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Personal tax

Compensation allowance as earnings (Lecture P1271 – 23.18 minutes)

Summary – Payment made to compensate an employee for the withdrawal of an ICT allowance was taxable as employment income.

Patrick McAllister was employed by the Commission of the Northern Ireland Assembly as an application development analyst managing a team of software developers. In addition to his salary, he was entitled to an ICT allowance of £5,640 per annum. This allowance was set out in a letter from the Commission to Patrick McAllister's Trade Union, and stated:

> "…the purpose of the ICT allowance is to recognise the skills and competencies that are required of and exercised by staff in the ICT discipline and to reflect the need to have ICT skills available in order to meet service requirements outside normal office hours if required… . The ICT allowance is payable exclusively to staff who occupy posts that are within the ICT discipline and require the post holder to exercise particular ICT skills and competencies."

Following a pay and grading review it was decided that there was no justification for paying an additional allowance for having ICT skills. Those receiving the allowance were predominantly men. Women, on the same grade in other disciplines were not receiving an allowance and the Commission was concerned about the possibility of equal pay claims being made.

Patrick McAllister received a lump sum payment of £44,860 in return for giving up his contractual right to the ICT allowance contained in his contract of employment. There was no commitment to remain employed by the Commission for any period of time beyond the date of the payment and there was no requirement to refund any of the payment if he left.

Patrick McAllister argued that the payment was an ex-gratia payment, with the first £30,000 being tax free. The payment was not made in return for any services past, present or future but rather it was paid so that the employer could avoid equal pay vulnerabilities. The only condition for the payment was the surrender of the ICT allowance.

HMRC argued that this sum was taxable earnings under s.62 ITEPA 2003 as an emolument of his employment.

Decision

The First Tier Tribunal found in favour of HMRC, concluding that the payment made derived from employment.

The payment was made to compensate for the loss of an allowance that had previously formed part of Patrick McAllister's salary. The payment was taxable as employment income, as it was paid solely for a change in the terms and conditions of his employment.

Patrick McAllister v HMRC (TC08181)

Termination payment and RTI (Lecture P1271 – 23.18 minutes)

Summary – The taxpayer had taken reasonable care when completing his online tax return and a 'hypothetical officer' should have considered Real-Time Information to identify the tax discrepancy that existed.

Alan Loughrey had always paid income tax under PAYE and had never been required by HMRC to file a tax return.

In 2013 he was made redundant and, believing that too much tax had been deducted from his pay in 2013/14, he filed a tax return for that year using figures from his P45. No longer able to access his electronic payslips, he included a £30,000 deduction against his termination payment that he was entitled to. Based on this return, HMRC processed a £14,000 tax refund. However, unknown to him, Alan Loughrey's employer had already deducted the £30,000 from the P45 taxable pay figure, meaning the exemption had been claimed twice.

On reviewing the return using the real time information (RTI) held on HMRC's computer systems, HMRC identified this discrepancy and HMRC raised a discovery assessment in April 2018 to correct the matter. HMRC argued that the hypothetical officer would not have been aware of the insufficiency of tax from a review of the information on the tax return

Alan Loughrey appealed. He did not dispute HMRC's calculation, but rather he challenged whether HMRC had satisfied the requirements to be able to make a valid discovery.

Decision

The First Tier Tribunal found that when submitting his online tax return, Alan Loughrey had followed HMRC's instructions and deducted £30,000 from the P45 figure for the tax-free redundancy payment. He had not acted carelessly as the online guidance did not indicate that amounts for which the £30,000 exemption had already been given should be treated any differently. There was no suggestion in that guidance that he should seek further advice from either HMRC or a qualified professional.

HMRC should have been aware of the discrepancy, as it was aware of the existence of the real time information on his pay figure from his employer. This information would make it obvious to a hypothetical officer that there was an insufficiency of tax in respect of employment income. After all, it was HMRC's computer systems that initially flagged the discrepancy on the tax return using the RTI data to begin with and further, HMRC had used the RTI information when reviewing the correctness of the tax return.

The appeal was allowed.

Alan Loughrey v HMRC (TC08198)

Taxing social media 'influencers' (Lecture P1272 – 19.51 minutes)

What is an 'influencer'?

There are a variety of definitions of 'influencer', but for the purposes of this article I will assume it's someone with the power to affect the buying habits of others by uploading some

form of original, often sponsored, content to social media platforms such as Instagram and YouTube.

Advertisers love influencers, as can be seen from the amounts that some big celebrities can reportedly earn for endorsing a product on Instagram.

- Cristiano Ronaldo (who has 300 million followers) – $1.60m per post;
- Dwayne Johnson (250 million followers) - $1.52m per post;
- Ariana Grande (245 million followers) – $1.51m per post.

Since Coronavirus restrictions began, many more people have started earning a living through their social media activities, whether through YouTube videos or posting articles and pictures on other platforms. As a result, more advisors are having to consider the tax issues that result from this way of generating income.

The influencer will usually be paid a fee for using their social media account to endorse a specific product or service. This is effectively the same as an image rights arrangement of a professional athlete, who would be paid an image rights fee for commercially endorsing a specific product.

What sort of income will be taxable?

Examples of situations that will be taxable are:

- A luxury health spa giving an influencer a week's free stay, in exchange for them posting pictures (tagged with the spa's name) of themselves on Instagram while there;
- A manufacturer of fitness equipment providing rowing and step machines to a fitness trainer, in exchange for the trainer being seen using and discussing them in their YouTube videos.

Influencers should be made aware, though, that the HMRC manuals say that "… voluntary payments designed in some way to augment the consideration payable for goods or services, whether past, present or future, are taxable".

Suppose that an influencer enters a contract with a major cosmetics company. The influencer agrees to post about its products to a mutually agreed schedule, for which the influencer will receive compensation. The influencer is so successful that the company's sales soar and, as a "thank you," the company gives the influencer fifty cases of expensive champagne. This is not done under any written or implied contractual arrangement. Will this 'gift' be tax-free?

Although it is made without any legal obligation whatsoever, to be treated as a tax-free gift, the property must be given out of disinterested generosity. This clearly is not the case here, as the property transfer arises in the context of the influencer's business relationship with the company.

CMA Report

Hidden advertising is illegal in the UK. The Competition and Markets Authority (CMA) published a report in August 2018 into the disclosure of paid endorsements on social media platforms. It singled out sixteen celebrities, including writer and fashion designer Alexa Chung and singer Ellie Goulding, who subsequently agreed to be more transparent when being paid to endorse products.

Changes have also been made by social media platforms to try to ensure compliance. For example, from 2021 onwards, anyone attempting to endorse a business on Instagram is prompted to confirm before posting if it appears they have been offered an incentive. If they have, they will not be able to publish their post until they have included a clear disclosure.

The CMA has also published guidance on how influencers should disclose this information in postings. Interestingly, from a taxation perspective, it defines 'payment' as "… any form of reward, including money, gifts of services or products, or the loan of a product…" and emphasises that this applies even if the influencer got sent it out of the blue (i.e. unsolicited 'freebies').

Any disclosable payments under these CMA rules are clearly likely to be regarded as income by HMRC.

Basis of taxation

If an influencer is paid for a post, they'll be taxed on the income. If the influencer is an employee, this will apply even where the fee is paid to them as a consequence of their employment in another organisation (e.g. a rugby union star endorsing a brand of rugby boot).

