Tolley®CPD

September 2017

Disclaimer

Tolley CPD takes every care when preparing this material. However, no responsibility can be accepted for any losses arising to any person acting or refraining from acting as a result of the material contained in these notes.

All rights reserved. No part of these notes may be reproduced or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without the prior written permission of Tolley CPD.

CONTENTS

Personal tax ... 5
- Tax relief for unreimbursed employee expenses ... 5
- Compensation for childcare service faults ... 6
- Change of policy– Mansworth v Jelley (Lecture P1031 – 8.22 minutes) ... 7
- Updated ERS guidance on restricted stock units ... 8
- Opinion on gold bullion EBT scheme ... 8
- Off payroll workers in the public sector (Lecture P1032 – 9.32 minutes) ... 8
- Enhanced pension protection again ... 10
- Taxation of state pension lump sums (Lecture B1031 – 15.07 minutes) ... 12
- The Rangers case - the end of the road for EBTs? ... 15
- Devolved tax in Scotland (Lecture P1033 - 8.09 minutes) ... 17

Capital Taxes ... 19
- Failure to make reasonable financial provision ... 19
- IHT residence NRB – practical points (Lecture P1034 – 15.27 minutes) ... 19

Administration ... 23
- Must a company director submit a tax return? ... 23

Deadlines ... 24

HMRC News (Lecture B1032 – 10.15 minutes) ... 26
- Small business online forum ... 26
- Funding for innovative businesses ... 26
- Agent Update 61 ... 27
- Spotlight 39 – Disguised Remuneration: Re-Describing Loans ... 30

Business Taxation ... 31
- Apprenticeships in the profession (Lecture P1035 – 15.25 minutes) ... 31
- Draft guidance: Corporation tax loss relief reform ... 34
- Central management and control (Lecture B1033 – 4.52 minutes) ... 34

VAT ... 36
- Temporary classroom buildings – standard rated or exempt? ... 36
- Zero-rating of mixed use conversions (Lecture B1034 – 18.45 minutes) ... 37
- R&C Brief 2/2017: VAT on care homes and hospitals ... 38
- Notice 714: Zero-rating young children's clothing and footwear ... 38
- Supplies closely related to education (Lecture B1035 – 13.13 minutes) ... 39
- EBay charging VAT ... 39
- Entitlement to make a barring order against HMRC ... 40
- Combined view of inaccuracy ... 41

Personal tax

Tax relief for unreimbursed employee expenses

In the March 2017 Budget the government confirmed the Autumn Statement announcement that a call for evidence would be published to better understand the use of the income tax relief for employees' business expenses, including those that are not reimbursed by their employer. The call for evidence was published in May 2017, with a closing date for responses of 10 July 2017. It clearly stated that the government had no plans to remove the relief on employee expenses

The main objectives of the call for evidence are to understand:

- if the current rules or their administration can be clearer and simpler
- whether the tax rules for expenses are fit for purpose in the modern economy
- why the cost to the exchequer of the tax relief for expenses which are not reimbursed has increased

The call for evidence is seeking views on:

- current employer practise on employee expenses;
- current tax rules on employee expenses;
- the future of employee expenses.

With a difficult economic climate, the CIOT believes that one of the main reasons for the increase in unreimbursed claims by employees is that employers are being stricter in what they will reimburse. This does not mean that those non-reimbursed expenses should not receive tax relief.

Colin Ben-Nathan, Chair of CIOT's Employment Taxes Sub-committee, said:

> "While it may be tempting for a government to look at the cost to the Exchequer of tax relief on employment expenses and limit relief where the employer has not directly reimbursed the expense, we think that this would be the wrong response and that tax relief on non-reimbursed expenses should be retained.
>
> "All workers should have the right to claim a deduction for the expenses incurred while fulfilling their work obligations, particularly where the employer chooses to pay a taxable cash allowance to cover employee expenses or where reimbursement is otherwise limited for cost control reasons."

The CIOT believe that many employees do not know that they are entitled to claim tax relief on non-reimbursed employment expenses, nor do many employees know where to find information on how to make a claim for tax relief and so they are calling on HMRC for better and easier access to appropriate information and a simpler process for claiming tax relief and a better process for claiming flat rate expenses.

The CIOT have recommended a review of the:

- differences between employed and self-employed entitlements for tax relief on business expenses, with a view to more closely aligning the income tax and NIC rules for each. For example, while an employee cannot claim relief for non-reimbursed training costs, a self-employed worker can claim relief so long as the training updates existing expertise or knowledge;

- tax reliefs available in respect of working from home to reflect the greater number of employees working remotely specifically how to deal with inclusive packages that do not allow for 'business use' to be itemised;

- tax-free relocation allowance of £8,000, which they consider is no longer reflective of typical relocation costs;

- current standard flat-rate tax-free allowances and benchmark scale rate payments to ensure that they remain relevant and reflective of current costs.

https://www.gov.uk/government/consultations/taxation-of-employee-expenses-call-for-evidence/taxation-of-employee-expenses-call-for-evidence

www.tax.org.uk/media-centre/press-releases/press-release-don't-abolish-tax-relief-unreimbursed-employee-expenses

Compensation for childcare service faults

HMRC has issued guidance on compensation for tax-free childcare claimants who, owing to technical problems, have been unable to complete applications, access childcare accounts, or receive timely eligibility decisions.

Claimants may be eligible to receive a one-off payment as well as reasonable costs directly caused by the service not working as it should, mistakes or unreasonable delays if they have:

- been unable to complete their application for Tax-Free Childcare;

- been unable to access their childcare account;

- not received a decision about eligibility for more than 20 days.

To make a claim, claimants must send HMRC:

- a brief description of the issues that they have had;
- copies of receipts for payments to their childcare provider;
- their full name and home address;
- their National Insurance number, bank name, account number and sort code

www.gov.uk/guidance/childcare-service-compensation

Change of policy– Mansworth v Jelley (Lecture P1031 – 8.22 minutes)

Summary - The Court of Appeal found that HMRC had been entitled to change its policy on the treatment of Mansworth v Jelley .

Mr Hutchinson had exercised some share options and taken advantage of a change in the allowed treatment of those transactions, enabling him to claim additional losses in later periods under HMRC guidance.

However, in June 2003, HMRC opened enquiries into Mr Hutchinson's return, warning him that they did not accept his additional losses.

In 2009, HMRC, following legal advice, issued corrected guidance stating that it would not accept the additional losses unless there had been reasonable detrimental reliance on the 2003 guidance. HMRC did not consider that Mr Hutchinson had shown this and served closure notices, bringing the enquiries to an end and refusing the additional losses.

Mr Hutchinson had been granted judicial review on the grounds of breach of a legitimate expectation, unfairness amounting to an abuse of power, unfairness by comparison with other taxpayers and the maintenance of unlawful enquiries. HMRC appealed the decision.

Decision

The Court of Appeal said that the taxpayer's only legitimate expectation is that he would be taxed according to statute, not concession or a wrong view of the law. This means that a public body can therefore change its policy if there is a good reason. It also observed that taxpayers with Mansworth v Jelley losses were not in the same position if they were in open years as opposed to closed years. For the latter group, HMRC had no power to reopen their affairs and to remove the ability to utilise the Mansworth v Jelley loss. The position was entirely different for those whose years were open, including Mr Hutchinson, so that comparative unfairness was not established. Furthermore, balancing the public interest against the interest of taxpayers affected by the decision to withdraw the 2003 guidance, there was no conspicuous unfairness; Mr Hutchinson was returned to the same position as he was in when he committed himself to the transactions that gave rise to the capital losses.

HMRC v R Hutchinson [2017] EWCA Civ 1075

Adapted from summary in Tax Journal (4 August 2017)

Updated ERS guidance on restricted stock units

On 1 August 2017 HMRC updated its Employment Related Securities Manual that gives guidance on the treatment of restricted stock units and dividend equivalents included within long-term incentive plans.

