover the Gift Aid claim, he became liable to pay around £215,000 in tax, interest, and penalties.

Allan Webster applied to the High Court to rectify his original tax return.

Decision

The High Court noted that HMRC had opened an enquiry into Allan Webster’s tax return thus starting the statutory process by which it could inquire into his tax returns and amend them. Having issued closure notices in June 2020, Allan Webster had indicated his intention to challenge the closure notices and this appeal to the closure notices had yet to run its course. The High Court concluded that it should not circumvent the tax tribunals, so did not have jurisdiction to amend a return.

They commented:

> “The fact that the resolution may not be one that the Claimant wants does not entitle him to circumvent the existing statutory regime and seek to ask the court to exercise its discretionary equitable jurisdiction. It does not mean that the statutory regime is unjust or unfair.”

The judge went on to say:

> “… it would be an odd and a surprising result and contrary to public policy if the statutory regime, which cannot be displaced in other circumstances… could be displaced and circumvented by the use of the equitable remedy of rectification.

The High Court concluded that, even if a tax return were in principle a unilateral instrument to which the equitable jurisdiction of rectification could be applied, the Court would not exercise its discretion in favour of the Claimant.

http://www.bailii.org/ew/cases/EWHC/Ch/2020/2275.html

Tax residence and COVID-19 (Lecture P1219 – 15.54 minutes)

In August 2020, HMRC provided updated guidance on how COVID-19 restrictions will impact the statutory residence test for individuals. This latest guidance, which can be found in Para RDRM13410 of the Residence, Domicile and Remittance Basis Manual, is structured in a question-and-answer format and clarifies a number of matters.

The more important ones are summarised below.

If relief for exceptional circumstances has been claimed due to the closure of international borders, individuals must be able to demonstrate that they made every effort to leave once those restrictions had been lifted.

The 60-day limit for exceptional circumstances has not been extended.

Any day spent working in the UK for more than three hours counts as a UK workday, even if that day would otherwise be disregarded because it is part of a period covered by the exceptional circumstances test.

A non-UK resident who came to the UK to assist a vulnerable relative during the COVID-19 pandemic may qualify for exceptional circumstances relief, depending on the facts and circumstances of the case. HMRC state:

> ‘You will need to be able to demonstrate why it was necessary for you to come and remain in the UK to provide support for a vulnerable member of your family.’

For the purposes of the family tie, children will still be considered to be in full-time education, despite the fact that their schools were closed for the summer term. It is assumed that their education continued over this period, albeit in a different environment.

Contributed by Robert Jamieson

Capital Taxes

Voting rights (Lecture P1217 – 11.03 minutes)

The issue in the somewhat unusual First Tier Tribunal case of Holland-Bosworth v HMRC (2020) was whether the taxpayer (H-B) should be entitled to claim entrepreneurs' relief in respect of a capital gain on a share disposal which took place on 6 December 2014. This sounds like a relatively straightforward exercise, but, as will become clear, the position was not entirely clear-cut.

H-B and another individual (who was not involved in the case) were equal shareholders in The Hayward Holding Group Ltd (Hayward). They held 310 ordinary shares each.

In 2007, H-B sold 273 of his shares to an unconnected company called Towergate. Towergate's shares were subsequently re-designated as 'A' ordinary shares. The 37 Hayward shares H-B retained were re-designated 'B' ordinary shares. This was all done by a special resolution dated 3 August 2007 and signed by Towergate and H-B. The resolution and Hayward's amended Articles of Association were in due course filed with Companies House on 6 February 2010.

H-B remained a director of Hayward after the sale of his shares to Towergate.

On 29 April 2013, H-B acquired a further 13 'B' ordinary shares by way of a bonus issue. This was effected by an ordinary resolution proposed and signed by (amongst others) H-B. The 50 'B' ordinary shares H-B held represented exactly 5% of Hayward's total ordinary share capital. More than one year later, in December 2014, H-B sold his 50 'B' ordinary shares for £1,350,000, realising a gain of £1,294,964, in respect of which entrepreneurs' relief was claimed.

H-B filed his self-assessment tax return for 2014/15 on 26 January 2016, in which he stated that the rights attached to the 'B' ordinary shares were incorrectly described in Hayward's Articles of Association and that, for all intents and purposes, the 'B' ordinary shares had full voting rights.

However, Article 4 of the Articles of Association stated:

> 'The holders of the 'B' ordinary shares shall not be entitled to receive notice of, attend or vote at any general meeting of the company.'

Article 5 went on to say:

> 'All or any of the rights for the time being attached to any class of shares for the time being in issue may from time to time (whether or not the company is being wound up) be altered or abrogated with the consent of the holders of not less than three-quarters of the issued shares of that class (the speaker's emphasis) or with the sanction of an extraordinary resolution passed at a separate general meeting of the holders of such shares . . . (and) every holder of shares of the class shall be entitled on a poll to one vote for every such share held by him.'

Judge Julian Ghosh outlined his understanding of the company's Articles of Association as follows:

> 'It is convenient to summarise my conclusion on the construction and application of Article 4 and Article 5 of the Articles of Association at this stage. Article 4 could not be clearer. The holders of the B ordinary shares were not entitled to vote at any general meeting of (the company). Article 5 provides for an "alteration or abrogation" of the B ordinary share rights. An "alteration" or "abrogation" suggests a modification of existing rights . . . Article 5 provides a protection against the modification of share rights which the affected shareholders may not want. Article 5 does not provide for the conferral of share rights, effected by shareholders of a particular class of shares, unilaterally as a class. Article 5 applies to all and any modification of existing rights to shares, nothing more. There is no ambiguity as to the effect of Article 4 and Article 5. These respective Articles simply apply fully on their terms.'

He went on to comment that the 'B' ordinary shareholders could not unilaterally 'arrogate' (i.e. claim without justification) to their shares votes or other rights might have the effect of diluting the rights of other classes of shares by means of an appeal to Article 5.

The relevant voting rights for the purposes of S169S(3)(b) TCGA 1992 have always been understood to be voting rights exercisable in general meeting. The word 'exercisable' means capable of being exercised, whether or not actually exercised (see Hepworth v Smith (1981)). Furthermore, in Boparan v HMRC (2007), the Special Commissioner decided that votes held by the taxpayer in a parent company did not make the votes held by that company in a wholly owned subsidiary 'exercisable' by the taxpayer.

In other words, the First Tier Tribunal concluded that the company's Articles of Association were sufficiently clear as to leave no doubt as to their construction and Judge Julian Ghosh declined to find as a fact either that Towergate would have consented to an amendment to the Articles of Association (in the absence of any evidence) or that Towergate and H-B considered that the 'B' ordinary shares did have voting rights exercisable in general meeting. H-B's appeal was dismissed.

This case serves as a reminder that it is not sufficient to hold 5% of a company's ordinary share capital in order to satisfy the 'personal company' definition. It is also necessary to comply with the voting rights test and, since 29 October 2018, to meet the further tests relating to beneficial entitlement to profits and assets (or sale proceeds).

Contributed by Robert Jamieson

Divorce: A holdover relief pitfall (Lecture P1218 – 10.02 minutes)

Background

As a general rule, where one unconnected individual gifts a capital asset to another individual, the gift is treated for CGT purposes as having been made at market value (TCGA 1992, s 17(1)).

However, there is a relatively well-known exception to this general rule, which applies in the case of transfers between spouses (TCGA 1992, s 58). This states that where the spouses are living together in the tax year and one of them disposes of an asset to the other, they are both treated as if the asset transfer was for consideration deemed to give rise to neither a gain nor a loss.

Separation and divorce

Care is needed when inter-spouse transfers of assets are made in the tax year following separation. This is because for CGT purposes ‘no gain, no loss’ treatment is not available; however, the individual is still connected with their spouse (TCGA 1992, s 286(2)).

This brings the CGT rule for transfers between connected persons (in TCGA 1992, s 18) into play. The connected persons rule broadly means that disposals and acquisitions of assets between spouses are treated as having been made otherwise than by way of a bargain at arm’s length.

When the couple divorces, their connection ends for CGT purposes. This means that the market value rule no longer applies automatically (unless exceptionally the individuals are connected for other purposes, such as by being business partners).

Holdover relief

If there is a genuine gift of a business asset (or a transfer at undervalue), CGT holdover relief (under TCGA 1992, s 165) will potentially be available. If the transfer is not a pure gift but a transfer at undervalue (in other words, if some consideration is given, but it is less than market value), unrestricted holdover relief may still be available if the proceeds are less than the base cost of the business asset (TCGA 1992, s 165(7)).

However, no gift relief is available if market value consideration is given for the business asset. Unfortunately, there is no statutory definition of ‘consideration’ for CGT purposes. In practice, ‘consideration’ can include not only cash but also non-cash assets.

HMRC guidance and case law

Until relatively recently, HMRC guidance (in its Capital Gains manual, at CG67192) stated that where a court makes an order (such as under the Matrimonial Causes Act 1973), HMRC’s view was that the transferee spouse did not give actual consideration in the form of surrendered rights, for the transfer. This was on the basis that the court order reflected the exercise by the court of its independent statutory jurisdiction and was not the consequence of one party to the divorce agreeing to surrender rights in return for assets. As there was no consideration, HMRC accepted that there would be no restriction in holdover relief if the assets transferred were business assets.

This approach followed judicial observations made G v G [2002] EWHC 1339 (Fam). Although this case was a divorce case, the following observation was made in the context of holdover relief for CGT purposes:

> "[43] This transfer is ordered on the footing that business hold-over relief will be available to the husband; that the wife will receive the shares at the husband's base value; and that, accordingly, no liability to CGT will arise on the husband as a result of the transfer. I have seen an extract from an Inland Revenue manual which confirms that a court-ordered transfer of business assets does in principle satisfy the conditions for a claim for hold-over relief; but which goes on to suggest that actual consideration given by the donee may reduce the gain potentially eligible to hold-over relief to nil. The view of the Inland Revenue appears to be that the actual consideration is the surrender by the donee of rights, which she would otherwise be able to exercise to obtain alternative financial provision. I do not share their view about that and I have to say that this view seems to me to be based on a misconception."