Employees and employers may want to set up an image rights company to deal separately with endorsement income, but HMRC will challenge such an arrangement where it appears to have been set up to avoid payroll taxes. In *Hull City AFC (Tigers) Limited v HMRC (TC07074),* concerning the image rights payments to the footballer Geovanni, The First-tier Tribunal concluded that, viewed realistically, the sums payable by the Club for Geovanni's image rights were actually paid to secure Geovanni's services as a footballer and not to obtain the right to commercially exploit his image. However, where there is not an employment relationship for tax purposes, there should be no doubt that income received for endorsement of products on social media is a form of image right.

To avoid high personal tax rates, setting up an image rights company may be appropriate in many cases, although the attractiveness will reduce in April 2023, when the corporation tax rate increases significantly for profits above £50,000. Note also that a UK-resident company is taxable on its worldwide profits.

Let's consider the tax that applies when the contract is with the influencer personally and assume that there is no employment relationship:

- If they're trading as an influencer (which would be established by considering the well-known 'badges of trade'), then the income will be taxed under Pt 2 ITTOIA 2005;

- If they're considered not to be trading, they'll be taxed under the miscellaneous income provisions in Ch 8, Pt 5, ITTOIA 2005.

Where payment is not in cash, the rules for barter transactions may apply. A barter transaction is essentially something that is capable of being converted into money or something of direct monetary value. The rules on such transactions were made explicitly clear for trading and property income by s71 FA 2016. The value of the transaction is the money's worth of the transaction, but this may be difficult to assess accurately.

It is therefore helpful if barter arrangements are clearly set out in an agreement between the influencer and the business looking to promote its products or services, with the terms and value explicitly stated. This will also help the business with which the influencer contracts to agree a deduction, as HMRC's view is that where a trader gives free goods and samples of its trade for the purpose of advertising to the public generally, these can be allowable deductions. See BIM45032 for examples.

Influencers, who presumably in the main are not tax experts, should be made aware that they could be left with a tax bill even where they have not received any cash!

Freebies

Even if the influencer isn't considered to be trading, it's likely that the products or services received where an agreement is in place are not gratuitous and therefore are likely to be taxable. This is on the assumption that the agreement amounts to an enforceable contract.

However, If the influencer is not trading, HMRC's view is that voluntary gifts are not taxable under Part 5 of ITTOIA 2005. Thus, when influencers receive complete freebies without their knowledge and there is no contractual arrangement or obligation to deliver content (so the influencer is not 'trading'), these 'voluntary gifts' are potentially tax-free, but HMRC will look at each case individually.

Relevant HMRC guidance

Many professions have specific guidance to help determine what's taxable and what's tax deductible, but there's currently no guidance available for social media influencers. There is, however, guidance for athletes (see BIM50610), writers (BIM 100205) and actors and entertainers (BIM50151). Some of this may prove useful as, for example, there is similarity between a writer and a blogger, or between a vlogger and an entertainer.

Points forward

Regulators are increasingly looking into the industry. The Advertising Standards Agency (ASA) has recently censured 122 celebrities, including Chloe Ferry (who found fame in 'Geordie Shore') and model and writer Jodie Marsh, for repeatedly flouting social media advertising rules. The ASA has the power to issue fines and delete posts, which it is now threatening to do if there is continued non-compliance.

No doubt it is an industry that HMRC will take an increasing interest in too, as Influencers may receive a wide range of (often expensive) gifts, such as holidays or fashion items. Increasing numbers of influencers will need to consider whether gifts received are taxable, so it would be prudent to ask clients about their social media income, including apparently free gifts received.

Contributed by Kevin Read

Double Tax Treaties (Lecture P1273 – 18.30 minutes)

Introduction

Although most of you should be familiar with the concept of double taxation, it is useful to recap the potential mischief we are facing. Subject to any exceptions, an individual is generally chargeable to income tax and capital gains tax in the UK, wherever arising (unless they are non-UK domiciled) but some income is taxed where its source is in the UK.

- Many other jurisdictions adopt the same approach so as a result a UK resident individual with income arising abroad is likely to be taxed twice on the same income, once in the country of origin and once in the UK.

- Double taxation can therefore act as a significant barrier to international trade and investment. Therefore, there are a number of methodologies adopted around the world to minimise or even eliminate the costs of double taxation and we are going to focus in this session on the use of double tax treaties

- Double tax conventions aim to eliminate the double taxation of income or gains arising in one State and paid to residents of another State. They do this by dividing the taxing rights that each treaty partner has under its domestic law over the same income and gains. It is worth noting that tax treaties are bilateral agreements made between two countries. Multilateral treaties (i.e. between many countries) are generally considered impractical as a concept. Bilateral Double Taxation Agreements are more commonly known as or referred to as treaties/conventions)

- Different mechanisms can exist whereby double tax relief is obtained by way of exempting the income from the charge to UK tax or alternatively as with the unilateral credit system credit for the overseas tax is taken against the UK Tax liability. Later we will look at the Model Treaty's provisions on this in a bit more detail.

- For many fiscal authorities, treaties serve an important function in combating loss of tax revenue through evasion, etc. Article 26 deals with exchange of information. It provides that the competent authorities shall exchange such information as necessary for carrying out the provisions of the convention or domestic law and is not restricted to those covered by the treaty. Article 27 was added in January 2003. it deals with the assistance in the collection of taxes. The article provides that the contracting states will lend assistance to each other in collecting taxes.

References to the Articles above relate to the OECD model treaty which is published as a model for countries negotiating treaties but there is no obligation on this to be used. Most of the UK treaties are based on the model although some significant ones, including the one with the USA, are different. It is always important to check the individual treaty when reviewing such matters but this module will consider the OECD model treaty to consider some of the principles it demonstrates.

The OECD model treaty

Articles 1-5 deal with the scope of the agreement, the taxes covered, definition of terms, questions of residence and the definition of a permanent establishment.

Articles 6-21 deal with the treatment of income of various descriptions, business profits, dividends, interest, royalties, employment income etc.

Article 22 deals with the taxation of capital.

The remaining articles include the provisions for the elimination of double taxation, exchange of information, non-discrimination, entry into force etc.

Article 23 A – Exemption method

Article 23 B – Credit method

Article 24 – non-discrimination

Article 25 – Mutual agreement procedure

Article 26 – Exchange of information

Article 27 – Assistance in the collection of taxes

Article 28 – Members of diplomatic missions and consular posts

Article 29 – Entitlement to benefits

Article 30 – Territorial extension

Interaction with domestic law

A double tax treaty can only make the position better for a taxpayer and it will never impose a tax charge.

For example, let's say that a treaty provides for a withholding tax ("WHT") rate of 10% to apply to dividends. This doesn't mean that that WHT will apply. First, we need to look to see the domestic position i.e. is tax applied and what rate it should be? Then, we look to the Treaty to see if this provides a better situation. E.g. if we are looking at a UK company paying a dividend to an Australian resident individual step one is to look at UK domestic law. Under UK domestic law there is no requirement to withhold tax on dividend payments. As a result, there is no need to look to the UK / Australia DTT – it will not give a better position than domestic law. It is irrelevant whether the dividend WHT rate is capped at say 10% because there is no WHT imposed under domestic law.

The provisions of a double tax agreement (DTA) entered into by the UK take precedence over domestic legislation, insofar as they provide relief from double taxation.

Article 4: residence

We need to establish where a person is resident as this is pivotal in determining the impact of the treaty and as far as individuals are concerned, the definition aims at covering the various forms of personal attachment to a State which, in the domestic taxation laws, form the basis of a comprehensive taxation (full liability to tax).