The updated guidance at ERSM20192 and ERSM20193 reflects changes introduced with effect from April 2016 by s17 Finance Act 2016 that ensures that, in most cases, such arrangements are taxed under the securities options rules, rather than as earnings on the receipt of 'money's worth'.

www.gov.uk/hmrc-internal-manuals/employment-related-securities/updates

Opinion on gold bullion EBT scheme

The GAAR was designed to prevent artificial and abusive tax avoidance schemes. The GAAR advisory panel was set up in 2013 to advise on disputes over potentially abusive tax arrangements, providing guidance and non-binding opinions on cases where HMRC considers that the GAAR may apply.

Last month, the panel provided its first opinion, where a company wished to incentivise two employees, Mr X and Mrs Y, using gold bullion and an employee benefit trust (EBT), in a way that would not constitute remuneration for tax purposes. The panel concluded that such arrangements were "abnormal" and not a "reasonable course of action in relation to the relevant tax provisions".

Under the scheme, the company funded the purchase of gold for each of the employees, which was then immediately sold by the employees. The company's liability to pay the third party supplier of the gold was then settled by the employees in return for a director's loan account credit in their favour and a long-term obligation to an EBT.

The panel published three separate opinions, one relating to the tax position of the company and one for each of the employees. It concluded that it was abnormal both for an employer to reward its employees using gold, and for the asset to be sold immediately after the purchase. It was not abnormal for an employer to establish an EBT for an employee, however they considered it to be abnormal for the obligation to fund an employer established benefit trust to be fulfilled by its key employees.

www.gov.uk/government/publications/gaar-advisory-panel-opinion-employee-rewards-using-gold-bullion

Off payroll workers in the public sector (Lecture P1032 – 9.32 minutes)

As a reminder, from 6 April 2017, it is the public body's responsibility to decide whether work done by the shareholder/director of a personal service company is caught by IR35. So for example where the NHS believe that work done by such an individual is caught, they must deduct tax and NIC from the invoiced amount.

On 2 August 2017, HMRC published updated guidance on the practicalities of how this will work.

Example

A company invoices the NHS £6,000 plus VAT for work done by a shareholder-director. If the NHS believe that the individual should have tax and national insurance deducted from the amount due, the individual must provide the NHS with their NI number. The £6,000 will be treated as the gross pay and deduct tax of £1,200 (6,000 x 20%) as well as primary NIC of £413.

The company will receive £5,587 (7,200 – 1,200 – 413) and the company will pay over the tax (£1,200), primary NI (£413) plus the secondary NI contributions due on the gross earnings of £6,000 to HMRC.

Payroll route

Under this route, the personal service company invoices £7,200 but the NHS only pays over £5,587, calculated as £1,200 VAT plus £4,387, (£6,000, net of income tax and NI totalling £1,613).

For VAT purposes, the company will account for output tax in BOX 1 of £1,200 and outputs of £6,000 in BOX 6, with £6,000 as income in the P&L account.

The £6,000 earnings appear on the NHS' payroll and the individual is able to withdraw tax-free salary of £4,387 from his company. When running the company's payroll this is shown as a non-taxable payment on the FPS summary. If using the basic PAYE tools, the £4,387 is not reportable and it does not appear on the self-assessment return of the individual as earnings from the company. It is the extraction of the already taxed amount.

Dividend route

As before, the personal service company invoices £7,200 but the NHS only pays over £5,587, calculated as £1,200 VAT plus £4,387, (£6,000, net of income tax and NI totalling £1,613).

For VAT purposes, the company will account for output tax in BOX 1 of £1,200 and outputs of £6,000 in BOX 6, with £6,000 as income in the P&L account.

Under this route the individual withdraws a tax free dividend of £4,387. This is not declared on the individual's self assessment return as the gross amount counts as earnings appearing on the NHS payroll.

The company's accounts

The £6,000 invoiced is recorded as turnover but is reduced by the tax and NI deducted at source (£1,613) by the NHS:

DR	Turnover	1,613	
CR	Debtors		1,613

The debtors will be left with a balance of £5,587, the amount that the NHS will actually pay to the company.

The company's corporation tax

The aim is to eliminate the £6,000 invoice from the corporation tax charge as tax has already been paid on these earnings via the NHS payroll.

The salary route will need no further amendment as the accounts will show:

Income	6,000
Less: Tax/ NI	1,613
Net	4,387
Less: salary paid	4,387
	-

The invoice has been removed.

The dividend route will need a corporation tax adjustment as follows:

Income	6,000
Less: Tax/ NI	1,613
Profit per accounts	4,387

Dividends are not an expense in the accounts and so to remove this profit that is not taxable, we need to deduct £4,387 for tax purposes.

www.gov.uk/guidance/off-payroll-working-in-the-public-sector-personal-service-companies

Enhanced pension protection again

Summary – The First Tier Tribunal decided that the taxpayer had not given notification without unreasonable delay after his reasonable excuse had ceased.

Alan Twaite, a retired engineer who had been a company director until his company had been taken over by Pilkington, after which time he became a branch manager.

From 2000, his pension advisers were Close Asset Management Ltd and his relationship manager was Julian Warden.

In the late 1990s Twaite had been diagnosed with heart failure that deteriorated and in 2000, he was referred for a heart transplant. He took early retirement in 2001. After three years of waiting for a transplant, he was given a pacemaker that stabilised his condition but did not cure him. Between 2006 and 2009, his condition was managed by a pacemaker and medication.

In 2006, Warden had advised Twaite that he was not eligible for such pension protection. When Twaite contacted Warden to tell him that the Pilkington pension information had been incorrect, Warden said that he would revise the figures and contact him again if the pension protection advice changed. However, Warden did not amend or supplement his advice and did not raise the matter again.

Warden left Close Asset Management Ltd and was succeeded by Kevin Broadbent. In March 2014, he contacted Twaite and confirmed that Warden's advice had been incorrect and that he needed enhanced protection. Twaite registered a complaint with Close Asset Management Ltd on the same day. In a letter dated 15 December 2014, Twaite was eventually sent the retrospective enhanced protection application form. He signed it on 2 February 2015 and it was submitted to HMRC on 24 February 2015 with a request that the late application be accepted. HMRC rejected the late application; a decision that was upheld on review.

Under reg 4(4) Registered Pension Schemes (Enhanced Lifetime Allowance) Regulations 2006, SI 2009/131 (the Regulations) the closing date for notifications was 5 April 2009. But reg 12 of the Regulations allows a late claim if the taxpayer had:

1. reasonable excuse for not giving notification before 5 April 2009 (reg 12(b));

2. given the notification without unreasonable delay after the reasonable excuse had ceased (reg 12(c)).

Twaite argued that he satisfied both conditions and appealed.

Decision

The Tribunal held that Twaite had had a reasonable excuse for failing to apply for enhanced protection within time. That excuse was Close Asset Management Ltd 's failure to advise Twaite of the need for a notification.

This reasonable excuse ended when he was told that the notification had been needed. So the Tribunal found that the reasonable excuse ceased in March 2014 when Broadbent informed Twaite that he should have made a notification but had not done so. It was clear that Twaite had already reached his own conclusion to the same effect in the course of (or immediately after) his conversation with Mr Broadbent on 1 March 2014, as he lodged a formal complaint with Close Asset Management Ltd on the same day.

The time from the taxpayer's insistence upon progress after the letter of 15 December and the eventual notification had been slightly more than two months. It followed that if the taxpayer had insisted upon progress about a month after the June emails, then, assuming the same two-month timeframe (which was itself generous given that the notification had been signed on 2 February 2015 but not sent to the Revenue until 24 February 2015), the notification would have been made by about the end of September. That would have been about five months earlier than the actual notification. The taxpayer's failure to do that made the delay unreasonable .

The appeal was dismissed.

Twaite v HMRC (TC06033)

Taxation of state pension lump sums (Lecture B1031 – 15.07 minutes)

A development seen in recent years is that of individuals continuing to work for their previous employer following either retirement or redundancy. Typically, an organisation does not want to lose valued skills overnight, while at the same time a senior manager or director will in many cases welcome the chance to pick up some consultancy work in his or her area of expertise

At the same time, the individual concerned may well be approaching state retirement age with the result that a combination of employment, consultancy and state pension might tip him or her into higher rate tax liability for the year in which employment ceases. This is where the deferral of state pension might prove useful.