However, HMRC's view subsequently changed. Its current view (at CG66886) is that where the court makes an order (e.g. for ancillary relief under the Matrimonial Causes Act 1973, which results in a transfer of assets from one spouse to another):

> '…then, following Haines v Hill [2007] EWCA Civ 1284, the court's order quantifies the value of the applicant spouse's statutory right by reference to the value of the money or property ordered to be transferred by the respondent spouse. The value of the statutory right surrendered is actual consideration for the assets received, which may restrict or preclude the availability of hold-over relief on the transfer.'

As indicated, HMRC's change of view on the availability of holdover relief follows the decision in Haines v Hill.

Haines v Hill

In Haines v Hill (a case on bankruptcy law and its interaction with matrimonial law), the transfer of an interest in a property in a divorce settlement was held to be a transaction made for consideration in money or money's worth for the purpose of bankruptcy law.

HMRC's view now appears to be that a court order quantifies the value of the applicant spouse's statutory right, by reference to the value of the money or property ordered to be transferred by the respondent spouse. Accordingly, the value of the statutory right surrendered represents actual consideration for the assets received, which may restrict or preclude the availability of holdover relief on the transfer of business assets

However, in an article ('Dispensing the correct treatment') by Robert Maas in Taxation on 16 January 2000, Robert questions HMRC's guidance at CG66886 and the effect of Haines v Hill in the context of holdover relief under TCGA 1992, s 165. Accordingly, taxpayers and advisers will need to decide whether to accept HMRC's guidance and its interpretation of Haines v Hill, or to adopt the reasoning in Robert Maas' article, when considering the approach to adopt in respect of any claim for holdover relief on the transfer of business assets upon divorce.

Contributed by Mark McLaughlin

Pension transfer and omission to draw benefit (Lecture P1216 – 21.04 minutes)

Summary – The transfer of pension funds into a personal pension plan was not a chargeable transfer for IHT, but the omission to draw benefits from that fund before death did give rise to an IHT charge.

While married, Mrs Staveley had set up a company, Morayford Ltd, with her husband. By the time of her divorce in 2000, her involvement with the company ceased but she had a large company pension fund. As part of her divorce settlement, her share of the company pension fund was put into a "section 32 buyout policy".

In 2005, shortly after being diagnosed with cancer in 2004, Mrs Staveley made a will. Her pension fund was still invested in the section 32 policy under which a lump sum would have been payable on her death to her estate and IHT would have arisen. She was aware that the pension was over-funded and that any surplus in the fund on her death would be returned to Morayford Ltd.

A few months before her death in December 2006, Mrs Staveley transferred her pension fund into a personal pension plan, her aim being to ensure that her ex-husband would not benefit from any surplus that was returned to the company.

Under this new pension plan, a death benefit was payable to, or for the benefit of, one or more beneficiaries, at the discretion of the pension scheme administrator. By completing an "Expression of Wish form" that formed part of the "Transfer-in Application Form", Mrs Staveley nominated her two sons to be considered as equal recipients of the death benefit.

During her life, Mrs Staveley had not drawn any pension benefits from her pension fund and, following her death in mid-2007, the pension benefits were paid out in accordance with her wishes.

HMRC determined that IHT was due on the lifetime transfer of funds into the personal pension plan, as well as on Mrs Staveley's omission to draw any benefits from her plan before death.

This case has progressed from the First Tier Tribunal to the Supreme Court with various twists and turns at each hearing. The First Tier Tribunal found tax payable on the omission but not the transfer, the Upper Tribunal found no tax payable at all, and the Court of Appeal held that both the transfer and the omission gave rise to a charge to tax.

The Supreme Court agreed that there were two issues to be decided:

1. Was the transfer to the personal pension plan not a transfer of value for IHT as it was a 'disposition not intended to confer gratuitous benefit'?

2. Did Mrs Staveley deliberately omit to exercise a right to draw her pension so that the value of her estate was diminished and the value of another person's estate was increased by that omission?

Decision

The Supreme Court stated that s10 IHTA 1984 applies where the donor does not intend to confer a gratuitous benefit. The Court found that when Mrs Staveley transferred her pension to the personal pension plan she did not intend to confer a gratuitous benefit to her sons. She had made the transfer so as to sever ties with Morayford Ltd and so ensure that none of the pension could be returned to her ex-husband following their acrimonious divorce. She did not make the transfer to increase her sons' inheritance.

Further, the Supreme Court found that when looked at together, the omission and the transfer did not form part of a scheme intended to confer a gratuitous benefit. S10 IHTA 1984 applied to the transfer and no IHT charge arose.

Regarding the second issue, the Supreme Court found that the purpose of her decision not to draw funds was to benefit her sons, as shown by the statement of wishes. It was virtually certain that the scheme administrator would honour her wishes and pay the money directly to her sons. The administrators' discretion did not break the link connecting the omission by Mrs Staveley to draw benefits during her lifetime and the payment of the death benefit to her sons. The omission to draw any pension benefits was the cause of the increase in her sons' estates. The Supreme Court concluded that IHT was payable under s3(3) IHTA 1984.

HMRC v Parry and other [2020] UKSC 35

Administration

Disposals of residential property (Lecture P1216 – 21.04 minutes)

Extended functionality

Remember, for UK residential property disposals made from 6 April 2020, taxpayers have 30 days after the property's completion date to report and pay any Capital Gains Tax due.

When the online reporting system was introduced back in April, taxpayers could only report their first disposal of residential property in a tax year. Where a taxpayer had subsequent disposals in the year, a paper form was required.

Since then, the system has been developed further so that now:

- it can be used to report more than one disposal in a tax year;
- personal representatives and those with power of attorney are able to file the return online.

Unfortunately, the system is still unable to deal with any amendment that is needed to an online return. In such case, the taxpayer must contact HMRC directly.

https://www.icaew.com/insights/tax-news/2020/aug-2020/hmrc-extends-cgt-30-day-reporting-functionality

ATT Guidance on UK Property Reporting Service

There have been a number of concerns about setting up the UK property account needed to be able to report these gains. The ATT has published some useful guidance on its website to help deal with agents' concerns.

Digitally excluded taxpayers

Some taxpayers are 'digitally excluded' due to age, disability, remoteness of location or for any other reason, including religious beliefs. These individuals will need to call HMRC on 0300 200 3300 to either grant their agent access to their online property account or request a paper return. Alternatively, their agent can request a paper return on their behalf via the agent line. Unfortunately, it is not possible to download a form online.

Digitally challenged taxpayers

These taxpayers are not eligible to contact HMRC to obtain a paper return and must submit their return and payment online through the new system. There are concerns that due to COVID-19 such individuals are not always able to gain the help that they would have normally relied on from family members. HMRC believes that they should be able to access the support that they need from HMRC to be able to authorise their agent to act on their behalf. This is good news for digitally challenged taxpayers with agents but what about individuals with no agent and no access to friends and family at this time?

https://www.att.org.uk/uk-property-reporting-service

Dentists' deliberate inaccuracies (Lecture B1216 – 26.12 minutes)

Summary – Two dentists' accrued contributions to an offshore remuneration trust were disallowed. HMRC's penalties for the dentists' deliberate claims, despite knowing that they were under no obligation to make the payments, were correct.

Dr Hallen and Dr Persson were dentists who were directors of Nationwide Healthcare Providers Limited, a company that provided premises, dental equipment and other supplies needed to run a dental practice. The two dentists were self-employed and paid monthly for the work that they did through this company.

The dentists claimed that they had made tax deductible contributions to an offshore remuneration trust, so reducing their taxable income to below their personal allowance. The contributions were accrued in their accounts but the amounts were never paid to the trust.

HMRC concluded the expenses were not allowable and issued discovery assessments for each of the four tax years concerned. HMRC also imposed penalties at 50.75% of the tax due for deliberate inaccuracies totalling over £100,000 between them.

Neither dentist appealed the assessments but both disputed the penalties arguing that they had taken reasonable care when filing their tax returns.

Decision

The First Tier Tribunal concluded that both dentists knew that the expenses had not been paid and that they were under no obligation to do so. The First Tier Tribunal stated that when the dentists reviewed and authorised their tax returns that had been prepared by their agent, they could not have overlooked or missed the claims, as they were large.

The Tribunal concluded the dentists' behaviour in claiming the deductions was not careless, but rather it was deliberate. The penalties were confirmed and the appeal dismissed.

Marie Christina Hallen and Anette Majvi Persson v HMRC (TC07775)

Cash sales deliberately unrecorded (Lecture B1216 – 26.12 minutes)

Summary - Cash sales of two car tyre companies were deliberately unrecorded as it was unreasonable to expect that the company accountants adjusted the sales figures.

Hamid Ali came to the UK in 1999 as refugee from Afghanistan. He founded two tyre shops: ADS Tyre Limited in 2011 and Top Notch Tyres Limited in 2013. Initially he was director of both companies but from April 2014 and November 2016, his wife became sole director but he was "the controlling mind of the companies at all relevant times".

Customers paid by both card and cash. The bookkeeping systems were poor and while the card machine effectively kept a record of card sales, there was no reliable and consistent system for recording cash sales. Cash received from sales was not usually banked but rather it was used to fund purchases from suppliers. Sometimes there were handwritten notes on supplier invoices indicating that the supplier had been paid by cash but such notes were not consistent and were often difficult to understand. As a result, cash sales went largely unrecorded.

Hamid Ali admitted that the companies did not raise invoices for any cash sales. He claimed that the accountants knew about the handwritten notes on supplier invoices and therefore they should have adjusted the companies' accounts accordingly. He claimed that, had he not been under so much personal pressure due to his father's illness and death as well as the serious medical problems relating to his children, especially his daughter, he may have identified the under-declaration of sales. As it was, he claimed that he had no idea that the sales were being under-declared.

HMRC raised VAT assessments and corporation tax discovery assessments for the periods and years concerned from 2012 to 2017. Penalties were charged on the basis that the errors concerned were deliberate, but not concealed, and that the disclosure by the companies was prompted. HMRC reduced the penalties charged from the maximum 70% to 59.5% (the reduction calculated as 30% of the maximum 35% possible reduction). The 30% consisted of 10% for the limited help given to HMRC in quantifying the potential lost tax and 20% for giving HMRC some but not all information and documents that were requested. HMRC gave no reduction in the penalties by reason of special circumstances.