Most treaties have a tie breaker clause which first considers the permanent home. if this not conclusive (i.e. there is a permanent home in both contracting States) we then consider the centre of vital interests (unless there is no permanent home in either place in which case, we skip this one). This is broadly where your family, friends, jobs and social connections are. If this in not conclusive then you need to consider the habitual abode (where you spend most of your time). If this is not conclusive then you would consider which country you are a national of. If this does not give a definitive outcome then it would be determined by mutual agreement between the countries involved.

In looking at this tie breaker it is important to acknowledge that these are not the same tests as we see for the purposes of the Statutory Residency Test. Dual residency is a particular problem for US citizens or green card holders because of the US tax system.

Specific income sources

Income from immovable property

The model treaty allows this to be taxed in the place where it is situated as well as the state in which beneficial owner is resident. Income from land will therefore typically give rise to double taxation but this will be relieved by the ability to claim double tax relief.

Dividend income

This is where we see withholding taxes being applied and where the double tax treaty will restrict the amount of WHT which can be deducted. The actual model treaty states: 'Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State **may be** taxed in that other State.' Because it states 'may be', whether or not it is taxed in the other state will depend on domestic law.

The model treaty then goes on to say that there will be a limit on the WHT in the company's state of residence to 5% if the owner of the shares has at least 25% of the shares and 15% in all other cases. These figures do vary in individual tax treaties.

Put in simple terms, dividends are taxed in the county of residence of the shareholder but they may also be taxed in the country in which the company is resident but the tax rate is limited.

Interest

The same basic principle applies as it does for dividends where interest may be taxed where the recipient is resident and/or where the interest arises but WHT is limited to 10% (in the model treaty). Note that interest which may be exempt under domestic rules (e.g. UK ISA interest) may still be taxable in the other country.

Income from employment

Article 15 of the OECD Model governs the taxation of income from employment. It is complex and gives rise to many issues.

The basic principle underlying the Article is to award the right to tax to the country where the employment is exercised. However, there is a second part which reverts the allocation of the taxing rights back to the State of residence, regardless of the fact that the employment

has been carried out in another State. The purpose of the provision is to facilitate international short-term secondments of employees.

Three conditions have to be met for this to apply:

1. The individual is present in the state where the employment is exercised in aggregate for less than 183 days in any twelve-month period;

2. The remuneration is paid by, or on behalf of, an employer who is not a resident of the other state (i.e. the one where the employment is exercised);

3. The remuneration is not borne by a permanent establishment which the employer has in that other state.

It is clearly going to be important to ensure that these conditions are met. It is also a clause where there are deviations from the model treaty in some of the more important UK treaties for example:

- UK/India - (c) the remuneration is not deductible in computing the profits of an enterprise chargeable to tax in that other State;

- UK/Hong Kong – (d) the remuneration is taxable in the first-mentioned state according to the laws in force in that State;

- UK/Singapore – (c) the remuneration is subject to tax in the first-mentioned Contracting State; and (d) the remuneration is not directly deductible from the profits for tax purposes of a permanent establishment or a fixed base in the other Contracting State.

Pensions

Very few treaties with the UK give any kind of relief for pension contributions paid in the UK but some significant ones do, including the US, France, Ireland, Canada and South Africa. Relief may be available in the UK for foreign pension contributions provided the schemes would be qualifying pension schemes for UK tax purposes.

Pension receipts are typically only taxable in the country of residence although you need to be careful as some treaties cover the pension only and not the lump sum and sometimes there is a dispute over whether something is a pension or not (e.g. if a UK individual takes their whole pension pot in one lump, is this a pension?).

Other income

Other income not covered by one of the other articles is typically taxable only in the state of residence.

Other provisions

Remittance clause

There is often a remittance clause even though it is not part of the model treaty.

Where under any provision of this Convention income arising in a Contracting State is relieved in whole or in part from tax in that State and under the law in force in the other Contracting State a person, in respect of the said income, is subject to tax by reference to the amount thereof which is remitted to or received in that other State and not by reference to the full amount thereof, then any relief provided by the provisions of this Convention shall apply only to so much of the income as is taxed in the other Contracting State.

For example, gains taxed in the UK on a remittance basis are relieved from tax in the US but any gain not remitted can be taxed in US. This can cause problems because what if it is remitted at a later date and taxed in UK? The US tax cannot be repaid automatically and so you would get a tax credit in the UK unless it is in time to amend the overseas return, in which case the expectation is that the overseas return will be amended.

Double taxation

There are two means by which a Treaty may eliminate double taxation – the exemption method or the credit method. In practice, both methods are used in actual negotiated treaties, although the credit method is used more extensively.

Articles 23A and 23B deal with double taxation where the same income or capital is taxable in the hands of the same person by more than one State. International double taxation may arise in three cases:

1. Where each Contracting State subjects the same person to tax on his worldwide income or capital.

   E.g. where a company is resident in two Contracting States and thus subject to tax in both states, Article 4 provides a tie break clause giving preference to one country which will have full taxing rights (or mutual agreement under the new model)

2. Where a person is resident of a Contracting State and derives income from, or owns capital in, the other Contracting State and both States impose tax on that income or capital.

   This can be resolved by allocating the exclusive right to tax between the Contracting States - this is generally the state of residence, however there are exceptions.

3. For other items of income or capital, the attribution of the right to tax is not exclusive, and the relevant Article then states that the income or capital "may be taxed".

   In such cases the State of residence must give relief so as to avoid double taxation.

Contributed by Ros Martin

Market value of shares gifted to charity **(Lecture P1271 – 23.18 minutes)**

Summary – The Tribunal determined the market value of the shares gifted as being the highest price a reasonably prudent purchaser would pay for them.

These appeals are lead cases involving the valuation of shares in a company called Baa Bar Group Plc that were gifted to charity.

Neil McArthur invested in Baa Bar Group Plc in anticipation that it would purchase a business, with the shares in Baa Bar Group Plc then be floated on a stock exchange.

Thomas Bloxham began a business, Baa Bar Ltd, which he sold to Baa Bar Group Plc for some £12m cash, deferred consideration of £250,000 and shares in Baa Bar Group Plc.

Baa Bar Group Plc was floated on the Channel Islands Stock Exchange and since then, both taxpayers gifted shares to charity and claimed income tax relief based on the market value of the shares at the time of the gifts.

Following an enquiry, HMRC issued closure notices stating that the market value of the gifts was lower than the relief claimed.

The taxpayers appealed.

Decision

The First Tier Tribunal concluded that the market value was the highest price a reasonably prudent purchaser would pay, not the highest price a range of reasonably prudent purchasers might pay.

To arrive at the price that such a prudent purchaser would pay, the Tribunal acknowledged that expert valuers would come up with different estimates as demonstrated by the difference in values put forward by expert witnesses as follows:

	Taxpayers' value	HMRC's value
19 Feb 2007	108	8
13 Aug 2008	41	16
16 Oct 2009	56	16.5

The Tribunal noted that there was a significant divergence on valuation, due to the different views of the experts as to the information available to the hypothetical purchaser, different weight given to the various methodologies considered and different assumptions used in applying those methodologies. The Tribunal concluded that in reaching their decision, it was important to consider various valuations methods, taking into account the information available about the business, its current position as well as the company's future prospects.

In conclusion, the valuations were closer to those provided by HMRC's expert witness than the taxpayer's expert witness.

Neil McArthur and Thomas Bloxham (TC08186)

Information on foreign income and gains **(Lecture P1271 – 23.18 minutes)**

Summary – Sch.36 Notices were 'reasonably required' but the Tribunal concluded that it did not have the jurisdiction to decide whether the taxpayer was UK domiciled at this stage.