State pension age

A reminder first regarding the state pension age. This has been undergoing radical change since April 2010.It is rising to 65 for women between 2010 and 2018, and then to 66, 67 and 68* for both men and women. (*subject to parliamentary approval, the increase to 68 will now take place between 2037 and 2039 which is seven years earlier than the current legislated date range of 2044 to 2046)

Taxing the lump sum

The tax rate finally applying to the lump sum depends on the marginal tax rate for income excluding the lump sum for the tax year in which received.

It is important to appreciate that the appropriate tax rate will be applied to the full sum at that marginal rate, irrespective of the size of the payment.

The DWP will deduct tax at source. The recipient must complete a special declaration indicating his likely band of taxable income and the appropriate rate will be withheld.

Example 1: Income £12,500, lump sum £50,000, tax deducted 20%

	£
Income excluding lump sum	12,500
Personal allowance (2017/18)	11,500
Taxable amount	1,000
Tax due at 20%	200
Tax on lump sum £50,000 at 20%	10,000
Total payable	10,200
Less paid	(10,000)
Due 31 January 2019	200

If the declaration is incorrect, the underpayment of tax will be identified when the self assessment return is completed for the year.

For practitioners used to dealing with cases where a source of income might be taxed at more than one rate, the treatment of state pension lump sum may be seen as counter intuitive

Example 2: State pension £11,600, lump sum £50,000, no tax deducted

	£
Income excluding lump sum	11,600
Personal allowance (2017/18)	11,500
Taxable at 20%	100
Tax due at 20%	20
Tax on lump sum £50,000 at 20%	10,000
Total payable	10,020
Less paid	(-)
Due 31 January 2019	10,020

In this case the applicant had assumed, when self-certifying the tax rate applicable to the lump sum, that he would not be a taxpayer in 2017/18 i.e. other income would be less than the personal allowance. In the event the state pension exceeded this by a small amount.

Result? The full, deferred lump sum becomes chargeable to income tax at 20%

It follows that, when advising clients, to be prudent when advising the DWP of the rate of tax to apply, and to do this only with as much detail of income for the tax year concerned as possible

For example, a retired teacher was born in June 1947 and the pension date is therefore at age 65 in June 2012.

His 2012/13 income was £51,000 and so deferral was advised until 2016/17, the tax year after he planned to cease full time work. The necessary deferral application was made in January 2012

A deduction of 20% was suggested to the DWP based on the following expected income for 2016/17:

	£
State pension	9,000
Occupational pension	10,000
Freelance income year	10,000
Total	29,000
Personal allowance	11,000
Taxable at 20%	18,000

He retired as planned in November 2015 and continued to work for his previous employer as a freelancer. The 2015/16 SA return was prepared in January 2017 and freelance income up until that point were below the £10,000 estimated above.

The monthly state pension was taken from January 2016 and the deferred pension in April 2016 with a gross payment of £27,300 less 20% tax £5,460

Draft computation 2016/17

Crucially, he had in March 2016 also, without informing the accountant, renewed the freelance assignment but with a substantial increase in fees and hours charged.

This resulted in the draft 2016/17 tax computation prepared in May 2017:

	£	
State pension	9,320	
Occupational pension	10,430	
Freelance income	25,090	
Total	44,840	
Personal allowance	11,000	
Taxable	33,840	
First £32,000 taxed at 20%	6,400	
Next £ 1,840 taxed at 40%	736	
Tax on lump sum £27,300 at 40%	10,920	
Total due	18,056	
Less deducted at source on lump sum	(5,460)	(see above)
Payable 31 January 2018	12,596	

The full lump sum was to be taxed at 40% as a direct result of other taxable income now exceeding the basis rate limit of £43,000.

In effect the top £1,840 of income was producing a tax liability of £736 + (£10,920/2) £5,460 i.e. £6,196 - a marginal tax rate of 336% !

A solution

Freelance profits and losses had, since commencement in 1991, been calculated on an accruals basis, and the working papers showed that, at 5 April 2017 there was a closing debtor of £2,500 brought into account.

Could the provisions of FA 2013 be used in order to switch to a cash basis for 2016/17 and so remove the client from higher rate tax liability?

The answer was yes. The 2016/17 accounts were then redrawn using the cash basis, with the following result:

	£
State pension	9,320
Occupational pension	10,430
Freelance income year	22,590
Total	42,340
Personal allowance	11,000
Taxable	31,340
Taxed at 20%	6,268
Tax on lump sum £27300 at 20%	5,460
Total due	11,728
Less deducted at source on lump sum	(5,460) (see above)
Payable 31 January 2018	6,268

Result? The switch to cash basis has produced an overall saving of £6,328 in 2016/17, including the removal of higher rate tax liability from the lump sum (£5,460)

Assuming a marginal rate of tax of 20% in 2017/18, this saving will be partly counterbalanced by the assessment to tax of the debtor of £2,500 (i.e. £500)

Conclusion

Practitioners need to be aware of the availability of the cash basis for unincorporated businesses and its use in marginal tax rate planning, particularly where first adopted in the year of receipt of deferred state pension

The client will not be happy if this opportunity is missed!

Note also that, from 6 April 2017, the threshold for the cash basis increased from £83,000 to £150,000 with the exit threshold (above which the cash basis may not be used) remaining at double the entry threshold i.e. £300,000.Many more clients will qualify as a result

Contributed by Brian Ogilvie

The Rangers case - the end of the road for EBTs?

Last month we reported on the long-awaited decision of the Supreme Court in the 'Rangers' football case (*RFC 2012 Plc (in liquidation) (formerly Rangers Football Club Plc) v Advocate General for Scotland);* a resounding victory for HMRC.

The old Rangers football club created an EBT with substantial funds and sub trusts of that EBT were set up for the benefit of certain players and other employees. The sub trusts made interest-free loans to those individuals.

The Supreme Court concluded that the proper test was what the company had paid rather than what the individuals received. The court was in no doubt that the money was paid as reward. The fact that it was paid to an EBT with the individuals receiving loans, rather being paid directly to the individuals did not affect the position. Rangers should have deducted PAYE when making the payment to the trust. (The Supreme Court held that *Sempra Metals* and *Dextra,* previous EBT loan cases were wrongly decided. Previously, promoters were able to point to these decisions to validate the arguments that loans could be made from EBTs without triggering a PAYE charge).

What now?

As predicted, HMRC are using the decision to put pressure on taxpayers to settle outstanding disputes. HMRC have already announced in its agents' blog that they will be inviting participants of similar schemes to settle tax liabilities that now fall due. They have said that details will follow in the next few weeks on how to register and settle the amounts due. Anyone wanting to get ahead of the game can email ca.admin@hmrc.gsi.gov.uk.

HMRC is likely to issue follower notices citing the *Rangers* case as a 'final judicial ruling'. A follower notice requires the company to amend its return / withdraw its appeal or otherwise settle with HMRC within 90 days of the date of issue. It seems likely however that most users will concede that there is no point in continuing to challenge HMRC.

Simply paying the tax and interest due is not sufficient to avoid a penalty: the dispute must be closed off completely. To avoid a penalty there must be a formal agreement with HMRC and any notice will probably include a form to send to HMRC to withdraw an appeal and / or amend a self-assessment. If means are a problem, it will be essential to agree a time to pay arrangement before the tax becomes due and payable.

Corporation tax

The logic of the *Rangers* decision is that corporation tax relief on the payment to the EBT is due in the year in which it was made. In most cases relief will have been claimed in that year and presumably this will now be accepted by HMRC. Where relief was not claimed at the time it may well be too late to make a claim now.

The additional PAYE and NIC now payable will generally be eligible for corporation tax relief. This should be in the computation for the year in which it is paid. In a settlement, HMRC's policy has been to net off the additional corporation tax relief against the PAYE and NIC liability. It is not yet clear whether this will still apply or whether HMRC will expect a gross payment of PAYE and NIC with relief being claimed later in the tax computation for the current period.

Who pays the income tax and NIC?