Both parties agreed that the companies' VAT and corporation tax returns contained under-declared sales. The issues to decide related to the penalties charged. Mr Ali argued that the tax return inaccuracies were not deliberate and were not attributable to Mr Ali. He disputed the penalty percentage (59.5%) arguing that this did not reflect the quality of the companies' disclosure and further, he believed that the penalties should also be reduced to reflect special circumstances.

Decision

The Tribunal found that, from the start when the shops opened, Hamid Ali knew that cash sales were largely unrecorded, and that adjustments to the companies' sales records would need to be made, if cash sales were to be accurately reflected in tax returns. The Tribunal did not accept that the hand-written notes on some of the purchase invoices gave the accountants the means to make the appropriate adjustments, as these notes were inconsistent, sporadic and difficult to follow. The companies' accountants were not in a position to do this. The Tribunal found that, on the balance of probabilities, Mr Ali did not genuinely believe that the accountants would adjust the sales figures. The inaccuracies in the companies' tax returns were therefore deliberate on the part of the companies of which Mr Ali a director, shadow director or manager of the companies at the relevant times.

The Tribunal found that HMRC's reduction of the penalty percentage by 30% of the maximum amount did reflect the quality of the companies' disclosure to HMRC, which they classed as moderate to poor. However, the Tribunal considered whether special circumstances applied due to the impact of the time spent away from his business due to his father's ill heath and his daughter's medical issues. They found that the cash sales issue had existed from day one of the businesses opening, so prior to these events and so could not have been a cause for failing to disclose the issue to HMRC.

However, once the enquiry had started, his daughter's medical conditions could have affected his ability to assist HMRC and he might have been able to ensure better quality disclosure of the tax return inaccuracies. Consequently, the Tribunal gave full reductions for helping and giving information; this resulted in a final percentage of 45.5%.

Hamid Ali, Top Notch Tyres Limited and ADS Tyre Limited v HMRC (TC07719)

Potential misallocation of payments (Lecture B1216 – 26.12 minutes)

One of the ways that the government has helped taxpayers during the COVID-19 pandemic is by allowing them to defer their second payment on account that would have been due for payment on 31 July 2020. Most taxpayers will settle their final 2019/20 bill by 31 January 2021 and their tax account will be brought up to date.

However, some taxpayers will need to take care. Without any instructions from the taxpayer, HMRC will allocate payments in the following order:

1. outstanding amounts of tax currently due
2. outstanding penalties
3. outstanding interest charges

Under normal circumstances, this order of set off would work in the taxpayer's favour as outstanding tax liabilities attract interest and penalties, whilst outstanding penalties only attract interest. However, as HMRC has waived any interest on the 31 July 2020 payment on account, this means that allocation of a payment against the outstanding payment on account rather than against a penalty notice, will result in interest charges being levied against the other charge.

Allocating payment

Taxpayers who have been issued a penalty notice after 31 July 2020, relating to an earlier tax year, should ensure that the payment of the penalty is allocated against the penalty notice rather than the overdue 31 July 2020 payment on account.

In theory taxpayers can notify HMRC of this at the time of making payment. Unfortunately, most payment methods do not allow for an instruction to be easily given to HMRC. Where this is the case, the taxpayer can request that the payment be reallocated at any point up to when HMRC communicates the allocation of the payment to the taxpayer. A request should be made as soon as possible after the payment has been allocated on HMRC's system.

Where the taxpayer calls HMRC and experiences any difficulties with the reallocation request, they may need to insist on a 'referral request' being made. Making this request means that the taxpayer's case is referred to someone within HMRC with the authority to override the automated systems and manually effect the reallocation.

It can take up to three weeks for the reallocation to be effected, but any interest charges accruing in the meantime should be automatically cancelled.

https://www.gov.uk/hmrc-internal-manuals/debt-management-and-banking/dmbm210105

Top 5 Mistakes When Handling a Tax Enquiry (Lecture P1220 – 23.32 minutes)

The list of “mistakes” that I will cover in the session is based on my 25 years’ experience as a specialist tax investigations consultant, and my time before that as an inspector in the Inland Revenue (as it was then called). I have considered the most common issues that I encounter when an accountant or other adviser asks me for their assistance in dealing with a tax enquiry.

Ignoring the basics

It is common, when you receive an enquiry letter from HMRC, for your first consideration to be your response. However, it is sensible to first establish the status of the letter, and whether it is a valid enquiry notice. The statutory enquiry framework is for HMRC to follow, just as much as it is for the taxpayer and their adviser. It is important to be realistic when assessing your level of competence to deal with a tax enquiry, and consider whether specialist assistance should be sought.

Dealing with information requests

Information can be sought by HMRC at any stage of any enquiry, but the first request is usually sent with the opening letter. The relevant legislation (s1(1), Schedule 36, Finance Act 2008) requires that information or documents requested by an HMRC officer must be “reasonably required” for the purpose of checking the taxpayer’s tax position. That phrase is not defined, and what may be reasonable in one case may not be reasonable in another. There is also the issue of timing – what is not reasonable in the opening request, may become reasonable (perhaps after the provision of other information to the officer). A typical example of this is private bank statements.

Where it is accepted that information requested by the officer is reasonably required, it is recommended that the items are given to HMRC in response to an informal request. This is because there can be implications for any resulting penalties if the officer issues a formal information notice.

Relationship with HMRC

I have seen numerous cases over the years where the adviser has been more concerned about “not rocking the boat” with the investigating officer, rather than considering the legislation, or the client’s rights. There can potentially be professional indemnity insurance issues if information or documents have been supplied to HMRC when they were not entitled to them, where the client pursues such an action.

Ultimately, the aim of the adviser should be to establish a professional working relationship with the investigating officer.

Meeting the investigator with the client

In a standard tax enquiry (under the provisions of s9A, TMA 1970 or Para 24, Sch 18, Finance Act 1998), there is not a statutory obligation on a taxpayer to meet with HMRC. My view is that the key consideration in deciding whether to take a client to a meeting with the investigating officer should be whether it is in the client’s interest to do so.

In cases I have seen, the decision to allow the client to meet HMRC, when it was not in the client's interest to be there, has been compounded by a failure to control the client during the meeting, or to intervene when required. Even with suitable preparation for a meeting, the client may say something without considering his response.

As an adviser, you do not know what the inspector is going to ask, and you don't know how your client is going to respond. Failure to intervene, to clarify an officer's question for the client, or the client's response, for example, can have significant consequences in the months after the meeting, and take a long time to undo if an incorrect answer has been given by the client, even where they have done so unintentionally. The situation is even worse where the client has lied to the HMRC officer, and the adviser has not taken suitable remedial action.

The issue of face-to-face meetings is not likely to arise under the current, coronavirus, circumstances, but it will return.

Asking for help

There can be a reticence to seek help when dealing with a tax enquiry. It is, however, important for the adviser to know their limits, and to get help sooner, rather than later. Although I am frequently asked to assist accountants when they receive the enquiry letter, it is sometimes much later in the process. On numerous occasions, I have been asked to assist when the enquiry is already two, three or four years old. The earlier that help is sought, the greater the assistance that can usually be provided, with a better chance of a more significant impact on the outcome of the enquiry. It is, however, never too late to seek help.

It can be sensible to seek a second opinion from an investigations specialist even where the accountant is confident they know the answer to their query. It is always worth seeking advice before responding to HMRC where the client discloses an underpayment of tax arising from their deliberate behaviour or there has been a failure to notify (particularly where these have occurred over an extended period); you have received an extensive, or unusual, information request; or there has been an absence of communications from HMRC over a period of several months (which may be an indication of a potential escalation of their action against your client).

When I speak to accountants, I always advocate a materiality limit of zero before taking advice. That is because although a case may look to be of relatively low level, there may be other issues which have not been identified, and which require further questioning of the client.

Summary

The session considered common mistakes that are made by accountants or other advisers when handling tax enquiries. Dealing with such cases is not rocket science, but there are numerous traps and pitfalls for the unwary. A consideration of the basics, combined with a willingness to seek specialist advice, even if only for a second opinion, can hopefully help readers avoid making the same, or similar, mistakes.

Contributed by Phil Berwick, Director at Berwick Tax Limited

Deadlines

1 October 2020

- Corporation tax for periods to 31 December 2019 for SME companies

5 October 2020

- Notify HMRC of income tax/CGT for 2019/20 if no return or notice to file received

7 October 2020

- Online VAT return and payment for 31 August 2020 quarter

14 October 2020

- Paper monthly EC sales list

19 October 2020

- Pay PAYE/CIS/student loan liabilities for month ended 5 October 2020
- File monthly CIS return
- PAYE settlement agreement tax/class 1B NIC liabilities
- PAYE for quarter to 5 October 2020 if average monthly liability < £1,500

21 October 2020

- File online monthly EC sales list
- Submit supplementary intrastat declarations for September 2020

22 October 2020

- Online PAYE/CIS/student loan payments
- Online PAYE for quarter to 5 October 2020 if average monthly liability < £1,500
- Online payment of PAYE settlement agreement liabilities

31 October 2020

- Submission of 2019/20 paper self-assessment tax returns
- Companies House should have received accounts of:
    - private companies with a 31 January 2020 year end
    - public limited companies with a 30 April 2020 year end

News

Chancellor's Winter Economy Plan (Lecture B1217 – 15.27 minutes)

Last month, the Chancellor cancelled the Autumn Budget and in its place announced the contents of his Winter Economy Plan. This contained a number of new financial support measures to help individuals and businesses through the continuing COVID-19 pandemic.

Job Support Scheme

The Chancellor confirmed that the Coronavirus Job Retention Scheme will end on 31 October 2020. In its place he is introducing a new scheme, the Job Support Scheme that will run from 1 November 2020 for six months.