Robert Perlman was born in Curaçao and had lived in the UK since at least 1967. Arguing that he was not UK domiciled, he claimed the remittance basis of tax.

HMRC opened enquires into his Self Assessment tax returns for the years 2014/15 to 2016/17 and in July 2019, notified him that they had decided he had a domicile of choice in the UK and so had not been entitled to claim the remittance basis.

They asked informally for information and document about his worldwide income and gains, so they could make consequential amendments to his tax returns and close the enquiries. However, Robert Perlman refused to provide that information, and so HMRC issued him with Notices under Sch. 36 Finance Act 2008.

Robert Perlman appealed the Notices on the ground that the information was not "reasonably required" because he was not domiciled in the UK. He argued that the information would only be reasonably required if HMRC had first proved he was not so domiciled. He requested that the domicile issue be decided as part of the appeal.

HMRC argued that the Tribunal did not have the jurisdiction to decide whether Robert Perlman was domiciled as part of an appeal against a Sch 36 Notice, and even if it did have that jurisdiction, it should decline to exercise it.

Decision

The First Tier Tribunal concluded that this appeal was against the issue of a Schedule 36 Notice, part of the 'preliminary investigative stage' of the enquiry. It is independent of any tax investigation. This appeal was limited to deciding whether the information requested was 'reasonably required' in order to check Robert Perlman's tax position.

Referring to the case Kotton v HMRC and others, the Tribunal concluded that "reasonably required" meant that it was only necessary that there be a "rational connection" between the enquiry and the information required by the Notice. The Tribunal found that the Notices were reasonably required.

The Tribunal found that the determination of Robert Perlman's domicile was beyond the jurisdiction of the appeal. With no right for the losing party to appeal a Sch. 36 Notice, if the Tribunal did have jurisdiction to decide Robert Perlman's domicile status at this stage, the losing party would have no right to appeal the decision, and that would be 'a surprising outcome'.

The Tribunal went on to say that 'the lack of an appeal right following Sch. 36 hearings is entirely consistent with the limited and preliminary role played by Sch 36 within the statutory framework.'

Alternatively, the First Tier Tribunal found that if it did have jurisdiction, it should not exercise it in these circumstances. The Tribunal stated that:

> 'Given that a domicile dispute often involves many days of contested witness evidence, it would not be in the interests of justice for the Tribunal to exercise that occasional jurisdiction in Mr Perlman's appeal against the Notices.'

The appeal was dismissed.

Robert Perlman v HRC (TC08168)

Bonuses to LLP members (Lecture P1271 – 23.18 minutes)

Summary – Bonus payments made to five LLP members were remuneration relating to former employment and so liable to income tax and Class 1 NIC.

Charles Tyrwhitt LLP is a limited liability partnership operating as a clothing retailer. In 2008, the partnership set up a bonus scheme for its directors and other senior management known as the Long-term Incentive Plan. Under the plan, once certain conditions had been met, eligible employees became entitled to bonuses, calculated by reference to the LLP's profits over a period when the individual had been an employee. To be eligible, individuals must still be employed or not have left as a 'bad leaver'. Under the original terms, becoming an LLP member could have meant that the individual was classed as a bad leaver and so would lose their entitlement. Consequently, the terms were changed so that eligibility was based on being either an employee or a member. A new clause was included that stated that the partnership would pay the relevant tax and NIC, depending on whether the individual was an employee or a member at the time of payment.

Five individuals were admitted to the plan when they were employees but later became LLP members, receiving bonuses under the scheme at that time:

- Charles Tyrwhitt LLP claimed that the payments were made to the individuals in their capacity as LLP members, and so should be treated as a share of the LLP profits, subject to income tax and Class 4 NIC;

- HMRC argued that the payments should be taxed as deferred employment income, subject to income tax and Class 1 primary and secondary NIC.

The First Tier Tribunal agreed with HMRC, confirming that the scheme was for the benefit of employees and the bonus payments were in respect of their employment. The bonus was received because the individuals had been eligible employees and not because they were members of the partnership.

Charles Tyrwhitt LLP appealed to the Upper Tribunal.

Decision

The Upper Tribunal concluded that the individuals had two different roles with the partnership —initially as employee and then later as a member of the LLP.

No evidence was provided to confirm that the partnership had agreed with its members that the bonus payments would represent part of their profit. The changes that had been made to the scheme merely ensured that the employees would not lose their right to the bonus on becoming members of the LLP.

The Upper Tribunal agreed with the First Tier Tribunal. The individuals received the bonus payments in their capacity as former employees. The bonus payments were contingent on the employees' contractual requirements being met and so should be taxed as employment income, even though the individuals received them after the employment had ceased.

The payments were derived from their employment and the appeal was dismissed.

Charles Tyrwhitt LLP v HMRC [2021] UKUT 0165 (TCC)

Capital tax

FAQs on property CGT reporting

The CIOT has stated that HMRC is currently reviewing online guidance to make the UK Property Disposal process clearer for customers and agents submitting online and paper returns. Examples of when an amendment/estimate can be made are currently being prepared separately. These examples will include links to how the legislation is applied.

In the meantime, HMRC has published a list of frequently asked questions with answers on some of the issues taxpayers have encountered while using the new 30-day CGT online reporting system.

The areas covered include:

- amending the returns;
- using of estimates;
- obtaining repayments;
- offsetting CGT payments
- authorising an agent;
- personal representatives using the service
- non-residents filing returns;
- using paper returns.

https://www.tax.org.uk/cgt-on-property-30-day-reporting-issues-hmrc-faqs

The family home: GWR exceptions **(Lecture P1274 – 11.47 minutes)**

The GWR rules: outline

The inheritance tax (IHT) 'gifts with reservation' (GWR) provisions (FA 1986, ss 102-102C, Sch 20) are anti-avoidance rules. They deal with situations where someone gives away an asset in the hope of surviving at least seven years in order for the gift to become exempt from IHT but continue to use or enjoy that asset during all or part of the period.

If 'caught' by the GWR rules, the gifted asset is treated as forming part of the deceased's death estate for IHT purposes. However, the GWR charge is subject to various exclusions and exceptions.

The basic GWR rule (FA 1986, s 102(1) states:

> '(1) Subject to subsections (5) and (6) below, this section applies where, on or after 18th March 1986, an individual disposes of any property by way of gift and either—
>
> (a) possession and enjoyment of the property is not bona fide assumed by the donee at or before the beginning of the relevant period; or
>
> (b) at any time in the relevant period the property is not enjoyed to the entire exclusion, or virtually to the entire exclusion, of the donor and of any benefit to him by contract or otherwise;
>
> and in this section "the relevant period" means a period ending on the date of the donor's death and beginning seven years before that date or, if it is later, on the date of the gift' (emphasis added).

The GWR rules (which originally applied to gifts from 18 March 1986) were extended to include rules relating to gifts of land from 9 March 1999 (FA 1986, ss 102A-102C), which were introduced to deal with certain IHT avoidance schemes at the time. The gifts of land rules broadly provide that a reservation of benefit will arise where the donor enjoys a significant right or interest, or is party to a significant arrangement, in relation to the land, and the donor occupies the gifted land or enjoys some right in relation to it.

Is there a 'gift' of the family home?

It is important to remember that the GWR rules apply to gifts. Hence if an individual receives full consideration for the property there should be no GWR, as there is no 'gift' element on which the rules can bite.