The earnings arose when the funds were contributed to the EBT and that it was the responsibility of the employer to operate PAYE at that point.

It is worth checking the year for which the PAYE determination was raised. There may be cases where determinations have been raised for the wrong year, given that *Rangers* tells us that it was the date of the original EBT contribution, not the date of the allocation to the sub trust, which may be in a different tax year.

If the employer no longer exists or has no funds to do so, can the PAYE be recovered from the beneficiaries? If the individuals do not reimburse the employers, does this create a benefit in kind issue? Complex issues that will take time to resolve, especially as some of the arrangements are over a decade old.

Disguised remuneration legislation and the trust going forward

Most of the disguised remuneration legislation, including the new loan charge to be introduced from 2019 appears to have been unnecessary because, following Rangers, a PAYE charge is triggered by the setting up of the trust in the first place.

HMRC's current practice is to calculate the ITEPA 2003, Part 7A charges as well as the initial PAYE liability and then credit one liability against the other. This can have unpredictable results and the calculations need to be carefully checked.

With trusts now serving no purpose, most companies are likely to want close their trusts down. In addition to paying the large PAYE and NIC bills, companies will face charges from their trustees for their work closing down the trusts and distributing the remaining trust assets.

Adapted from an article by Tolley in association with Andrew Hubbard, Editor in Chief of Taxation Magazine

taxagents.blog.gov.uk/2017/08/17/employee-benefit-trusts-tax-agent-blog/

Devolved tax in Scotland **(Lecture P1033 - 8.09 minutes)**

Under the Scotland Act 2012, Stamp Duty Land Tax is replaced by Land and Building Transaction Tax, UK Landfill Tax is replaced by Scottish Landfill Tax and from 2016/17, the Scottish parliament is able to set its own rates and thresholds for income tax to apply to general income for Scottish taxpayers.

Under the rules, there is a minimum amount of income tax that must be collected by HMRC. This is calculated as the UK rate for basic, higher and additional taxpayers less 10%. The Scottish government then decide the Scottish Rate of Income Tax (SRIT) to add to this minimum rate which is payable to the Scottish Parliament. The SRIT could be lower or higher than 10%, making Scotland either more or less attractive to taxpayers.

Example – SRIT set at 7%

	Basic rate	Higher rate	Additional rate
UK rate	20%	40%	45%
LESS:	(10%)	(10%)	(10%)
SCIT rate	7%	7%	7%
Scottish rate	17%	37%	42%

Currently there is no differential between Scotland and the rest of the UK as the SRIT is currently 10%.

2017/18 onwards

The Scottish government is unable to set its own personal allowance or vary tax reliefs that are available but they can set their own income tax rates and bandings that apply to general income only (Employment income, partnership earnings, self employed income, pensions and property income). This could complicate matters in the future.

Currently the higher rate threshold in Scotland and the rest of the UK is £43,000 (£11,000 personal allowance plus £32,000 basic rate band). Originally the Scottish government wanted higher rate tax to kick in 1% higher, so at £43,430 but this did not happen.

In the future, if the Scottish government do introduce a higher band of say £44,000, this could make tax calculations more complicated in Scotland; General income would be taxed using the £44,000 threshold while savings and dividend income would use the £43,000 threshold. This would be an additional challenge for HMRC and the software providers to cope with.

Capital Taxes

Failure to make reasonable financial provision

Summary – Daughter was awarded £30,000 from her father's estate despite him making it clear that he had disinherited his three children.

Stanley Nahajec died leaving an estate worth around a quarter of a million pounds. In a letter disinheriting his three children, he left the whole of his estate to his friend, Stephen Fowle, who was also the estate's sole executor.

The daughter, Elena Nahajec, issued proceedings under the Inheritance (Provision for Family and Dependants) Act 1975, arguing that the will did not make reasonable financial provision for her. She was an independent adult who had tried to build a relationship with her father. She was not well off but aspired to improve herself by becoming a veterinary nurse.

She claimed £59,000 to cover capitalised sums to pay off her debts, fund her GCSEs as well as a veterinary course, and also maintenance and travel costs whilst she was training.

Decision

S3(3) states that the court must have regard to the manner in which an applicant might expect to be educated or trained. An award to pay off her debts would not be sufficient; the award was the judge's best estimate of the capitalised costs of maintenance for a reasonable time and took account of her debts as well as the fact that she may never actually undertake the course she wanted to do.

Despite Elena Nahajec having virtually no contact with her father for several years, Leeds County Court said that she was entitled to capitalised maintenance of £30,000, stating that her full claim of £59,000 was unreasonable.

IHT residence NRB – practical points (Lecture P1034 – 15.27 minutes)

The residence nil rate band is given on death, in addition to, but before, the basic nil rate band.

The allowance available is calculated as:

- Residential enhancement at the date of death; PLUS
- Brought forward allowance of a spouse/ civil partner who died earlier.

It is being phased in over four years with the residential enhancement for each tax year being as follows:

2017/18	£100,000
2018/19	£125,000
2019/20	£150,000
2020/21	£175,000

Example

Miranda dies in June 2018 leaving an estate:

Half share in residence owned jointly with husband, Ferdinand	£200,000
Cash and investments	£275,000
Wholly owned holiday cottage used as a residence	£150,00
(Mortgage outstanding £75,000)	
Total Estate	**£550,000**

The house passes by survivorship to her husband, Ferdinand.

In her will she leaves legacies of £10,000 to each of her four grandchildren and the residue of the estate is split equally between her two children and former nanny.

In February 2021 Miranda's husband, Ferdinand dies leaving the house, now valued at £450,000 plus the value of his remaining estate totalling £300,000. In his will he leaves £10,000 to each of the four grandchildren and then residue of his estate to his two children.

Miranda's estate

The jointly owned property passes as an exempt asset to Ferdinand, her spouse.

The net value of the cottage, £75,000, is a qualifying residential interest but only two thirds passes to her children, the remaining one third to her former nanny. So £50,000 of the available residential nil rate band of £125,000 is used, leaving £75,000, or more importantly 60% (75/125) of the available band on Ferdinand's death.

Her taxable estate is £300,000 (£275,000 cash and investments + £25,000 of the property not covered by her residential nil rate band). This is less than the basic nil rate band of £325,000 and so no tax is payable. The unused nil rate band available for transfer is £25,000 (325,000 – 300,000) or 7.69%.

Ferdinand's death

When Ferdinand dies in 2020/21 the residential nil rate band is then £175,000 and his brought forward allowance from Miranda's death is 60% of £175,000. His total allowance is therefore the brought forward allowance of £105,000 plus his own allowance of £175,000, making £280,000 to set against the qualifying property that he is leaving to his children.

He also has a basic nil rate band of £325,000 plus £25,000 transferred from Miranda on her death.

His inheritance tax is calculated as:

Qualifying property	450,000
Cash and investments	300,000
Less:	
Residential nil rate band	(280,000)
Basic nil rate band	(350,000)
Taxable estate	120,000
Inheritance payable at 40%	£48,000

First death before 6 April 2017

Where the first death occurs before 6 April 2017, the unused residence nil rate band is deemed to be £100,000 so when working out the percentage left to transfer to the surviving spouse, you consider how much of the £100,000 has been used, and consider this as a percentage of £100,000. Where none has been used on the first death, the survivor's residence nil rate band is increased by 100% of whatever the value of the residence nil rate band is at the date of the second death.

Tapering

Where an estate is worth more than £2 million the residence nil rate band is progressively withdrawn at a rate of £1 for every £2 of excess so that by 2020/21, anyone with an estate in excess of £2,350,000 will not be entitled to any of the additional residence nil rate band. Where we are looking at the second death, the unused brought forward residence nil rate band from the spouse serves to increase this threshold up to a maximum of £2,700,000.

Qualifying residence

A qualifying residence is a residence that passes to a lineal descendent, as well as spouse or civil partner, widow or widower of such a descendent provided they have not remarried following the death of that lineal descendent.

This gift must be on death but it does not matter whether it is a specific bequest or a bequest forming part of the residue of the estate.