The new scheme is designed to protect viable jobs, where employers can provide at least a third of normal working hours. Under the scheme the business will continue to pay its employee for time worked, with part of the payment for hours not worked split between the employer and the Government. For every hour not worked by the employee, both the Government and employer will pay a third each of the employee's usual hourly wage, with the Government contribution capped at £697.92 a month.

Class 1 employer NICs and pension contributions are not covered and will remain payable by the employer.

Employers will not be able to top up their employees' wages above the two-thirds contribution to hours not worked at their own expense.

Example

An employee has usual earnings £2,400 a month but from 1 November he will work only 40% of his normal hours. Under the new scheme, the employee will receive:

	£
Actual work paid by his employer	960
Job Support Scheme grant:	
Paid by employer (2,400 – 960)= 1,440/3	480
Paid by the Government (as < 697.92)	480
Employee's taxable earnings received	£1,920

This means that:

- employee's payslip will show gross pay of £1,920 so they bear a cost of £480;
- employer pays £1,440 plus all of the ERs NIC and pension contributions on £1,920;
- the Government funds £480.

The calculation of “usual” wages will be similar to that for the Coronavirus Job Retention Scheme and for employees who have been on furlough it will be based on their underlying usual pay / hours and not the amount paid whilst on furlough.

Claiming the grant

Employers will be able to claim the grant online from December 2020 and will be paid monthly in arrears, reimbursing the employer for the Government’s contribution.

Eligible employers

All employers with a UK bank account and UK PAYE schemes are eligible.

However large businesses:

- will be required to demonstrate that their business has been adversely affected by COVID-19;
- must not make capital distributions, such as dividend payments, whilst using the scheme.

Employers may still claim the Job Retention Bonus if eligible.

Eligible employees

Employees must be on an employer’s PAYE payroll on or before 23 September 2020. It does not matter if neither the employer nor employee previously used the Coronavirus Job Retention Scheme.

Employees will be able to move on and off the scheme and they do not have to be working the same pattern each month. However, each short-time working arrangement must cover at least seven days.

For the first three months of the scheme the employee must work at least a third of their usual hours and be paid their normal contracted wage for those hours. After this three-month period, the Government will review whether to change the working percentage threshold required.

Employees cannot be made redundant or put on notice of redundancy whilst their employer is claiming for them under the scheme.

Self-employment income support scheme extended

Claims for the second Self-Employment Income Support Scheme (SEISS) grants closes on 19 October 2020.

The Chancellor has now announced that the SEISS will be extended but only to those who are currently eligible for SEISS and are continuing to actively trade but face reduced demand due to COVID-19. Detail on what is meant by these terms has not be published but they will mean that businesses that have had to close during the pandemic will not be able to claim if they have not restarted during the qualifying period.

The third lump sum payment will cover the three months from November to the end of January 2021 and will be worth 20% of average monthly profits up to a total of £1,875; capping average monthly profits at £3,125 (£3,125 x 20% x 3 months = £1,875).

The Chancellor also announced that a fourth grant covering the period from February to April 2021, but the Government will review the level of the second grant and set this in due course.

HMRC has not announced details of how to apply but, as with the previous grants, it seems likely that individuals will be contacted directly by HMRC.

VAT deferral 'New Payment Scheme'

Businesses that deferred VAT due from March to June 2020 were originally told that the full amount deferred would need to be paid by the end of March 2021. Those that can pay their deferred VAT can to do so by 31 March 2021.

However, the Chancellor has now announced that, rather than paying in full at the end of March 2021, by opting in to the new scheme such businesses can make 11 payments spread over the period to the end of March 2022, interest free. HMRC will put in place an opt-in process in early 2021 and further details will be provided once it is published.

Extension of temporary reduced VAT rates

The temporary reduced rates for the hospitality and tourism sector was due to end on 12 January 2021 and applies to supplies of food and non-alcoholic drinks from restaurants, pubs, bars, cafes and similar premises, as well as supplies of accommodation and admission to attractions across the UK.

This temporary period has now been extended until 31 March 2021.

Enhanced Time to Pay for Self Assessment

The Chancellor has announced that Self Assessment taxpayers will be able to set up time to pay arrangements for payments that fall due on 31 January 2021:

- Deferred 2nd payment on account in respect of 2019/20;
- Balancing payment for the 2019/20 tax year, which will be the total income tax, capital gains tax, Class 2 and Class 4 NIC due for that year less the first payment on account (if paid);
- First payment on account for 2020/21.

Taxpayers with liabilities of up to £30,000 will be able to use a self-service time to pay facility to agree a plan with HMRC, spreading their payment over 12 months. We have yet to hear if the parameters of this existing facility will be increased from £10,000 or whether a separate COVID-19 self-service facility will be set up. The time to pay arrangement must be set up before the due date and then, provided that the taxpayer keeps to the agreed payment schedule settling amounts by direct debit, late payment penalties should not be charged but interest will run on the late paid tax with effect from 31 January 2021.

If a taxpayer fails to make an agreed payment without contacting HMRC before the due date, HMRC can cancel the time to pay arrangement and start proceedings to collect the late paid tax, including direct recovery from the taxpayer's bank account(s).

Taxpayers with liabilities of £30,000 or more can also access time to pay, but they must contact the dedicated coronavirus time to pay helpline to do so.

Loan scheme extension

The government is allowing new applications to the following temporary loan schemes up until 30 November 2020:

- Bounce Back Loan Scheme for small businesses;
- Coronavirus Business Interruption Loan Scheme is available to UK businesses with turnover under £45 million;
- Coronavirus Large Business Interruption Loan Scheme
- Future Fund, the Government's investment scheme for innovative and fast-growing UK-based businesses.

In addition, the COVID-19 Corporate Financing Facility will remain open until 22 March 2021. Where a company has exhausted all other options, and is of strategic importance to the UK, the government may also consider providing bespoke financial support.

Further loan term changes

The Government is allowing businesses that borrowed under the Bounce Back Loan Scheme the option to repay their loan over a period of up to ten years. UK businesses will also have the option to move temporarily to interest-only payments for periods of up to six months (an option which they can use up to three times), or to pause their repayments entirely for up to six months (an option they can use once and only after having made six payments).

The government will allow Coronavirus Business Interruption Loan Scheme lenders to extend the term of a loan up to ten years, providing additional flexibility for UK-based SMEs who may otherwise be unable to repay their loans.

https://www.gov.uk/government/publications/winter-economy-plan

Fraud and the Coronavirus Job Retention Scheme update

There is much in the news at present about HMRC cracking down on fraud linked to the Coronavirus Job Retention Scheme

At the beginning of September, the ATT posted about the first wave of compliance letters having been sent out by HMRC that started happening from mid August 2020.

The good news is that HMRC has stated that they will not charge a penalty where the employer did not know they had over-claimed at the time they received the grant and that they correct any error as soon as they become aware of it. HMRC has acknowledged that employers and their agents had a lot of rules to learn and apply in a very short space of time and that it was understandable that errors were made. However, where an employer is aware of a claim error, they need to correct this as soon as possible. The deadline for correcting an over-claim is the later of:

1. 90 days after the date the employer received the grant they were not entitled to

2. 90 days after the date the employer received the grant that they are no longer entitled to keep because their circumstances have changed

3. 20 October 2020 (i.e. 90 days after Royal Assent of Finance Act 2020).

Where an employer is still making claims under the CJRS, the amendment can be made online. In other cases, the employer must contact HMRC directly.

On 11 September 2020, Rebecca Cave writing for AccountingWEB stated that:

> “HMRC believes between 5% and 10% of CJRS grants contain mistakes or have been illegally claimed (i.e. fraud). HMRC’s Jim Harra, speaking to the Public Accounts Committee, estimated the value of CJRS fraud or error to be £1.75bn to £3.5bn, but that assumes that every error has made an entire CJRS claim completely incorrect.”

In their search to find fraudulent claims, HMRC has identified CJRS claims where something does not look right and have sent letters to claimants stating that the employer’s CJRS claim appears to be incorrect but no details are given of how much the over-claim may be or who the potential ineligible employees are. It seems that it is up to the employer to go back over their claims looking for ineligible employees and re-checking their grant claim calculations.

Some might say that it seems that HMRC is asking employers to do HMRC’s own donkeywork for them to find errors that have been made. This may well pick up some errors that have been made, but how many fraudsters will hold their hands up and come forward at this stage?

The letter states that the employer should contact HMRC:

- By phone before 22 September 2020 if they believe that their claim is correct, after which, HMRC will open a compliance review that could trigger penalties.

- By email if their claim is incorrect and the employer will be given instructions on how to make a formal disclosure. Presumably employers can still make a voluntary disclosure up until 20 October 2020.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/914166/CC-FS48-factsheet_020920.pdf

Rebecca Cave AccountingWEB 11 September 2020

Local lockdown grants (Lecture B1216 – 26.12 minutes)

In September the government announced that businesses in England required to close due to local lockdowns may be entitled to taxable lockdown payments from their local authority.

The amount that will be paid will depend on the business premises' rateable value, annual rent or mortgage payment.

1. if a business occupies a premises with a rateable value less than £51,000 or occupies a property or part of a property subject to an annual rent or mortgage payment of less than £51,000, it will receive £1,000;

2. if a business occupies a premises with a rateable value of exactly £51,000 or above or occupies a property or part of a property subject to an annual rent or mortgage payment of exactly £51,000 or above, it will receive £1,500.

However, the payments will not be available to any businesses still closed at a national level.

Local authorities will be responsible for distributing the grants. They will receive an additional 5% top up fund to provide discretionary grants to help other businesses affected by closures that may not be on the business rates list. Payments to such businesses can be any amount up to £1,500, but may be less than £1,000 in some cases.

https://www.gov.uk/government/news/ministers-announce-new-grants-for-businesses-affected-by-local-lockdowns

Spotlight 56 and disguised remuneration

HMRC has published Spotlight 56 that provides new guidance on tax avoidance arrangements that seeks to reward directors of owner-managed companies through loans using a remuneration trust.

The guidance explains that under the arrangements, a company contributes to an offshore remuneration trust and claims the contribution as a deductible Corporation Tax expense.