HMRC's view is that a sale for less than full value arising from a 'bad bargain' is not necessarily a gift with reservation. However, HMRC also considers that the GWR provisions apply to sales at undervalue, although they only apply in respect of the undervalue proportion (see IHTM14316).

The 'de minimis' rule

The term 'virtually the entire exclusion' in FA 1986, s 102(1)(b) potentially provides some scope for the donor to continue benefiting from the gifted property to a limited extent.

Examples of situations where HMRC considers that 'de minimis' benefits to the donor may be permitted without bringing the GWR provisions into play are set out in HMRC's Revenue Interpretation 55, and in IHTM14333. These include:

- a house which becomes the donee's residence but the donor subsequently stays with the donee for less than one month each year, or in the absence of the donee for not more than two weeks each year;

- social visits (excluding overnight stays by the donor as a guest of the donee) to a house the donor has given away. According to HMRC, the extent of the social visits should be no greater than visits the donor might be expected to make to the donee's house in the absence of any gift by the donor; and

- a temporary stay for some short term-purpose in a house the donor had previously given away; for example, while the donor convalesces after medical treatment, or looks after a donee convalescing after medical treatment, or while the donor's own home is being redecorated, or for visits to a house for domestic reasons, such as babysitting for the donee's children.

However, if these de minimis benefits escalate into something more significant, the GWR provisions may apply (e.g., a house in which the donor begins staying longer and rent-free, such as for most weekends or for one month or more per year).

Full consideration

If the donor gives full consideration in money or money's worth for continued occupation or enjoyment of the property, there should be no GWR.

For example, if a family member gives their home to another family member but carries on occupying the property, the occupation is disregarded for GWR purposes if the donor pays full consideration (and continues to do so during the period of occupation).

HMRC accepts that 'full' consideration falling within 'normal' valuation tolerances will be acceptable. However, it is not altogether clear what is regarded as 'normal' in this context; so both parties should obtain regular independent professional advice to determine full consideration (i.e., in this case a commercial amount of rent).

A turn for the worse

There is also a specific relieving provision to prevent unexpected and unfortunate changes in circumstances involving family members. The donor's occupation of gifted property is disregarded if the following conditions are all satisfied (FA 1986, s 102C(3); Sch 20, para 6(1)(b)):

a) the occupation results from an unforeseen change in the donor's circumstances; and

b) the donor has become unable to maintain himself through old age, infirmity or otherwise; and

c) the occupation represents reasonable provision by the donee for the donor's care and maintenance; and

d) the donee is a relative of the donor (or his spouse or civil partner).

These conditions are cumulative, and therefore potentially onerous. Nevertheless, the above provision can provide a potentially useful 'let-out' from a GWR charge.

Example: Gift of house followed by serious illness

Jane gifted her house to her daughter Karen in December 2012. Jane moved into a small bungalow, while Karen and her husband moved into the gifted property as their home.

Unfortunately, in February 2021, Jane (who did not previously have any major health problems) suffered a serious stroke, which left her needing constant care. Following her release from hospital, Jane moved back to her old house, where Karen looked after her. However, Jane sadly died in May 2021.

Jane's gift of the property was made more than seven years before her death. Nevertheless, the house would otherwise have been treated as forming part of her estate for IHT purposes under the GWR rules but for this exception for an unforeseen change of circumstances.

In cases of serious illness where donors cannot maintain themselves, HMRC would probably accept that the occupation of gifted land represents reasonable provision for the donor's care and maintenance (see IHTM14342). However, this exclusion from a GWR charge would only be available until the donor sufficiently recovered.

Contributed by Mark McLaughlin

Registering and managing an estate

An estate must be registered by 5 October after the tax year in which the estate starts to receive income or has capital gains liable for Income Tax or Capital Gains Tax. Once registered the estate will receive a Unique Taxpayer Reference (UTR) and a Trust and Estates Self Assessment return will need to be filed.

HMRC has published new guidance on using its online services to register an estate and to manage taxpayer's estate details.

Registering an estate

The registration process is for Income Tax and Capital Gains Tax.

Executors, administrators, personal representatives or their authorised agents should use the online service to register a deceased person's estate if the:

- estate is worth more than £2.5 million at the date of death;
- value of assets sold by the personal representative in a tax year exceeds £500,000;
- total income tax and capital gains tax due for the period between the date of death and the date the estate is settled exceeds £10,000.

The guidance explains when and how to register as well as what happens once the estate is registered. Where registration is not required but the estate has more than £100 in tax to pay, the guidance states that representatives should use 'informal arrangements'. This can be done in writing to HMRC, informing them of:

- Income Tax and CGT due for the administration period;
- name, address, National Insurance number and UTR of the deceased;
- personal representative's name and contact details.

https://www.gov.uk/guidance/register-an-estate-as-a-personal-representative

Managing an estate

The second guidance note explains how to use the online service to update any changes to the estate including:

- replacing the personal representative;
- updating the name and address of the current personal representative;
- providing details which were not known at registration;
- closing the estate.

It is not possible to update the details of the person who has died or the years of tax liability.

https://www.gov.uk/guidance/manage-your-estates-details

Multiple dwellings relief and historic use **(Lecture P1271 – 23.18 minutes)**

Summary – The Upper Tribunal confirmed the First Tier Tribunal's decision that Multiple Dwellings Relief was not available for the purchase of a house with an annexe that may or may not have been used as separate properties in the past.

On 27 April 2016 the taxpayers bought a detached property with an annexe, a garage and a summer house for £575,000. They made a claim to reduce the SDLT due on the property by £10,000 on the basis that the acquisition qualified for multiple dwellings relief.

The annexe contained a sitting room, kitchen/utility room, bedroom and shower room. The annexe could be accessed either from outside via its own doors or by using a corridor which was connected to the main house. The annexe did not have its own separate postal address, council tax or utility supply. There was also a restrictive covenant over the land to prevent more than one bungalow being built on it.

HMRC opened an enquiry into the SDLT return and in August 2018 issued a closure notice amending the return denying the multiple dwellings relief.

On appeal, the First Tier Tribunal agreed with HMRC finding that, although the property had the facilities for the occupant to sleep, eat and wash in the property, it lacked the privacy and security required to be treated as a separate dwelling.

Keith Fiander and Samantha Brower appealed to the Upper Tribunal on the grounds that the First Tier Tribunal had failed to take into account oral evidence given by Samantha Bower and that it had erred in law in reaching the conclusions that it did. The couple claimed that from her evidence, it was clear that when they viewed the property for sale and at completion, that the two buildings had initially been physically separated and only later joined by a brick corridor with two internal doors between the main house and the annexe. HMRC did not recall this evidence.

Decision

There was no written or recorded evidence supporting her claim and so the First Tier Tribunal's findings of fact could not be displaced and her oral evidence was considered inadmissible.

However, even if the evidence had been admissible, it would not have affected the outcome was what mattered for SDLT was the use of the buildings at completion, and not their use in the past.

The Upper Tribunal concluded that the First Tier Tribunal were correct and there had been no error in law.

The case was dismissed.

Keith Fiander and Samantha Brower v HMRC [2021] UKUT 0156 (TCC)

SDLT refund time limit

Summary – A repayment of SDLT for a substantially performed contract not fully performed was denied as the SDLT return could not be amended outside of the 12-month time limit.

In 2012, Christian Peter Candy bought a 25 year lease on a property for £20 million, intending to develop it.

At the same time, he acquired a 201 year lease for £48 million, payable in four instalments. The first instalment of £7.39m was paid on 1 October 2013.