Only one residence may qualify per estate and so the personal representatives must nominate which property it applies to where more than one residence is owned on death.

There is no specific legislation pertinent to what qualifies as a residence for this purpose but it seems likely that the CGT Principal Private Residence rules and associated case law may well prove relevant in future rulings.

Administration

Must a company director submit a tax return?

Summary – Mr Kadhem had a reasonable excuse for not filing a tax return on time and penalties were cancelled.

Mr Kadhem was a company director who appealed against penalties imposed for filing his 2014-15 tax return late. He argued that had HMRC told him it was necessary to file a tax return, he would have filed a return 'immediately.' But no such request was made.

HMRC argued that:

1. they had sent a notice to file a return to the taxpayer, but he said he had not received it;

2. in any case, a company director should submit a return each year without a prompt or reminder.

Decision

On the first point, the tribunal was not satisfied that HMRC had sent the notice and, even if it had, that it had been addressed correctly.

Secondly, the First Tier Tribunal found nothing in the legislation to support HMRC's argument that a company director should automatically submit a return. It seemed that HMRC had based their claim on government guidance on running a limited company in which it was stated that 'as a director of a limited company, you must … register for self assessment … and send a personal self-assessment tax return'. However, the Tribunal said that the guidance did not have the force of law and the taxpayer was not obliged to follow it. Additionally, the guidance did not reflect the law accurately.

The taxpayer had a reasonable excuse for not filing the return on time and the penalties were cancelled.

Mohammed Salem Kadhem V HMRC (TC5929)

Deadlines

1 September 2017

- Payment of corporation tax liabilities for periods ended 30 November 2016 if not liable to pay by instalments
- Check HMRC website for changes to car mileage fuel rates

7 September 2017

- Due date for VAT return/ electronic payment for 31 July 2017 quarter

14 September 2017

- Quarterly corporation tax instalment payment for large companies.
- Monthly EC sales list if paper return used

19 September 2017

- Pay PAYE/CIS liabilities for month ended 5 September 2017 if by cheque
- File monthly CIS return

21 September 2017

- File online monthly EC sales list
- Intrastat — submit supplementary declarations for August 2017

22 September 2017

- PAYE/NIC/student loan/CIS payments due if paid online

30 September 2017

- Private companies - 31 December 2016 accounts to Companies House
- Public limited companies - 31 March 2017 accounts to Companies House
- CTSA returns filed for periods ended 30 September 2016
- End of CT61 quarterly return period
- 2016-17 Small business relief claims deadline to local authority
- Businesses to reclaim EC VAT chargeable in 2016

1 October 2017

- Payment of corporation tax liabilities for periods ended 31 December 2016 if not liable to pay by instalments

5 October 2017

- Notify HMRC of chargeability to income tax and CGT for 2016/17

HMRC News (Lecture B1032 – 10.15 minutes)

Small business online forum

As part of the government's business tax roadmap announced at Budget 2016, HMRC has launched a new online tax forum and dedicated webchat service for small businesses and the self-employed. This started in March 2017 when a pilot was launched and since then the forum has grown to have more than a 1,000 registered users.

The idea is that this Online Forum should be a quick and easy way for small businesses to get answers to their tax questions, as well as help with:

- starting a business;
- support for growing a business – including taking on employees and expanding;
- buying and selling abroad;
- completing tax returns;
- tax credits.

The forum does not deal with personal queries about a taxpayer's individual circumstances.

Mel Stride, Financial Secretary to the Treasury and Paymaster General, said:

> "The UK's 5.4 million small businesses play a vital role in our economy. We want to help businesses get off the ground and support them as they grow.
>
> That is why we are launching a new forum and webchat service which will give these companies useful hints and tips – including how to complete tax returns, grow a business and trade outside the UK – so that they can continue to flourish."

www.gov.uk/government/news/new-help-for-small-businesses-launched

https://online.hmrc.gov.uk/webchatprod/community/forums/list.page

Funding for innovative businesses

HM Treasury has launched a consultation, as part of the government's 'patient capital review' that was announced in November 2016, that will run until 22 September 2017.

Decisions arising from the consultation are expected to be announced in the Autumn Budget 2017.

Entitled ‘Financing growth in innovative firms, ’ the consultation:

- proposes a new national investment fund to help young, growing businesses;
- asks whether existing tax-advantaged schemes could be made more effective.

Some suggestions include:

- a new ‘patient capital ISA’ in the form of an additional individual savings account allowance that can be invested in listed funds that make patient capital investments;
- extending business investment relief (for which measures are to be included in Finance (No 2) Bill 2017); and
- removing stamp taxes from the purchase of shares in closed-ended funds with a minimum level of investment in unquoted equities.

www.gov.uk/government/consultations/financing-growth-in-innovative-firms

Agent Update 61

Paying HMRC at the Post Office

The Transcash service is being withdrawn from December 2017 and taxpayers will need to find a different way of submitting payments to HMRC, such as:

- Direct Debit;
- Online or telephone banking, including Faster Payments, Bacs and CHAPS;
- Debit card online or by telephone.

Changes to PAYE Settlement Agreements (PSA)

From 6 April 2018 HMRC plans to:

- provide an online digital service for PSA submissions and payment;
- remove the need for an annual upfront PSA agreement;
- improve and clarify PSA guidance.

Digital services for the Enterprise Investment Scheme (EIS) and Seed Enterprise Investment Scheme (SEIS)

The new digital service, 'Apply to use the Venture Capital Schemes', is now available in Private Beta (by invitation only) for unrepresented companies seeking to obtain an advance assurance for a proposed investment under the EIS, SEIS or from a Venture Capital Trust.

HMRC are currently designing the process for companies to submit a Compliance Statement - forms EIS1 and SEIS1 - online to be available later this year and this will be followed by functionality for agents to submit applications on behalf of clients.

The new digital service will mean changes to the way that investor details, company documents and information are to be provided.

Incorporation top tips

Apparently, last year 8% of online applications to incorporate and nearly 53% of paper applications were rejected, often for simple reasons. So before submitting:

- Check the name using the Companies House company name availability checker and again just prior to submission to ensure that the name is not the same as one already in existence. Make sure the name is consistent throughout the incorporation documents and any supporting documentation;
- Check that if the company name contains a 'sensitive' word, one that will require supporting documentation which is then submitted with the application. A list of those words and expressions can be found at https://www.gov.uk/government/publications/incorporation-and-names;
- Ensure the correct memorandum is with the INO1, dated and signed correctly;
- Individuals must show their nationality in a correct and acceptable form;
- Make sure the full names of the officers are shown, not just their initials;
- Check the subscribers to the company are correct and the company is not shown as subscribing to itself. A subscriber must have its own legal personality. If the subscriber is a corporate body please ensure you have evidence to confirm that the corporate body has legal personality;
- An officer is only able to claim exemption under Section 243 of the Companies Act 2006 if the application has been made in advance and the exemption granted. This is also true of People with Significant Control claiming exemption under Section 790. Claim exemptions in advance.

SA302 Process

From 4 September 2017 HMRC will no longer be issuing paper copies of tax calculations directly to agents.

All agents who have filed a SA return online will be able to print a copy of the tax calculation and/or the Tax Year Overview when it suits them rather than calling HMRC and waiting up to 2 weeks to receive a copy.

- if a lender refuses to accept self-serve copies we would suggest agents check if they are on the List of Lenders who accept them;
- if agents do not know how to print from their commercial software we would suggest they contact their software provider;

- if another third party needs a copy of the tax calculation please check if they will accept a self-serve copy.

More information can be found at:

https://www.gov.uk/government/publications/mortgage-providers-and-lenders-who-accept-a-sa302-tax-calculation-or-tax-year-overview

The new Trusts Registration Service (TRS) has launched

The TRS allows trustees to register their Trust online. The new service complies with the Money Laundering, Terrorist Financing and Transfer of Funds Regulations (2017 No. 692) which came into force on 26 June 2017 and replaces the 41G paper form, which was withdrawn at the end of April 2017.