The director of the contributing company makes very small loans to the trust, or to someone appointed by the trust. The contributions received by the trust are not used to provide benefits to anyone other than the director of the contributing company through loans made to them on uncommercial terms.

It is claimed that the loans are not connected with the director's employment with the company. Instead they may say they receive the loans because, as a provider of finance, they qualify as a beneficiary of the trust.

As part of the arrangements a personal management company is set up and controlled by a third party supporting the arrangements or in some cases controlled by the contributing company or its director. The third party extracts the scheme fee, then transfers the remaining money to the director of the contributing company. Money received by the director is claimed to be a tax-free loan.

The GAAR advisory panel has found that such schemes are contrived and serve no purpose other than to avoid tax.

The guidance highlights actions HMRC may take in relation to the use of similar arrangements without going back to the GAAR panel for a new opinion, including issuing a counteraction notice and also an accelerated payment notice to require up front payment of the disputed tax.

https://www.gov.uk/guidance/disguised-remuneration-tax-avoidance-by-owner-managed-companies-using-remuneration-trusts-spotlight-56

DAC6: Disclosure of cross-border arrangements

As part of an increased focus on tax transparency, in 2018 the EU introduced a new Directive known as DAC6. This Directive requires 'intermediaries' to report details of certain types of cross-border tax arrangements to tax authorities.

HMRC has published a report 'DAC6: Disclosure of cross-border arrangements' to better understand the role of intermediaries in cross-border tax arrangements and the potential impact of the new DAC6 regulations.

DAC6 requires intermediaries to report details of certain types of cross-border tax arrangements to tax authorities. The research aims to deepen HMRC's understanding of:

- The profile of the UK intermediary population (accountants/tax advisers, banks, lawyers and wealth managers) in the context of cross-border arrangements;
- The impact of the new regulations on tax planning and avoidance related activity, particularly among High Net Worth Individuals and multinational corporates;
- The potential impact of the new regulations on the intermediary population and awareness of the new regulations.

In the UK, DAC6 is implemented by the International Tax Enforcement (Disclosable Arrangements) Regulations, SI 2020/25, with a number of relaxations to reporting deadlines made by the International Tax Enforcement (Disclosable Arrangements) (Coronavirus) (Amendment) Regulations, SI 2020/713.

https://www.gov.uk/government/publications/dac6-disclosure-of-cross-border-arrangements-research

Business Taxation

Profits of a jewellery and bullion trader (Lecture B1216 – 26.12 minutes)

Summary – The ‘presumption of continuity’ approach was correctly applied to 2010 but the case was remitted back to the First Tier Tribunal to recalculate the profit adjustment required in 2010 and 2011, to take account of the ‘anticipated profit margin’ approach that the company considered to be relevant.

Stirling Jewellers (Dudley) Limited carried on a trade as a jeweller and bullion dealer. Prior to 2007, the company had a turnover of around £3 million and focused on selling jewellery to the public and to other shops. However, between 2007 and 2012, the price of gold rose substantially and the company’s business was transformed. The turnover increased from about £5 million in 2009 to about £50 million in 2010. By 2011, the company had a turnover of over £140 million and its business consisted almost entirely of purchasing scrap gold for smelting.

The company accepted that its record-keeping processes did not cope well with the increase in the scale of its business. The company had no electronic invoicing system until a computer system was introduced in February 2010. Until this date, the company’s books depended on manual carbon- copy purchase invoice books and manual calculations made using a calculator by a bookkeeper. A new computer system was introduced in 2010 but it did not improve matters. As the First Tier Tribunal stated:

> “The … computer system was frankly amateurish …… it was not really a 'system' as such. It was simply a surrogate typewriter, and not a very good one at that. It did not seem to represent any significant step forward in improving the quality or reliability of the Appellant's record-keeping.”

HMRC argued that the company had not provided sufficient evidence when buying gold. For example, for its accounting period ending in 2011, there was a difference of just over £9 million between the amount that the company claimed to have spent buying gold and the amount that HMRC considered could be justified using the company’s business records. For a period of 23 days there were either no invoices or insufficient invoices to justify the company’s claim. HMRC applied a ‘presumption of continuity’ to support adjustments to cost of sales in other accounting periods between 2007 and 2014.

The First Tier Tribunal recalculated the company’s business profits using a daily average of purchases to determine the cost of sales for the missing days, but only accepted the ‘presumption of continuity’ for 2010. The First Tier Tribunal concluded that the company’s record-keeping procedures improved markedly from 2012, when the company engaged the services of a qualified accountant and improvements were made to the accounting systems. Thus they denied the ‘presumption of continuity’ for periods after 2011.

HMRC and Stirling Jewellers (Dudley) Limited appealed to the Upper Tribunal:

Decision

Stirling Jewellers (Dudley) Limited disputed the amount added-back by the First Tier Tribunal, arguing that the 'daily average' approach resulted in an excessive add-back. The Tribunal had ignored the "anticipated profit margin" approach that the company considered to be relevant. This approach involved using the predictable profit margins that were supported by the company's records from sales with Englehard, where records were both complete and reliable. The Tribunal's method ignored the relatively predictable link between gross receipts from Englehard (at most 99.75% of the gold fix) and amounts the company paid to buy gold (at least 97.5% of the gold fix). The Upper Tribunal agreed and the company's appeal was allowed. The Upper Tribunal remitted the case back to the First Tier Tribunal to reconsider the extent of the company's taxable profits for 2010 and 2011, taking into account these margins.

The Upper Tribunal dismissed HMRC's appeal to apply the 'presumption of continuity' to years before 2010. Despite there being problems with the company's record keeping in these earlier years, the under-declaration of tax only became an issue once the business expanded dramatically from 2010 onwards. The sudden increase in turnover and reliance on hand-written IOUs, when cash was short to pay for gold bought, led to expenses being overstated, but not before.

Stirling Jewellers (Dudley) Limited v HMRC [2020] UKUT 0245 (TCC)

Amortisation of goodwill (Lecture B1218 – 11.47 minutes)

The First Tier Tribunal decision in Armstrong & Haire Ltd v HMRC (2020) is of interest in that it deals with the important matter of the corporation tax treatment for the amortisation of goodwill derived from a professional business.

Armstrong & Haire Ltd (AHL), a company based in Yorkshire, acquired the assets of a couple of dentistry businesses on 1 December 2010 and began trading as a dental practice on that date. The preceding businesses had been carried on separately since December 1996 by two self-employed dentists who worked from the same premises and shared various overhead costs. Each of the two unincorporated businesses came to an end on 30 November 2010 as a result of the merger.

The two dentists had equal shareholdings in AHL and each was a director of the company.

AHL's accounts for the year ended 30 November 2011 recognised goodwill as an intangible fixed asset with a value of £1,400,000. The directors intended to write this asset off over a five-year period on a straight-line basis. Amortisation of £280,000 was therefore charged in AHL's profit and loss account for that first accounting period, with a deduction being claimed against the company's corporation tax. An identical amount was charged in each of the next two accounting periods.

It was at this stage that HMRC decided to investigate. Interestingly, they did not try and challenge the calculation of AHL's goodwill figure or the validity of the transfer, which they might well have done in the light of their attitude in recent cases such as:

- Villar v HMRC (2018); and
- Dyer v HMRC (2020).

Instead, they focused on the more straightforward argument that the dental goodwill had been created prior to 1 April 2002 and that a deduction under the intangible fixed assets regime for acquisitions from a related party in such circumstances was prohibited by what is now CTA 2009.

The company's tax advisers, in return, had initially argued that the two businesses acquired by AHL had only been created in 2006 'as a result of changes in NHS contracts' (to quote from the case report) so that the company was not subject to the general rule in S880(a) CTA 2009 limiting the application of Part 8 of CTA 2009 to assets created or acquired on or after 1 April 2002.

They noted the provisions of S884 CTA 2009 as determining the date when goodwill is deemed to have been created and they contended that the 'business in question' referred to in S884 CTA 2009 must be the business making use of the asset, i.e. the company. They further submitted that the present business was a different business to the separate businesses previously carried on by the shareholders. They accepted that these previous businesses were similar to AHL's business, but stated that these were separate businesses compared to the company's single business. The decision in George Humphries & Co v Cook (1934) was cited where the High Court judge considered that a partnership formed between a film processing business and a film development and printing business constituted a new business rather than the continuation of an existing business.

The same principle was noted, in reverse, in C Connelly & Co v Wilbey (1992) where an accounting partnership with two offices was dissolved and the two partners each carried on as sole traders from a single office. The High Court's conclusion was that the division of the business meant that neither sole trader carried on the previous trade.

Based on these precedents, the advisers maintained that, where two businesses of approximately equal size merge, it cannot be said that either business has continued.

Judge Anne Fairpo in the First Tier Tribunal summed up their position as follows:

> '(AHL) submitted that the "business in question" in S884 CTA 2009 is that carried on by the appellant company and that that business commenced on 1 December 2010 following the acquisition of the separate preceding businesses of the two shareholders. (AHL) submits that the provisions of S884(b) CTA 2009 therefore apply to treat the goodwill as created on or after 1 April 2002. (AHL) further submitted that the provisions of S715(4) CTA 2009 supported this position, as that section deemed the goodwill to have been created in the course of carrying on the business in question. In addition, it was submitted that the amendment to S884 CTA 2009 to remove references to "internally generated" goodwill showed that it must be possible for acquired goodwill to be regarded as created on or after 1 April 2002.
>
> (AHL) explained that arguments which had been raised previously as to whether a new business had commenced as a result of changes to NHS contracts in 2006 were no longer being pursued.'

In other words, the company's advisers obviously felt that their later line of defence was a stronger one than the position which they had initially adopted in correspondence with HMRC.

The crux of HMRC's contrasting argument was that S884 CTA 2009 could not be interpreted to mean that the goodwill in this case was created on or after 1 April 2002. They said that the relevant test is not whether the company carries on a different business from the previous business but rather whether the business to which the goodwill relates had been carried on by the company *or a related party* (the speaker's emphasis) before 1 April 2002. HMRC also stated that, if the 'business in question' in S884 CTA 2009 was intended to be the business carried on by the company making the claim, the section would not need to make mention of the business being carried on by a related party. This seems like a strong point.