S.44 FA 2003 imposes a charge to SDLT where substantial performance of a contract takes place prior to completion. In this case, a charge to tax arose at that time. With the contractors having started work by 8 October 2012, the contract had been substantially performed and Mr Candy submitted land transaction returns for both leases, paying the full amount of SDLT due. He paid SDLT on the initial lease and that relating to the 'substantial performance' of the contract for the second lease.

Nearly 18 months later, on 1 April 2014, Mr Candy gifted his property interests to his brother, signing a deed of novation discharging him from all remaining obligations. His brother paid the next two instalments of the £48 million as they fell due.

S.44(9) FA 2003 states that if the contract is later "for any other reason not carried into effect," the tax must (to that extent) be repaid by HMRC. The repayment must be claimed by amendment of the relevant SDLT return. Having made his SDLT return for the full amount due, Mr Candy claimed the relevant SDLT repayment.

The issue in this case concerned the 12-month time limit that applies when amending an SDLT return, with the time running from the filing date. This strict time-limit is subject to an exception if or where another (unspecified) provision has "otherwise provided".

In this case, HMRC denied the repayment as the contract was (by way of novation) rescinded or annulled or otherwise not carried into effect after the expiry of the normal 12-month time-limit for amending the original return.

On appeal, the amendment was allowed. On their reading, the First Tier Tribunal found that S.44(9) allowed an amendment to be made to the SDLT return as the novation of the lease meant that the contract was never completed.

Decision

The Upper Tribunal agreed with HMRC, finding that the amendment was out of time as the usual 12-month time limit applied.

The Tribunal stated:

> "In the world of SDLT, charging tax on two different persons by reference to different periods is a natural incident of the system. It seems to us that the circumstances of the taxpayer in this case are, in truth, no more economic double taxation than a case where a property is sold to person A and then to person B and then to person C in quick succession for the same price of £x. Assuming that the contract is completed before the subsequent sale (and, therefore, is not subject to the special rules in s.45 of, and Sch.2A to, FA 2003), SDLT would be payable by each of A, B and C on the same consideration of £x.
>
> Moreover, a transaction such as that undertaken by the taxpayer is, in our view, far from the typical case to which s.44(9) was addressed. That subsection was principally aimed at cases where there was 'single' taxation in circumstances where it was unfair for the single taxation to remain in charge. The simple case is one where the original contract is not carried into effect rather than one where it is novated so that another contract operating in favour of a different person takes its place.

HMRC's appeal was allowed.

HMRC v Christian Peter Candy

Administration

Enquiry notice validity (Lecture P1271 – 23.18 minutes)

Summary –HMRC sending an enquiry notice to the wrong address did not render the enquiry invalid as the taxpayer's advisers acknowledged and acted on the enquiry.

Under sS.9A and 15 TMA 1970, HMRC must give notice of an enquiry into a taxpayer's tax return by sending it addressed to the taxpayer's usual or last known place of residence, or their place of business or employment.

In early 2005, HMRC received two documents showing Mr Tinkler's address as Station Road:

1. Form 64-8 on the appointment of BDO Stoy Hayward (BDO) as his agent;

2. Mr Tinkler's 2003/04 Self Assessment Tax Return.

As a result, HMRC amended the address that was held on their system to show the Station Road address rather than the address at Heybridge Lane where Mr Tinkler had previously been living in a rented house.

For reasons that were not stated, on 1 July 2005 , HMRC incorrectly changed the address back to Heybridge Lane and that same day, sent two letters:

1. A notice of enquiry into Mr Tinkler's 2003/04 Return to Heybridge Lane;

2. A letter to Mr Tinkler's accountants and tax advisers, BDO Stoy Hayward (BDO), informing them of the enquiry and raising a number of questions about his tax affairs. It included a copy of the notice that had been sent to Heybridge Lane.

BDO replied to HMRC by letter on 6 July 2005, confirming that BDO would respond to the questions raised in relation to capital gains by 22 August 2005 as requested by HMRC. BDO also referred to a "gilt strip loss" which had mistakenly not been included in the Return. If taken into account, BDO asserted that Mr Tinkler had suffered an income tax loss for 2003/04 of some £2.5m but it pointed out that it could not amend the Return "as the Return is now the subject of a section 9A TMA 1970 enquiry". A repayment of tax overpaid by Mr Tinkler was nevertheless sought which BDO stated amounted to £605,319.58 (plus £30,265.98 in overpaid surcharge). HMRC responded by letter dated 12 July 2005, noting the gilt strip loss claimed but saying that "no repayment will be made until after the enquiry has been concluded".

Correspondence continued between HMRC and BDO, during which time HMRC were informed that Mr Tinkler no longer used the Heybridge Lane address and on 1 November 2005, HMRC corrected the address recorded in their system to Station Road.

HMRC finally issued a closure notice in August 2012, denying the losses and stating that Mr Tinkler owed just over £700,000 in tax.

At this time, Mr Tinkler argued that the closure notice was invalid because the initial notice of enquiry had been sent to Heybridge Lane, which was neither his usual or last known place of residence, nor his place of business or employment.

HMRC argued that as Mr Tinkler and his agent had corresponded with HMRC on the shared assumption that the enquiry was validly opened, he was estopped from challenging that assumption.

The First Tier Tribunal and Upper Tribunal dismissed Mr Tinkler's appeal but the Court of Appeal allowed it.

HMRC appealed to the Supreme Court.

Decision

The Supreme Court considered the principles governing estoppel by convention in CRC v Benchdollar [2009] STC 2342 and concluded that by replying and engaging with HMRC's enquiry process, BDO had confirmed that they were acting on the shared assumption that the enquiry had been validly opened.

Had HMRC not relied on the common assumption, and objections to the enquiry notice were raised at the start, HMRC could have issued an alternative notice with the new address. Waiting over nine years to raise the issue was not acceptable.

Lord Burrows concluded by saying:

> "Standing back from the detail, what Mr Tinkler and his advisers have done is to take at a late stage what can fairly be described, on the facts of this case, as a technical point (that the notice of enquiry was sent to the wrong address) even though that has not caused Mr Tinkler any prejudice. It is entirely satisfactory that, by reference to estoppel by convention, the law has the means to avoid such a technical point succeeding."

HMRC's appeal was allowed.

Tinkler v HMRC [2021] UKSC 39

HMRC's appeal process **(Lecture P1275 – 13.07 minutes)**

This article considers the process to follow when you do not agree with an HMRC decision. The session focuses on the appeal process for direct taxes. There are variations in the process for indirect taxes, but they are not considered here.

Can I submit an appeal?

You will need to check if there is the right of appeal against a particular HMRC decision. Typical examples where there is a right of appeal include certain information notices issued by HMRC, assessments and penalty notices. If you are not sure, HMRC should state the right of appeal when issuing their decision.

Where there is a right of appeal, you will need to observe the relevant time limit and any other considerations. You may need to refer to the relevant legislation, or HMRC guidance.

Where there is not a right of appeal, other remedies may be available. You can consider using HMRC's complaints procedure, or judicial review, although the latter is an expensive process and expert legal advice should be sought.

Advisers will, generally, need to ensure that they submit an appeal against an HMRC decision that the client does not agree with, to protect the client's legal position. There may also be circumstances where the client agrees with, for example, an HMRC assessment, and the adviser should still submit an appeal.