Customers can register a new trust online now and agents will be able to register on behalf of trustees before October 2017. By early 2018 agents and lead trustees will be able to make variations to trusts if they need to report a change of circumstance. As the new TRS is not currently available to agents, we would ask our customers who use an agent to delay notifying HMRC until the new service is operational.

This means that all new trusts with a tax consequence need to be registered by 5 October 2017 and existing trusts are required to provide additional information by 31 January 2018 through the new service, to comply with the SA deadline.

The new TRS means we will be able to capture and retrieve trust records electronically, making it easier for customers to register the trust and avoid late filing penalties.

2016-17 Self Assessment Individual Exclusions – 'in year' fix

As reported in previous months, changes arising from Personal Savings and Dividend Taxation Reform effective April 2016, mean that it is more beneficial for some customers to allocate some of their Reliefs and Allowances (e.g. Personal Allowance) against dividend income before savings income.

Last month we reported the possibility of an 'in year' fix. HMRC have decided to make changes to the 2016-17 calculator in-year across their systems and interfaces to address the errors in the current calculator and enable affected customers to be able to file online and receive the correct calculation.

They are planning to implement this change in October 2017 and the exact date will be confirmed as soon as it is known. They are asking commercial software developers to deliver in-year updates to align with HMRC's systems, to avoid filing error submissions. The fix will correct Exclusions 48 to 56 and 58 to 59 which cover the majority of cases.

HMRC will automate the recovery of all cases where a return has already been filed, but shows the incorrect tax position for the customer. This will include all customers whether they have filed online or on paper. This recovery will include an SA302 and bespoke output to the customer to advise them of the correction.

Taxpayers can choose to:

- Await the implementation of the fix in October 2017 and then file online; or
- Continue to file online if their current software allows them to do so; or
- File on paper (with a covering letter identifying the Exclusion).

www.gov.uk/government/publications/agent-update-issue-61

Spotlight 39 – Disguised Remuneration: Re-Describing Loans

HMRC has added Spotlight 39 to its targeted list of tax avoidance schemes.

This concerns attempts to avoid the new ‘loan charge’ on disguised remuneration loans outstanding on 5 April 2019 by producing documentation to the effect that the sums involved are not loans, but money the taxpayer holds in a ‘fiduciary capacity’.

HMRC says the disguised remuneration loan charge will apply to any form of credit, or other right to a payment, regardless of what it’s called.

How re-describing loans is claimed to work

Scheme users are being told they can sign documents saying that the sums they’ve received from their disguised remuneration scheme under loan agreements are not loans at all but merely held by them in a ‘fiduciary capacity’.

Why you shouldn’t use this scheme

The loan charge will apply to more than just loans, including any form of credit or other right to a payment regardless of what it’s called. If you adopt this approach and choose not to reflect the loan charge on your tax return you may face a significant penalty in addition to the tax charge.

Deliberately misleading, or concealing information from HMRC may result in criminal prosecution.

www.gov.uk/guidance/disguised-remuneration-re-describing-loans-spotlight-39

Business Taxation

Apprenticeships in the profession (Lecture P1035 – 15.25 minutes)

Tolley Exam Training and First Intuition have been working closely together and will be delivering accountancy and tax apprenticeships for:

- Level 4 Professional Accounting/ Taxation Technician (AAT/ATT)
- Level 7 Accountancy/ Taxation Professional (ACCA and other accountancy professional exams/CTA)

What is an apprenticeship?

Apprenticeships currently exist in areas such as management, advertising, engineering, law, accountancy and taxation and they are all about teaching *new* skills either to new employees or by teaching existing staff new skills. Interestingly, there is no age limit for employees under going an apprenticeship.

Each apprenticeship has a 'standard' or syllabus that details the competences in terms of knowledge, skills and behaviours that are needed in the workplace and will be covered as part of the learning required to obtain an apprenticeship. 'Trailblazing' employers have developed standards by working in conjunction with relevant professional bodies. They are standards developed by employers for employers.

Benefits of hiring an apprentice

There have been a lot of positive messages in the news aimed at both the apprentices and employers. This has helped to make apprenticeships a talent attraction tool. Gaining a qualification within the workplace is a strong proposition to aid recruitment.

The apprentice gains skills for life to help further their future career, often in a well-respected profession. They get training, a qualification and work experience. It is likely that by the time graduates are recruited, apprentices will be well ahead of the game in terms of work experience and money earned.

The apprenticeship offers employers a strong recruitment opportunity and enables them to train and develop staff in the way that suits their profession and leads to a skilled and committed workforce. 7 out of 10 apprentices stay with their employer. Remember there is also a cost saving from reduced National insurance contributions when hiring someone under the age of 25 and the employer gets to use their levy or take advantage of the government funding.

Employing an apprentice

There is a Find An Apprenticeship online service to help you identify the apprenticeships that exist by typing in a key word for your industry and find an approved training provider offering the apprenticeship that you wish to do.

An apprenticeship must be for a minimum of 12 months of training, employment and support.

Once you contact the training provider, you agree a price and sign a contract.

The training provider will undertake a job role analysis that involves matching the job you are offering with the apprenticeship that you want to do. As part of this process they will check that it is a genuine and suitable job, with opportunities for the apprentice to gain knowledge, skills and behaviours required for that apprenticeship. They will also carry out a health and safety assessment.

The employer is not allowed to ask the apprentice to contribute towards the financial costs of the apprenticeship.

Off the job training

Under an apprenticeship there is a 20% off-the-job training requirement, where training takes place outside of the normal working environment and must lead directly towards the achievement of the apprenticeship. This is the equivalent of one day a week but it can be delivered as block release if that works better. This training can be held at the normal place of work but not as part of the apprentice's normal work duties.

The 20% off-the-job training includes:

- teaching the theory through:
    - Lectures;
    - Role plays and simulations;
    - E-learning.
- Practical training:
    - Work shadowing;
    - Mentoring;
    - Industry visits;
- Assessment and assignment time

The apprentice's learning journey

Each individual will have their own learning plan from when they start to when they complete their apprenticeship. This will include how they will learn and which courses they will attend.

Assessment will take place throughout the apprenticeship (on-programme assessment) where the apprentice is learning the knowledge, skills, and behaviours of the apprenticeship. These could be assessed by exams, work based assessments as well as the apprentice maintaining training logs. Throughout the apprenticeship, the apprentice will have 3-month progress reviews held by the training provider.

The employer, apprentice and training provider will decide when they believe that the apprentice is ‘provisionally’ competent and ready to move on to the end-point assessment. This is a final assessment to demonstrate that the apprentice is competent in all of the areas set out in the ‘standard’. This takes the form of a simulation, or mini case study as well as the review of a portfolio that has been put together throughout the apprenticeship picking out the highlights of their work, showing how they have achieved the requirements set in the standard. Finally the apprentice may be asked to put together a reflective statement whereby they explain in their own words how they found the apprenticeship, what they have learned and is there anything they would change.

Apprenticeship levy

From 1 May 2017 large employers with a pay bill or Class 1 NIC earnings of over £3 million must pay the apprenticeship levy. This is calculated as 0.5% of their pay bill less the £15,000 levy allowance. The levy goes into a digital account and for every £1 that goes into that account the government tops it up with 10 pence. This happens at the same time as PAYE is paid and the payments are deductible for corporation tax purposes.

The employer has 24 months to use those payments for apprenticeship training before the payments expire which is on a first in, first out basis. The training must be provided by an approved provider so someone on the Register of Apprenticeship Training Providers.

The funds in the levy account can be used up to the funding band. Every standard will have its own funding band so for example the ATT level 4 this is £9,000 and is spread over the apprenticeship. 80% is paid out monthly and the final 20% is paid out at the end when they satisfy the end point assessment. This serves as a big incentive to ensure that an apprentice sees their apprenticeship through to the end.

Non-levy paying employers

Under co-investment there is a financial contribution fro the employer but only up to 10% of the funding band. So for Level 4 ATT, the employer will pay £900 with the government paying the remaining 90%.

Co-investment is available for non-levy payers but also to those who have fully utilised the funds in their digital account from paying the apprenticeship levy.