Judge Anne Fairpo pointed out that AHL 'had not argued that, and had not provided any evidence to indicate that, the preceding businesses had changed in any sudden or dramatic manner that could indicate that the original businesses had ceased and new businesses had commenced'. Any evolutionary or organic change, as might be expected to occur over time, would not, it was said, 'change the nature of the businesses between their acquisition in 1996 and their disposal to (AHL) in 2010'. Put simply, the goodwill amortised by the company represented, in HMRC's view, the goodwill of a business which was carried on by a related party before 1 April 2002 and so could not fall within the intangible fixed assets regime and qualify for tax relief.

HMRC's reasoning found favour with Judge Anne Fairpo. Two quotations from the conclusion of her judgment should be highlighted:

> 'Goodwill cannot be acquired independently from the business in which it was created.'

This statement had previously been confirmed in the Upper Tribunal case of Greenbank Holidays Ltd v HMRC (2011).

> 'As I consider that the "business in question" refers to each of the acquired businesses and not the business carried on by the company (if that is different), it follows that the goodwill is that of a business which was carried on by a related party before 1 April 2002 and is therefore outside the scope of the corporate intangibles . . . regime.'

As a result, no amortisation deduction was available in respect of AHL's goodwill for the accounting periods in question. AHL lost the case, but it should be noted that, if the company had acquired the goodwill from the unincorporated businesses on or after 1 July 2020, relief would indeed have been available by virtue of S31 FA 2020.

Contributed by Robert Jamieson

Notification of uncertain tax treatment by large businesses

The Chartered Institute of Taxation (CIOT) has published its response to HMRC's 'notification of uncertain tax treatment by large businesses' consultation.

The CIOT does not support the introduction of a requirement for large businesses to notify HMRC of uncertain tax treatments. According to the CIOT, the policy objectives of the proposal have not been clearly explained, and it is unclear from the consultation document 'what precisely it is that this measure is intended to achieve or, more particularly, a coherent and practical proposal for achieving it'.

The requirement to notify would leave large businesses in a position of considerable uncertainty regarding their compliance obligations.

Furthermore, the proposal does not represent a fair balance between the powers of HMRC and the rights of taxpayers, particularly with regard to the penalty that could arise in circumstances when the taxpayer has taken care with their tax affairs and, consequently, has not done anything wrong. The CIOT is of the view that the proposal will erode the collaborative compliance relationship that the Government has sought to develop with large businesses over its recent policy initiatives. It also believes that the proposal will give rise to a large and unnecessary compliance burden for large businesses, with a consequent adverse impact on administration for HMRC, which is disproportionate to the amount of tax that is expected to be raised by the Exchequer.

The CIOT urged HMRC to revisit plans to introduce the requirement, particularly given the current challenges facing many businesses, and to consider a number of other recommendations, which include:

- providing a clear and objective definition of 'uncertain tax treatment';
- clarifying the proposed exclusion for 'what HMRC already knows';
- limiting the proposal to corporation tax, at least initially;
- considering additional exemptions to the requirement to notify, to 'better focus' the compliance obligation;
- revisiting the proposed de minimis threshold and proposed notification timing;
- introducing a strong reasonable excuse defence.

https://www.lexisnexis.com/tolley/guidance/corporatetax/linkAlertDoc.faces?csi=281957&lni=60SJ-F0S3-CGXG-00F0-00000-00&pqid=27728510&view=GLPCALIST&bhcp=1

Interest deductions for UK branches

Summary - HMRC was entitled to disallow interest deductions claimed by the UK permanent establishments (PEs) of two Irish companies.

The taxpayers were Irish companies that had PEs in the UK. When calculating their UK corporation tax liability, the PEs claimed deductions in respect of interest that HMRC disallowed.

UK PEs are required to calculate UK corporation tax on a portion of the profits of the company of which it is a part, using the 'separate enterprise principle' and on the assumption that the PE has such equity and loan capital as it could reasonably be expected to have as a separate enterprise. HMRC applied this assumption using a capital attribution tax adjustment to attribute to each PE a notional amount of 'free' capital (capital that does not give rise to tax-deductible interest expenditure). This had the effect of disallowing tax deductions for interest that the PEs had actually paid to third parties.

The taxpayers appealed. They argued that the disallowance was contrary to the UK-Ireland double tax treaty (DTT) and that the PEs should be treated as having the ratio of free to borrowed capital that they actually held, rather than being deemed to have a notional amount of free capital. This argument hinged on the fact that the DTT dated from 1976 and was based on the 1963 version of the OECD Model Tax Convention. It was only in 2010 that the updated model expressly contemplated the attribution of notional free capital. The taxpayers argued that such an attribution would only be permissible if the DTT had been amended to reflect the wording of the 2010 OECD model. No such amendment had been made and therefore no such attribution was allowed.

Decision

The Court of Appeal rejected these contentions. It commented that it was 'by no means obvious' that the 2010 changes to the OECD model introduced a requirement to attribute a notional level of capital to a PE.

The new wording emphasised the requirement to treat the PE as an independent entity but did not address the issue of capital attribution. On the contrary, all the OECD commentaries had stressed that the OECD Model had never laid down precise or exhaustive rules. The Court then based its judgment on the construction of the business profits article of the DTT.

In its view, the separate enterprise principle as set out in that article required a comparison of how the PE financed and accounted for its business with what it would have done had it operated as a separate enterprise. To construe it as requiring the PE's actual ratio of free to borrowed capital to be applied would be self-defeating. The court therefore rejected the taxpayers' construction of the DTT, holding that there was nothing in it to prevent the UK from attributing notional free capital to a PE.

Irish Bank Resolution Corporation Ltd (in special liquidation) and another v HMRC [2020] EWCA Civ 1128

Adapted from Tax Journal (11 September 2020)

VAT

Bathroom contractors (Lecture B1216 – 26.12 minutes)

Summary - Output tax was due on the payments made by customers to third party self-employed contractors but assessments for the first three periods were out of time.

Marshalls Bathroom Studio Ltd designs, manufactures, supplies and installs bathrooms. In addition to its in-house team of fitters, plumbers and tilers, the company also uses the services of a number of self-employed contractors to assist installing bathrooms. These third party contractors are not VAT registered.

Once a design has been finalised and a deposit paid, the company provides the customer with a quote and order setting out the cost of the bathroom fittings and labour costs but makes no reference to third party contractors. Marshalls Bathroom Studio Ltd decides which fitters to use.

Once the bathroom is completed, the company issues an invoice quoting VAT inclusive figures for the job but no split of the net and VAT amounts. The invoice also shows how the customer should make payment. Where a contractor has installed the bathroom, this is indicated on the invoice and the customer is required to pay the contractor directly.

Marshalls accounted for output tax on the payments it received but excluded any of the payments made directly to the contractors.

HMRC raised VAT assessments totalling £22,615 covering the VAT periods from February 2012 to November 2015. HMRC argued that the company should have accounted for output tax on the invoices that were settled directly with their contractors as the whole contract was supplied by Marshalls Bathroom Studio Ltd to the customer and the contractors worked for the company.

Marshalls Bathroom Studio Ltd appealed.

Decision

The First Tier Tribunal agreed with HMRC. The customers dealt only with the company and not the contractors. Having completed the design work, the company chose the fitters and any issues about the job would be raised directly with Marshalls Bathroom Studio Ltd, not the contractor.

Both contractually and commercially, Marshalls Bathroom Studio Ltd supplied fully installed bathrooms, with the contractors undertaking their work for the company. Marshalls Bathroom Studio Ltd should have accounted for VAT on all of the invoices raised

HMRC issued their assessments on 1 November 2016 and so the first three assessments were issued out of time as they were made more than four years after the end of the VAT accounting period concerned. The assessments for the remaining VAT periods were valid and so output tax totalling £17,646 was payable by Marshalls Bathroom Studio Ltd.

Marshalls Bathroom Studio Ltd v HMRC (TC07753)

Legal fees incurred to rescind land transfers to a discretionary trust

Summary – The trust was formed to benefit family members and so input tax was not reclaimable; being an incidental benefit to the farming business was an insufficient link.

Three generations of the Bainbridge family ran a farming partnership: Tom Bainbridge, his son and grandson. The partnership farmed three pieces of land with the original core land held in Tom's name, a second plot held in his son's name and the third plot was held jointly between father and son.

Tom Bainbridge was elderly and in poor health, and there were concerns that claims on the land might be made by other family members following his death and the farming partnership would no longer be viable. Consequently, the three plots of land were moved into a discretionary trust with title to the land transferred to the trustees. The Bainbridges believed that no capital gains tax would be payable on this transaction but later discovered that this was incorrect. Following successful High Court proceedings, the land transfers to the trust and the trust itself were rescinded and no CGT was payable. Having incurred substantial legal fees, Tom and Colin Bainbridge sought to reclaim the input tax on those fees arguing that they had been incurred for the purposes of the partnership's business and as such should be recoverable.

HMRC argued that there was no direct link between the legal costs and the partnership business. The legal services were supplied to the claimants as individuals, rather than to the VAT registered partnership and were incurred in taking action as a result of individual concerns about the land being split up in the event of a member of the partnership dying. There was a direct link between the fees and the owners of the land, but not with the actual farming business.

Decision

The First Tier Tribunal concluded that the beneficiaries of the trust were individuals and not the partnership. A solicitor's letter confirmed that the trust was set up to ensure that Tom, his wife, his son and his five grandchildren would benefit from the trust.

Assets within the trust were not partnership assets and so there was no connection between the expenditure and the partnership. As the trust was set up for personal reasons, its dissolution could not be a business expense. It did not matter that the partnership may have benefited from the trust being set up, as this was merely incidental to the main reason for establishing it.

The First Tier Tribunal concluded that the input VAT was not recoverable.

T & C Bainbridge Farming Partnership v HMRC (TC07759)

Termination and compensation payments (Lecture B1216 – 26.12 minutes)

Previously, early termination fees and compensation payments have been treated as outside the scope of VAT. This has now changed retrospectively.