Other remedies

Where there isn't a right of appeal, you will need to consider any alternative remedies. Depending on the circumstances, HMRC's complaint's procedure may be appropriate. If you do not agree with HMRC's final decision under that process, you can refer the matter to the Adjudicator's Office. If you do not agree with the decision of the Adjudicator's Office, you can ask for the matter to be reviewed by the Parliamentary and Health Service Ombudsman, subject to a referral from the client's Member of Parliament.

Another potential remedy is judicial review, although it should be noted that this is an extremely costly process.

Making an appeal

There are certain formalities that must be observed when making an appeal to HMRC. The appeal must be made in writing, and include the following details:

- The name of the client;
- The reference number;
- The decision (or assessment) that is being appealed against;
- The grounds for appeal;
- What you consider the outcome should be (including the correct figure of tax, if known).

It is important to observe the time limit for making an appeal (usually 30 days from the date of the HMRC decision, although this period is currently being extended where the delay is due to coronavirus). Where an appeal is made outside the time limit, HMRC may accept a late appeal, depending on the circumstances. Where HMRC do not accept a late appeal, you can apply to the tribunal to determine whether the late appeal can be accepted.

When making an appeal, you should consider whether it would be helpful to submit further information to assist the officer when reviewing their decision. In addition, advisers should ensure that they submit a postponement application, where appropriate, when appealing against an assessment. If a postponement application is not made, HMRC may pursue the tax charged.

HMRC's response to an appeal

When you have submitted your appeal, and any supplementary information, documents and representations, the officer will review their decision. The outcome of that review may be that the officer upholds their original decision. Alternatively, the officer may agree with the grounds for appeal and amend their decision. There may be further negotiations or discussions with the officer before they reach a decision regarding the appeal, and that should, generally, be welcomed.

If agreement cannot be reached, the taxpayer has the option of seeking a statutory review or going to the tribunal (or both). Another option may be HMRC's Alternative Dispute Resolution process, which will be covered in a separate session. Advisers should note that Alternative Dispute Resolution is not a statutory process, and it may not be available in all cases.

Statutory review

The statutory review (also referred to as internal review) process can be used where there is an appealable HMRC decision. There is a review by an officer who has not been involved in the case. The process provides an opportunity for further representations to be made. There are time limits to be observed, for the taxpayer and HMRC. The statutory time limit for HMRC to conduct the review is 45 days, although this can be extended by agreement.

There has been negative reporting of the statutory review process since its introduction, particularly given that one HMRC officer is reviewing another HMRC officer's decision. My view is that it can be a cost-effective way of making progress. Where the reviewing officer does not overturn the original decision, the review can help to identify HMRC's arguments, or gain clarity on their position, which can be useful if the matter is subsequently heard at the tribunal. The review may also help to avoid the time and costs associated with a tribunal hearing, or to refine the issues to be discussed through the Alternative Dispute Resolution process.

The tax tribunal

The tribunal system is independent of HMRC. Appeals are made to the First-tier Tribunal and are generally heard by that body.

Cases are categorised, with the more complex ones being heard by the Upper Tribunal. Cases allocated to a non-complex category may not necessarily have a hearing. Where a hearing is held, it will be in public, unless there are exceptional circumstances.

Advisers should note that there are usually two people sitting on the panel at the First-tier Tribunal – a legally-qualified judge and a member who has relevant experience. This creates a very different environment from that which advisers who attended hearings at the General Commissioners, prior to the introduction of the tribunal system, may have experienced. Cases at the Upper Tribunal are usually heard by two judges.

The standard position at the First-tier Tribunal is that both parties pay their own costs. The tribunal can award costs where one party has acted unreasonably in bringing, defending or conducting the proceedings. In the Upper Tribunal, the losing party will generally have to meet the costs of the other side, although it is possible to opt-out of the costs regime.

Decisions from the First-tier Tribunal can be appealed to the Upper Tribunal, if permission is granted, and where there has been an error of law. Appeals beyond the Upper Tribunal are possible, where there is a point of law (and also subject to permission being granted).

Contributed by Phil Berwick (Director, Berwick Tax)

Deadlines

1 September 2021

- Corporation tax for periods to 30 November 2020 if not liable to pay by instalments.

7 September 2021

- Due date for VAT return and payment for 31 July 2021 quarter (online).

14 September 2021

- Quarterly corporation tax instalment payment for large companies.
- Paper monthly EC sales list for businesses based in Northern Ireland selling goods.

19 September 2021

- PAYE/NIC/student loan/ CIS payments for month to 5 September 2021 if by cheque.
- File monthly CIS return.

21 September 2021

- Online monthly EC sales list for businesses based in Northern Ireland selling goods.
- Supplementary intrastat declarations for August 2021 — arrivals only for a GB business, arrivals and despatch for a business in Northern Ireland.

22 September 2021

- PAYE/NIC/student loan/CIS payments for month ended 5 September 2021 — online.

30 September 2021

- Accounts of private companies with 31 December 2020 year-end and public limited companies with 31 March 2021 year-end.
- CTSA returns for companies with an accounting period ended 30 September 2020.
- End of CT61 quarterly return period.
- Business rates — small business relief claims for 2020-21.
- Businesses to reclaim EC VAT chargeable in 2020.
- Report the disguised remuneration loan charge.
- 5% hospitality VAT rate ends.

News

Reporting expenses and benefits through payroll

The 'Tell your Employees' section of HMRC's guidance has been revised so that employers know what action they must take once they register to payroll benefits.

By 1 June after the end of each tax year, employers must give their employees written notification by payslip, email or letter, explaining that benefits have been payrolled and explain what it means for them.

The notification must tell their employees that they will not be taxed twice because the employer has registered to payroll their benefits with HMRC before the start of the new tax year. Employers should include the following information:

- details of the benefits they have payrolled in the tax year, for example car fuel – this can include what the benefits are, the cash equivalent and which ones have been subject to PAYE tax;
- the amount they have payrolled for optional remuneration (OpRA);
- details of benefits they have not payrolled.

Employers should also tell their employees what will happen during the first year of payrolling benefits. Employees will need to know that:

- their tax code will change to take out the adjustment for their benefits in kind
- the employer will put the adjusted amount through payroll each month and they will pay tax on that amount
- at the end of the year the employer will tell them how much taxable benefit they have had in the year and what it was for

https://www.gov.uk/guidance/payrolling-tax-employees-benefits-and-expenses-through-your-payroll#history

Business Taxation

Sideways loss relief denied (Lecture B1271 – 20.30 minutes)

Summary - The purchase and sale of film rights was not a trade and so sideways loss relief was not available to carry back losses made against employment income in earlier years.

Having ceased employment with Morgan Stanley, Robert Poll set up a photography business as a sole trader using Premiere Picture Sovereign. He committed £650,000 to the business although only £125,000 of this was his own money. The remainder was provided by way of loan from GBF Capital Limited, a company connected with Premiere Picture.

As a result of the way film distribution rights are valued for accounting purposes, his accounts for the first accounting period showed a loss of £583,881 and in 2007/08 he made a claim to carry back these losses and set them against other income he had received in the previous three tax years.

His business generated further losses in the following two tax years of £22,149 and £9,798 respectively.

HMRC disallowed the loss claims, principally on the basis that the film business was not a trade or that, even if it was, it was not commercial.

Robert Poll appealed against HMRC's closure notices on the basis that he was carrying on a trade on a commercial basis. He also claimed that the closure notices were invalid as there was a delay of several years before the closure notices were issued.

Decision

The First Tier Tribunal confirmed that the closure notices were valid as there is no time limit for HMRC to issue such notices. Where the taxpayer considers that there is an unreasonable delay, they can apply to the Tribunal for a direction requiring HMRC to issue a closure notice.