Small employers with less than 50 employees can waive the co-investment and receive 100% of the cost, up to the funding band paid for by the government. This applies for 16 – 18 year olds or, 19 – 24 year olds who have had an education and healthcare plan or within local authority care.

Draft guidance: Corporation tax loss relief reform

The reform of corporation tax loss relief for all companies and unincorporated associations subject to corporation tax will be introduced in Finance (No 2) Bill 2017 and has two aims:

1. Restriction - Limiting to 50% the amount of profit which can be relieved using carried-forward losses for companies with profits above £5 million; and

2. Relaxation - Allowing most carried-forward losses arising from 1 April 2017 to be used more flexibly against the total taxable profits of a company and its group members, without the strict distinction between trading and non-trading profits.

HMRC has published initial draft guidance, running to 28 pages, on changes to the treatment of carried-forward corporation tax losses from 1 April 2017. Comments on the draft guidance are invited by 25 September 2017.

HMRC says this initial set of guidance focuses on the core rules and other aspects where guidance has been specifically requested. Amended and further draft guidance will be issued in due course.

The guidance provides detail on the application of the proposed new rules in a number of areas, including:

- How to calculate the 50% restriction;

- Administrative aspects of making claims;

- Allocating the £5 million allowance around a group;

- Expanded change of ownership rules.

The guidance says little on the circumstances when the targeted anti-avoidance rule might apply. Examples of situations that might be outside the rule's scope would have been useful.

www.gov.uk/government/publications/reform-to-corporation-tax-loss-relief-draft-guidance

Central management and control **(Lecture B1033 – 4.52 minutes)**

Summary - The FTT found that Jersey subsidiaries, that were set up to take a single uncommercial decision as part of a scheme to crystallise latent capital losses, were UK resident.

Following advice from PwC, a group of companies had implemented a plan aimed at crystallising latent capital losses. The plan made use of companies incorporated in Jersey and for the plan to work, it was critical that the Jersey companies were tax resident in Jersey, rather than the UK. Establishing where they were 'centrally managed and controlled' was key to the plan's success.

The plan was carefully designed and carried out to ensure the central management and control of the Jersey companies remained with the board of directors, despite obvious influence from the parent group.

Decision

To establish residence, the First Tier Tribunal said that it was important to establish who made the strategic and management decisions about the companies' business and where those decisions were made.

The Tribunal noted that the Jersey companies were only ever intended to be Jersey resident for a very short period of time and during that time, had a limited function, requiring relatively little in the way of strategic and management decisions; and that the UK parent/its advisers set the policy and confidently expected that the board would take the steps provided for under the plan.

The Tribunal found that the companies' real business was to undertake the parent's plan for the realisation of enhanced capital losses through the acquisition of assets at an overvalue under call option arrangements. It was therefore inherent to the uncommercial nature of the only decision of the directors that they were simply implementing decisions taken by the parent company.

Following this case, taxpayers and their advisers will need to review and tighten their processes and controls to ensure that non-UK resident companies remain non-UK resident for tax purposes. As well as the normal safeguards, careful consideration should also be given to:

- whether or not there is a commercial justification for making particular decisions;
- ensuring that formal board minutes accurately reflect the actual discussions conducted at board meetings; and
- the use and status of single-purpose non-UK resident companies. Development Securities represents authority to distinguish between offshore companies established to perform a limited, single, function for a group of companies and those established to perform single act.

Development Securities (NO 9) Ltd & Others v HMRC (TC06007)

Adapted from Tax Journal

VAT

Temporary classroom buildings – standard rated or exempt?

Summary –The letting of temporary classrooms fixed to the ground were the supply of immovable property, exempt under s 31 and Item 1, Group 1, Part II, Sch 9 VATA 1994.

Part of the Ian Ramsay Church of England School had been condemned. Until more suitable permanent arrangements could be made, a two-storey temporary building was needed. It consisted of three prefabricated blocks with classrooms, staff and office accommodation, toilets, stores and ancillary accommodation, an internal lift and lift shaft, and internal staircases.

HMRC determined that the supply was an exempt supply under Item 1 of Group 1 of Part II of Sch 9 VATA 1994, which exempted: 'the grant of any interest in or right over land or of any licence to occupy land...'. That exemption fell to be construed in accordance with Council Directive (EEC) 77/388 (the Sixth Directive). Article 13B(b) of the Sixth Directive provided that member states should exempt from VAT: 'the leasing or letting of immovable property'. Council Directive (EC) 2006/112 (the 2006 Directive) subsequently repealed the Sixth Directive but retained that exemption in art 135(1)(l). Article 12(2) of the 2006 Directive also retained the definition of building, formerly in art 4(3)(a) of the Sixth Directive, as 'any structure fixed to or in the ground'.

On appeal to the First Tier Tribunal, the focus had been on whether individual component parts of the building had been fixed to or in the ground and whether such parts could be easily dismantled or moved. They found that the building or the units had not been fixed to or in the ground and so allowed the taxpayer's appeal.

HMRC appealed to the Upper Tribunal.

Decision

The First Tier Tribunal had been wrong to construe *Maierhofer* as requiring it to address whether component parts, rather than the integrated building, had been fixed to or in the ground; and whether such parts, as opposed to the building (or all the component parts comprising the building) could be moved, or dismantled and moved, easily.

The Upper Tribunal concluded that on any reasonable view the building was fixed to or in the ground. It had substantial foundations that had been sunk into the ground and held firmly in position on those foundations by the large compressive force which it exerted on them. It had been connected to services that had run through the ground. Two external staircases had been secured to the ground. Importantly, it could not be dismantled and moved easily. Indeed, ninety-eight man days had been needed to dismantle and move it.

The appeal was allowed.

HMRC v Sibcas Ltd [2017] UKUT 298 (TCC)

Zero-rating of mixed use conversions (Lecture B1034 – 18.45 minutes)

Summary –None of the dwellings in either appeal had been created by converting part of a building that had not been previously designed for use as a dwelling because they had been created from an amalgamation of both the non-residential and residential part.

S30 VATA 1994 provides that a supply of goods or services specified in Sch 8 should be zero rated. More specifically, Item 1(b) of Group 5 applied zero-rating to a first grant by a person converting a non-residential building or a non-residential part of a building into a building designed as a dwelling or number of dwellings, of a major interest in, or in any part of, the building, dwelling or its site.

The Upper Tribunal heard two appeals together as they raised the same issue as to whether the supply of a new dwelling which occupies space which used to be partly residential and partly non-residential qualifies for zero-rating or whether it only qualifies if it occupies space all of which used to be non- residential.

If the supply was a zero-rated supply, Languard and the partnership could recover the VAT paid on supplies used in carrying out the conversion. If the supply was not zero-rated then it was not a taxable supply even where the supply was made in the course of a business, because it would be an exempt supply under ss 4(2) and 31(1) of and Item 1 of Group 1 of Sch 9 to the Act. If it was an exempt supply, then there could be no recovery of the input VAT.

The Languard case

The company bought a public house and obtained planning permission to convert the building into four self-contained maisonettes. However, before conversion the ground floor was entirely commercial while the two floors above were where the public house manager lived and so had been residential.

The taxpayer sold its interests in the maisonettes with each sale being the first grant of a major interest in the respective maisonette. The First-tier Tribunal held that the non-residential part of the public house had been converted into a building designed as four dwellings and allowed the appeal. HMRC appealed.

The MacPherson case

In the second case the partnership had bought an old village shop consisting of office space and associated storage on the ground floor plus living accommodation on both the ground and first floors. The partnership converted the property into two semi-detached dwellings with each of those dwellings including areas that had previously formed part of both the residential and non-residential areas.

The First Tier Tribunal decided that the partnership had not converted a non-residential building or non-residential part of a building and so the conversion did not fall to be zero-rated, because it did not come within Item 1(b), not being 'the simple conversion of a non-residential part of a building but the conversion of that part plus a residential part'. The appeal was dismissed and the partnership appealed.

Decision

Group 5 contained Notes on the interpretation of the Group, the relevant notes here being Notes (7), (9) and (10)(b). Taken together, the Notes had the effect that where before the conversion, the building already contained a residential part, the conversion of a non-residential part would not be treated as converting a non-residential part of the building for the purposes of Group 5 unless the result of that conversion was to create an additional dwelling or dwellings.