In order to bring the VAT treatment into line with CJEU case law developments (Meo (C-295/17 and Vodafone Portugal (C-43/19)), HMRC has issued Revenue and Customs Brief 12 (2020): Early termination fees and compensation payments. This states that HMRC now treat such fees and payments as subject to VAT at the standard rate, as the monies are consideration for supplies. Such fees and payments are made as a result of events envisaged under a contract, are part of the agreement and so are considered to be consideration for what is provided under that contract.

HMRC's VAT manual has been updated to reflect this and VATSC05920 states that:

> "HMRC's policy is to treat payments arising out of early contract termination as consideration for a taxable supply. Businesses must account for VAT on these fees. This applies in cases where the original contract allows for such a termination, as well as when a separate agreement is reached."

The R&C Brief confirms that businesses are required to correct the 'error'. This confirms that retrospective corrections are expected. However, any taxable person that has had a specific ruling from HMRC saying that such fees are outside the scope of VAT need only account for VAT on such fees received after the issue of this Revenue and Customs Brief.

https://www.gov.uk/government/publications/revenue-and-customs-brief-12-2020-vat-early-termination-fees-and-compensation-payments

Registration for intending traders

The Association of Taxation Technicians had raised a concern with HMRC that VAT registration applications are being automatically refused where the business includes little or no taxable supplies in the next 12 months on their application.

HMRC has confirmed that this is indeed the case. In their responses they stated:

> "HMRC is aware that in certain business sectors there is a likelihood of zero turnover for "the next 12-months" when a customer registers; currently if there is a zero turnover placed in the VAT 1 then as per our risking parameters in some circumstances an application can be rejected. These risking parameters are under constant review to mitigate any impacts they may have on particular intending trader customer sectors, but until any specific changes come in to effect it may be beneficial for your members to know they can provide the evidence for the eligibility of their clients using the VRS email address;

They recommend that where such an application has been rejected for this reason that the business should email evidence to substantiate its eligibility to register to HMRC's email address for new VAT registrations at vrs.newregistrations@hmrc.gov.uk. The application will then be reviewed and amended accordingly.

https://www.att.org.uk/technical/news/vat-registration-intending-traders-—-hmrc-update

Brexit VAT (Lectures B1219 – 15.24/ Lecture B1220 - 18.43 minutes)

Key principles

- EU and non-EU imports of goods to be treated in the same way;
- Level playing field for UK businesses i.e. no VAT free imports by an overseas seller;
- Overseas sellers to pay correct VAT on goods they sell which are already in the UK;
- Northern Ireland Protocol – includes VAT issues and separate procedures. For example, a business in Northern Ireland will buy and sell goods within the EU in the same way as now i.e. VAT free acquisitions and dispatches rather than imports and exports. This is necessary to create a soft border between Northern Ireland and Ireland, i.e. to avoid problems with the Belfast (Good Friday) Agreement.

Issues for UK importers

Postponed accounting will be introduced for worldwide imports i.e. EU and non-EU imports of goods. This means that VAT is not payable by a VAT registered business at the time goods arrive in the UK; entries are instead made by the UK importer on their relevant VAT return:

Box 1 – output tax

Box 4 – input tax – subject to any restriction for non-business or private use; or restriction with partial exemption

Box 7 – inputs – net value of goods.

Postponed accounting will produce a big cash flow saving for businesses because no VAT is payable at the time of import. Note – postponed accounting is optional for a business but it makes sense to adopt it from 1 January 2021 as soon as new procedures apply.

Three stages for introduction of new procedures

The following timeline has been included by HMRC in its main policy document about the new rules, headed: The Border with the European Union – Importing and Exporting Goods. The document is 206 pages long and was issued in July 2020. It can be downloaded from the HMRC website.

1 January 2021 – importing standard goods e.g. clothing and electronics. Basic customs requirements must be met but up to six months allowed to complete and submit customs declarations. Duty will be payable but can be deferred. No UK Safety and Security declarations needed for the first six months. Standard customs declarations are needed for controlled goods and excise goods e.g. alcohol and tobacco. Export declarations and UK exit Safety and Security declarations are required for all goods.

1 April 2021 – extra rules re animal products – meat and eggs etc. – no VAT issues

1 July 2021 – full customs declarations to be made at the point of importation and pay relevant tariffs. Full Safety and Security declarations needed.

Key issues

- NORTHERN IRELAND PROTOCOL - is separate and needs to be considered by business either based in Northern Ireland or who trade in goods with Northern Ireland businesses.

- CUSTOMS DECLARATIONS – needed for both imports and exports of goods into/from the UK.

- CUSTOMS DUTIES – UK Global Tariff (new) – dependent on origin of goods, classification, customs value of goods.

- VAT – EU will be treated the same as the rest of world. Postponed accounting for VAT registered importers is an option. Non-VAT registered importers pay VAT at same time as duties.

- SAFETY v SECURITY DECLARATIONS – information about movement of goods for both imports and exports.

- DUTY DEFERMENT ACCOUNT (DDA) – is needed by any trader making a deferred declaration until July 2021 because deferred declaration also means deferring the duty payable. Duty is paid monthly with a DDA rather than on each consignment.

- EORI NUMBER – must be "GB" number – 10 minutes to apply for EORI number on line – one week to be issued – most UK businesses will already have a number if they are involved with overseas trading.

- COMMODITY CODE – important part of process.

- CUSTOMS VALUE – needed to make a customs declaration and to calculate duties on an import.

- IMPORT AGENT – do you use an agent or make your own declarations? If the latter, this will be done by accessing HMRC's CHIEF system – and having a "CHIEF badge." Most businesses use an agent: "Customs declarations are complex" – quote from HMRC guidance.

- INTRASTAT CONTINUES FOR ARRIVALS – for at least 2021 – information from these reports is needed by government to record details of imports from EU countries – this information will not be accurate because many customs declarations will be delayed for six months as explained above – hence need for Intrastat arrivals to still be reported. But intrastat dispatches will be abolished apart from in Northern Ireland.

- EC SALES LISTS – to quote from HMRC press office (20 August 2020): "EC Sales Lists will only be required for sales of goods to EU businesses that are treated as intra-Community dispatches under the terms of the Northern Ireland Protocol. They will not be required for any supplies of services or any supplies of goods that are treated as an export."

Note – to quote from the HMRC guidance:

> "Free trade agreements between the UK and the EU, and between the UK and other countries, may reduce or remove tariffs on some goods. The origin of the goods will determine whether they are eligible under these arrangements for those preferential tariffs."

Exporters – key issues

- EORI number – GB;
- Customs declarations – intermediary/agent used in most cases;
- New tool is available – "check duties and customs procedures for export of goods" on gov website;
- UK Safety and Security declaration – needed in all cases;
- Certificates or licences to import certain products into EU will be needed by UK exporters e.g. food, live animals, chemicals/drugs.

Consignment value

Goods outside UK and consignment is less than £135

Note - £135 is 'consignment value' and not each individual item being sold.

From 1 January 2021, consignments < £135 will be subject to 'supply VAT' when sold to customer and not 'import VAT' when they arrive in the UK. If a consignment exceeds £135, import VAT applies when the goods enter the UK so therefore no supply VAT is charged at point of sale.

Low Value Consignment Relief – £15 – is being abolished from 1/1/21.

Online marketplaces

Online marketplaces (OMPs) where involved in the sale will be responsible for collecting and accounting for VAT. This also applies if goods are already in the UK at time of sale, irrespective of their value.

What is an OMP? - any electronic interface that facilitates the sale of goods to customers.

Direct sale <£135 - overseas business sells directly to UK consumers i.e. no OMP is involved in the deal. The overseas seller must register for VAT in the UK and account for sales VAT to HMRC. Same approach if goods are already in UK and sold by overseas seller without OMP involvement i.e. as is the case now.

The overseas seller (or OMP) liable to account for output tax, must provide the customer with a VAT invoice at the time of the sale. <u>For direct sales by an overseas seller, a VAT invoice must accompany the goods in transit.</u> This allows HMRC to do risk-based checks at border.

B2B sales where UK customer is VAT registered – reverse charge if less than £135

Example

John is VAT registered in the UK and buys a print cartridge directly from a French supplier for £50. The value is less than £135 so no import VAT is due on arrival in the UK. John accounts for £10 VAT on his own return by doing the reverse charge calculation. If John fails to give his VAT number to the French seller, he will be treated as B2C and charged £10 UK VAT by the French supplier (or OMP) i.e. supply VAT rather than import VAT.

No changes to excise goods or non-commercial transactions between private individuals.

End result – no VAT is paid at border when goods arrive if < £135 but customs declarations are still made.

OMP – if involved in a deal, they are deemed to be making the supply of goods to the UK consumer – plus UK VAT at appropriate rate.

Note – the value for VAT purposes is the amount paid by the final customer

UK VAT registration will be needed for any business that operates as an OMP that facilitates sales of goods to UK customers.

Note – if stock is already in the UK at the time of sale (no OMP) – the same rules apply as before 1 January 2021 i.e. UK VAT registration is needed by overseas seller who is making taxable sales in UK – zero registration threshold.

Goods in UK at point of sale – any value - owned by overseas seller – sold to consumer through OMP.

If a consignment exceeds £135, then import VAT is due when the goods arrive in the country.

The onward sale of goods is deemed to be made by the OMP and not by the overseas seller in all cases if the goods are in the UK at the time of the sale, irrespective of value. The overseas seller is not supplying goods to the consumer. At the time of the sale, the overseas seller makes a zero-rated sale to the OMP. This is a taxable sale so means the overseas seller must be VAT registered in the UK (nil registration threshold) to both zero-rate the sale to the OMP and claim import VAT through postponed accounting and input tax on other costs. A Box 6 entry is made on the UK VAT return of the overseas seller.

However, if the buyer of the goods is VAT registered in the UK, the sale is deemed to have been made by the overseas seller and not the OMP.

Example – post 1/1/21

Overseas seller Andre is based in Italy and imports a table worth £500 into the UK which will be sold on Amazon i.e. an online marketplace (OMP). Andre is registered for VAT in the UK and Italy. The table is stored at a warehouse until a customer is found. No VAT is payable at import (postponed accounting) but the goods are declared for customs purposes – Andre accounts for output tax of £100 and claims input tax of the same amount on his relevant UK VAT return i.e. by adopting postponed accounting.