The appeal in Languard was allowed and the appeal in MacPherson was dismissed

HMRC v Languard New Homes Ltd; MacPherson v HMRC [2017] UKUT 307 (TCC)

R&C Brief 2/2017: VAT on care homes and hospitals

HMRC has revised its policy on the definition of 'personal care' for the purposes of deciding when a new building can qualify for zero-rating as a care home, or is treated as a standard-rated hospital.

Where an institution is badged as a 'hospital', it may still be zero rated as a care home if the intended purpose of the building is to provide accommodation for the care needed due to:

- old age;
- disability;
- past or present dependence on alcohol or drugs;
- past or present mental disorder.

Following the decision in Pennine Care NHS Trust (TC04998), HMRC accepts that besides providing for lengthy periods of residence, 'personal care' in a care home may also involve a high level of medical treatment. A treatment centre incorporated within a care home and used at least 95% by the residents of that home will qualify for zero-rating.

Businesses may be able to recover VAT paid on supplies that would have been eligible for zero-rating under the revised policy, subject to the four-year limit on claims.

www.gov.uk/government/publications/revenue-and-customs-brief-2-2017-vat-care-homes-and-hospitals

Notice 714: Zero-rating young children's clothing and footwear

This notice explains when supplies of children's clothing and footwear can be zero-rated and updates and replaces the March 2015 version.

Sections 8 'Single or multiple supplies' and 9 'Services' have been amended to use terminology consistent with other HMRC publications so that references to 'mixed' supplies have been replaced with 'single or multiple' supplies.

www.gov.uk/government/publications/vat-notice-714-zero-rating-young-childrens-clothing-and-footwear

Supplies closely related to education (Lecture B1035 – 13.13 minutes)

In our June notes we reported on the CJEU's decision in HMRC v Brockenhurst College (Case C-699/15) .

As a reminder, Brockenhurst College ran courses in catering, hospitality and the performing arts which would normally be exempt from VAT. The college looked to provide students with practical experience and so also ran a restaurant as well as stage performances that were open to the public at a reduced price. The college argued that the catering and entertainment were exempt as supplies 'closely related' to the provision of education.

The CJEU found that supplies of catering and entertainment services by a college, as part of the technical training of its students, were exempt supplies under article 132(1)(i) of the Principal VAT Directive.

Following the Court of Justice's decision, R&C brief 39/2014 has been cancelled and replaced by a new page in their VAT Education Manual (VATEDU53400) explaining its revised policy.

HMRC will apply the guidance of the Court on a case by case basis to decide whether the supplies are exempt as being closely related to exempt supplies of education, or are standard-rated and state that there are three main criteria that must be satisfied:

1. The education in question must be being provided by way of business (ie fee paying rather than grant funded)

2. The activity in question must be student-led and 'essential' to their education.

3. The activity must not have the purpose of generating additional income for the body in direct competition with commercial enterprises.

EBay charging VAT

Last year the chancellor introduced measures aimed at tackling the increase in VAT evasion by overseas traders that sell goods in the UK through online marketplaces such as eBay and Amazon.

HMRC was given the power to force such internet marketplaces to ensure that their overseas customers were registered and accounting for VAT. Failure to do so would risk them being liable for the tax themselves.

If an overseas retailer does not comply, HMRC will issue a direction to the online marketplace notifying that it will be jointly liable for the VAT on future sales made by that retailer if it is allowed to continue using the online marketplace.

EBay has started charging VAT at 20% on its fees to businesses trading in the UK in line with HMRC's tougher stance against online traders. The business has undergone a

restructure so that, instead of contracting with eBay Europe Sarl (the Luxembourg entity), customers are contracting with eBay (UK) Ltd.

> Alan Pearce, Blick Rothenberg VAT partner, said: 'According to HMRC, over 7,000 new “internet traders” applied for VAT registration in 2016, compared with 700 in the previous year, suggesting that the new powers are having a significant effect.

Adapted from Taxation magazine (10 August 2017)

Entitlement to make a barring order against HMRC

Summary – the First Tier tribunal were correct in granting BPP's application for a debarring order.

BPP considered that two group companies provided separate supplies:

- BPP Learning Media Ltd supplied students with books (zero rated);
- BPP University College of Professional Studies Ltd supplied education (standard rated).

HMRC considered the supplies of books formed part of a single standard-rated supply of education services (Sch 8 group 3 notes (2) and (3) VATA 1994) and consequently issued VAT assessments.

In May 2013, BPP appealed and HMRC served its statement of case 14 days late on 21 October.

On 11 November, BPP requested further information from HMRC and applied to the First-tier Tribunal for an order that HMRC supply that information within 14 days of issuing it, failing which BPP's appeals should be allowed.

The tribunal agreed and told HMRC to provide the information by 31 January 2014.

On 14 March, BPP applied for an order debarring HMRC from further action as the information was not provided.

On 23 June, the First Tier tribunal granted BPP's application and made a debarring order.

On appeal, the Upper Tribunal said that the First-tier Tribunal had made an error of law and lifted the order. The Court of Appeal restored the First Tier Tribunal‘s decision and HMRC appealed to the Supreme Court.

Decision

The Supreme Court said that the First-tier Tribunal had considered all of the relevant factors, including the disadvantage to HMRC and the disproportionate benefit to BPP. The fact that HMRC was discharging a public duty did not justify the application of a

special rule or approach nor was it disproportionate for BPP to have sought a debarring order rather than proceeding to a hearing.

The argument that the result of the debarring order would result in an unjustified windfall for BPP by improving its prospects of success in the substantive appeal could be made by any party facing a debarring order, and would, if accepted, save in exceptional circumstances, undermine the use of the sanction of a debarring order.

HMRC did not show that the decision was unjustifiable, given the combination of the nature and extent of its 'failure to reply to BPP's request, the length of the delay in rectifying the failure and the length of the consequential delay to the proceedings, the absence of any remedy to compensate BPP for the delay and the absence of any explanation or excuse for the failure, coupled with the existence of other failures by HMRC to comply with directions'.

HMRC's appeal was dismissed.

BPP Holdings Ltd and others v CRC, Supreme Court

Adapted from Taxation magazine (10 August 2017)

Combined view of inaccuracy

Summary – The taxpayer was correct to apply para 8, schedule 24 to calculate the penalty due.

The taxpayer used software to prepare its quarterly returns and adopted the default setting for the return dates that stopped the period one day short and moved it to the beginning of the next one. Effectively, the final day's inputs and outputs were moved into the next return. This occurred on 15 returns; 9 produced an underpayment of VAT but the rest an overpayment. When HMRC discovered the issue, it told the taxpayer to correct the reporting and imposed penalties of £149,186.

HMRC argued that, under Sch 24 para 5a FA 2007 a penalty was incurred for each shift of output tax, looking at each output tax omission on a period-by-period basis. The taxpayer disputed the penalties arguing that the delayed tax rules under paragraph 8, schedule 24 applied that would result in a penalty of only £1,865.

The First-tier Tribunal found for HMRC so the taxpayer appealed.

Decision

The Upper Tribunal said that para 8 anticipated 'a combined view of inaccuracy across two returns. It does not allow one to stop at the first inaccuracy', as suggested by HMRC. Further, para 8 required a 'relevant causal connection between a taxpayer under-declaring tax in one return and … declaring the amount of under-declared tax in a subsequent return'.

If HMRC were allowed to stop at the first inaccuracy, and base a penalty on an inaccuracy with no regard to subsequent returns, para 8 would never be called into play.

In this case, the taxpayer had adopted a consistent and systematic approach to its VAT returns so that, for each, one day fell out of the period and into the next. There were two inaccuracies — one in each of two returns — and this had been the type of inaccuracy contemplated by para 8.

The penalty should be calculated in accordance with para 8 and the appeal allowed.

M J Hickey Plant Hire and Contracts Ltd v HMRC, Upper Tribunal

Adapted from the case summary in Taxation (10 August 2017)