The table is sold for a higher price than expected – a B2C sale for £700 plus VAT. The OMP (Amazon) charges £140 VAT to the UK buyer and issues a VAT invoice, accounting for output tax on its next UK VAT return. Andre invoices the OMP for a zero-rated sale of £700 from his UK registration. He includes this in Box 6 of his UK VAT return. The OMP charges a platform fee of £70 to Andre in Italy based on 10% of the selling price i.e. £70. Andre will account for the reverse charge on his Italian VAT return on the payment of £70 made to the OMP, based on the Italian rate of VAT.

If the table was purchased by a VAT registered business in the UK, which supplied its VAT number to the OMP(Amazon), the sale is deemed to have instead been made by the overseas seller (Andre) and not the OMP. He will charge £700 + £140 VAT rather than the OMP.

Note – Andre must be VAT registered in the UK because of the nil registration threshold for a non-UK business. He needs a VAT number as soon as he intends to start trading in the UK.

Note – there are no changes to the rules for non-OMP sales of goods where the goods are already in the UK at the point of sale (i.e. VAT is accounted for by the overseas seller as an NETP). An NETP must register for VAT as soon as it intends to make UK sales because of the nil registration threshold.

Note – a UK customer is defined by the delivery address of the goods and not the billing address, although this will be the same in most cases.

Note – postponed accounting on imports is recorded in Box 1 and not Box 2 of the importers VAT return – along with relevant entries in Box 4 and 7.

Key issues for OMPs

- Location of goods at time of sale – inside or outside UK?
- If outside UK, is value excluding VAT less than £135?
- If goods are in UK, is seller based in UK or an overseas seller?
- If goods are being sold by an overseas seller, is buyer registered for VAT in UK?
- Rate of VAT that applies to the goods being sold – 0%, 5%, 20%?

Key quote from HMRC guidance:

"OMP liability will not apply to business to business sales where the goods are in the UK at the point of sale. The business recipient will need to provide a valid UK VAT registration number to show that the supply is business to business sale. If this is not provided the sale should be treated as a business to consumer transaction. Where a valid VAT registration number is provided the supply will be from the overseas OMP seller, rather than the OMP, to the business recipient and will follow existing VAT rules. There will be no reverse charge applied to this transaction."

Other issues

- Goods sold by UK business (outside of Northern Ireland) into Northern Ireland – VAT supply in UK as now but there is a new digital import declaration requirement. A Trade Support Service will provide help on this new administrative requirement.

- Exports – goods leaving the UK will be exports – no despatches after 31 December 2020 - distance selling thresholds will no longer be relevant for B2C sales of goods into an EU country that exceed 35,000 or 100,000 Euros on a calendar year basis.

- Call-off stock – held in EU countries by a UK business. No need for a UK business to register for VAT in that country at the moment – acquisition tax accounted for by known customer (must be VAT registered) at the time of call-off. But UK business will need an overseas VAT number in that country from 1 January 2021 i.e. to import goods into the country and then charge domestic VAT when onward sale is made.

Contributed by Neil Warren

EU VAT Package (Lecture B1216 – 26.12 minutes)

The EU e-commerce VAT package was due to come in to play on 1 January 2021 but due to Covid-19 its implementation has been postponed until 1 July 2021. The new package aims to simplify VAT reporting across the EU, with sellers using a single VAT return in their own country to report all of their EU sales, relieving them of the need to have multiple VAT registrations in other member states where they trade.

Introduction of the One-Stop-Shop EU VAT return

Currently, once a country's distance selling threshold has been exceeded, businesses must register for VAT in that country and file foreign VAT returns in these countries. From 1 July 2021, the thresholds are effectively being withdrawn. Cross-border sellers will have to charge the VAT rate of the customer's country of residence from their first sale and remit it to the foreign tax authorities.

From 1 July 2021, there will be a new single EU VAT return, the 'One Stop Shop" (OSS) return that will build on the success of the MOSS return. The new OSS scheme will be extended beyond digital services, telecoms and broadcasting services to include services and event organisers. By opting to file a new OSS online return together with their domestic VAT return, B2C sellers will no longer need to register in multiple EU countries. Instead, they will submit details of all of their EU supplies to their domestic VAT authority, who will be responsible for forwarding both supply details and payments to the relevant EU VAT authorities.

Non-EU sellers may apply to use the OSS regime, and will need to nominate a single EU state to register and file in. This means that when the UK leaves the EU at the end of the year, UK B2C businesses selling to EU countries will be able to take advantage of this scheme from 1 July 2021.

Ending of the low-value import VAT exemption and implementation of the new IOSS return

From July 2021:

- Low value consignment stock relief will be abolished. Intended to relieve the burden on customs of checking large volumes of low value items, the exemption encouraged fraud with sellers under declaring the values of their goods;

- EU and non-EU sellers must charge VAT at the point-of-sale for consignments up to €150 which can be processed through the new 'Import One Stop Shop' (IOSS). In order to declare the VAT on any affected imports below €150, non-EU sellers must register for IOSS in one EU state.

Making marketplaces the deemed seller and collector of VAT

Under the new rules, online marketplaces will become the 'deemed seller'. For imports up to €150, the marketplace must charge the customer VAT at point-of-sale. Sellers will benefit from reduced VAT obligations, and may be able to deregister in some EU states.

If a marketplace opts out of the scheme, the VAT obligation becomes the responsibility of the seller's delivery company

https://www.avalara.com/vatlive/en/vat-news/eu-2021-e-commerce-vat-package.html

Duty Free in the EU

From January 2021, British passengers travelling to EU countries will be able to take advantage of duty-free shopping, as 'rest of the world' allowances are extended to include the EU countries.

At the same time, the duty free allowances are being significantly increased.

Alcohol

The new allowances are as follows:

- 42 litres of beer

- 18 litres of still wine

- 4 litres of spirits OR 9 litres of sparkling wine, fortified wine or any alcoholic beverage less than 22% ABV

With these new limits, an individual will be able to bring three crates of beer, two cases of still wine and one case of sparkling wine to GB without paying UK duties.

Tobacco

The new allowances are as follows:

- 200 cigarettes OR
- 100 cigarillos OR
- 50 cigars OR
- 250g tobacco OR
- 200 sticks of tobacco for heating OR
- any proportional combination of the above

The government responses confirm that from January 2021:

Tax-free sales to go

The government has announced that tax-free sales in airports of goods such as electronics and clothing for passengers travelling to non-EU countries will go.

VAT Retail Export Scheme

VAT refunds for overseas visitors will be removed. Overseas visitors will still be able to buy items VAT-free in store and have them sent direct to their overseas addresses, while the costly system of claiming VAT refunds on items they take home in their luggage will be ended.

https://www.gov.uk/government/news/duty-free-extended-to-the-eu-from-january-2021

Temporary reduced VAT rate queries (Lecture B1216 – 26.12 minutes)

Following the Chancellor’s announcement in July that certain supplies of hospitality, holiday accommodation and admission to attractions would be subject to a temporary 5% reduced rate of VAT until 12 January 2021 (now 31 March 2021), the ATT raised a number of questions with HMRC. On 14th September 2020, the ATT published the responses received from HMRC.

Non - alcoholic drinks

HMRC has confirmed that alcohol served with a mixer is a single supply of an alcoholic drink and so is chargeable to standard rate VAT. Low alcoholic drinks, like a shandy, qualify for the reduced rate if there is no excise duty charged on them as they would be they would be considered a soft drink.

Promotional offers

Where a business makes a promotional offer, the economic and commercial reality of that deal must be considered. Supplying a burger with a free pint of beer represents two supplies: the supply of a burger and the supply of a pint of beer. The consideration received will need to be apportioned to ensure that the correct amount of VAT is accounted for on the supply of each item.

On the premises

The temporary reduced VAT rate applies only to supplies of food and non-alcoholic drinks for consumption on the premises on which they are supplied. HMRC has confirmed that this means the food retailer's own premises or any area set aside for the consumption of food by the food retailer's customers whether or not the area may also be used by the customers of other food retailers. Where catering is not provided on the catering supplier's own premises the standard rate of VAT still applies.

HMRC has confirmed that, although off premises caterers cannot take advantage of the temporary reduced VAT rate, they can take advantage of the new flat-rate percentage of 4.5%, as this applies to "Catering services including restaurants and takeaways". When HMRC introduced the new temporary rates, they were based on an estimate of the reduction of VAT declared across the sectors. They have stated that they recognise that this will work in some businesses favour. This could not be changed whilst still maintaining the simplification benefits the scheme provides.

Wedding packages

HMRC clarified that a supply of a package of wedding services (for example, use of rooms for a ceremony, a wedding breakfast and evening party), is a single standard-rated supply. Who supplies the catering is not relevant. However, until 12 January 2021 (now 31 March 2021), where a business provides catering on its own premises and are not providing this as part of a wedding package, it may benefit from the temporary reduced rate.

Holiday accommodation deposits

HMRC has confirmed that where a deposit was taken before the reduction in the VAT rate, the business may choose to apply the rate applicable at the basic tax point to the deposit as well as the balancing payment. Currently, there are no plans for anti-forestalling legislation to be implemented when the rate reverts back to 20%.

Admission to parks/ attractions

An admission charge to enter an amusement park/fair ground or similar facility is eligible for the reduced rate but what about additional amounts paid for certain rides once inside? HMRC has stated that to be considered eligible for the reduced rate, the ride must be similar to that of an amusement park or fairground in its own right. The individual features of the rides in question and the charging structure in place will need to be assessed before a final ruling can be given on this issue.

Where a ticket [season or otherwise] is for a bundle of supplies, some of which are eligible for the reduced rate and some that are not, then the consideration will need to be apportioned. The temporary reduced rate will apply to season tickets purchased and paid for from 15 July 2020 to 12 January 2021 (now 31 March 2021).

https://www.att.org.uk/technical/news/hmrc-response-att-queries-temporary-reduced-rate-vat