Although Robert Poll had spent some 18 hours a week on business activities, he had effectively paid out a capital sum to obtain a possible future income stream. With the steps pre-arranged, the First Tier Tribunal found that the purchase and sale of film rights did not amount to a trade. He was not trading in film rights.

Finally, even if the business had amounted to a trade, the Tribunal concluded that it was not carried out on a commercial basis with a reasonable expectation of profits, so denying any sideways loss relief claim.

The appeal was dismissed.

Robert Poll v HMRC (TC08172)

CIS gross payment in error (Lecture B1271 – 20.30 minutes)

Summary – By making gross payments to their construction works subcontractors without checking their CIS status, the contractors had failed to take reasonable care.

North Point (Pall Mall) Ltd and China Town Development Company Ltd were connected companies that engaged subcontractors to carry out construction works. Based on their understanding of the construction industry scheme, they made payments to the subcontractors without any deduction of tax on the basis that gross payment status applied.

After a review, HMRC told the companies they should be deducting tax from the payments to the subcontractors and they should register for the construction industry scheme. After taking advice, the taxpayers registered for the scheme.

In 2017, HMRC issued determinations under reg 13 of the Income Tax (Construction Industry Scheme) Regulations 2005. This was on the basis that the taxpayers had failed to take reasonable care.

The taxpayers appealed saying they had taken reasonable care to comply with the law and the failure to deduct tax was due to an error made in good faith. They had also claimed relief under reg 9(3), but HMRC refused.

Decision

On the reg 9(3) claim, the First Tier Tribunal noted that HMRC's guidance stated that the department had to consider giving relief under reg 9(3) before making a reg 13 determination. So, after a determination had been made under reg 13, neither HMRC nor the tribunal could grant relief under reg 9(3).

The Tribunal accepted the taxpayers made the error in good faith but said this did not amount to taking reasonable care.

The judges said:

> 'The test is whether the advice is appropriate to the issue under consideration. When numbers are big and the facts complicated, it is more appropriate to go to a tax silk than would be the case if the numbers are small and the facts are simple.'

They considered a reasonable director would have sought independent tax advice from an expert.

The appeal was dismissed.

North Point (Pall Mall) Ltd and China Town Development Company Ltd (TC8205)

Adapted from the case summary in Taxation (12 August 2021)

New capital allowances rules (Lecture B1272 – 15.43 minutes)

Ritchie Delivery Ltd, which is not a member of a group, runs a successful transport business. In the summer of 2021, the company's directors decided to expand its operations since trade had increased substantially because of growing demand during the COVID-19 pandemic.

During the year ended 31 March 2022, the company incurred the following expenditure:

Date	Asset	Expenditure
September 2021	Four new lorries	£648,000
October 2021	Seven second-hand forklift trucks from Insolvent business administrator	£36,800
November 2021	New solar panels for warehouse roof	£410,000

At the end of the previous accounting period, Ritchie Delivery Ltd had a tax written down value of £375,000 on its main capital allowances pool and £25,000 on its special rate pool. The capital allowances claim for the present accounting period are as follows:

	FYAs	Main pool £	Special Rate £	Allowances £
WDV b/f		375,000	25,000	
WDA (18%/6%)		(67,500)	(1,500)	69,000
AIA expenditure				
Forklift trucks		36,800		
Solar panels (NOTE)			410,000	
AIA (100%)		(36,800)	(410,000)	446,800
Super-deduction expenditure				
Lorries	648,000			
FYA (130%)	(842,400)			842,400
WDV c/f		307,500	23,500	
TOTAL				1,358,200

NOTE: The cost of the solar panels represents special rate expenditure. Since the panels are new, they qualify for the temporary 50% FYA. However, because Ritchie Delivery Ltd has sufficient AIA capacity, it is preferable to claim a 100% AIA on them instead.

As far as the lorries are concerned, they will need to be tracked individually (because of the clawback provisions when they are sold).

Contributed by Robert Jamieson

Extended loss carry-back for unincorporated businesses (Lecture B1273 – 12.26 minutes)

Price, who has been a self-employed consultant for several years, found that the fortunes of his business dropped sharply when the COVID-19 pandemic arrived. His recent adjusted trading results have been:

	£
Year ended 31 March 2021	(160,000)
Year ended 31 March 2020	48,000
Year ended 31 March 2019	72,000
Year ended 31 March 2018	55,000

Price's other income for the last four years was:

	2020/21	2019/20	2018/19	2017/18
	£	£	£	£
Property	9,000	9,000	8,500	8,500
Dividends	4,600	6,000	7,400	6,100

Because Price's trading loss arose in 2020/21, he decided not to make a sideways claim under S64 ITA 2007 for that year, given that he could utilise his personal allowance (£12,500) and his dividend tax allowance (£2,000) against his other income. However, he made a S64 ITA 2007 claim against his total income for 2019/20.

Price falls into Para 1 Sch 2 FB 2021, in view of the fact that he has:

(i) made a loss in 2020/21; and

(ii) satisfied condition A.

His tax position for 2020/21 and 2019/20 is:

2020/21

	£	Loss £
Trading	–	(160,000)
Property	9,000	
Dividends	4,600	
	13,600	

2019/20

	£	£
Loss b/f		160,000
Trading	48,000	
Property	9,000	
Dividends	6,000	
	63,000	
Less:		
S64 ITA 2007 relief	(63,000)	63,000
	£Nil	
DEDUCTIBLE AMOUNT		(97,000)

Price has a deductible amount of £97,000 which can be carried back under the extended loss relief regime to 2018/19 and then to 2017/18. However, it is only set against his trading profits (and not his total income) for those two earlier tax years.

2018/19

	£	Loss £
Loss available		(97,000)
Trading	72,000	
Less: Para 1 Sch 2 FB 2021 relief	(72,000)	72,000
		–
Property	8,500	
Dividends	7,400	
	15,900	
		(25,000)

2017/18

	£	£
Loss available		(25,000)
Trading	55,000	
Less: Para 1 Sch 2 FB 2021 relief	(25,000)	25,000
	30,000	
Property	8,500	
Dividends	6,100	
	44,600	
No loss remaining for carry forward.		Nil

Note: The extended loss relief rules produce a satisfactory result for Price.

For 2018/19, his personal allowance (£11,850) and his dividend tax allowance (£2,000) will cover most of his income so that he will only have a small residual tax charge of 7.5%.

For 2017/18, his personal allowance (£11,500) and his dividend tax allowance (£5,000) will ensure that he is a basic rate taxpayer for that tax year. Price must make his claim under Para 1 Sch 2 FB 2021 by 31 January 2023.

Contributed by Robert Jamieson

Uncertain tax positions – consultation 2 (Lecture B1274 – 15.43 minutes)

Introduction

Following feedback from its initial consultation in March 2020, the Government has issued a second consultation. The closing date for comments is 1 June 2021.

Definition

There is more than one way to interpret or apply tax legislation in relation to a transaction.

This proposal will require businesses to tell HMRC where:

1. They have used an interpretation or application, for a transaction, that is contrary to HMRC's known position, or

2. They are dealing with a new or novel type of product, transaction or business structure where there are various ways that it can be treated and HMRC's position is not known

Revised proposals

From April 2022, large businesses will be required to notify HMRC when a trigger is satisfied (see later) if:

1. Turnover exceeds £200m, and/or

2. The balance sheet total exceeds £2 billion

The proposal will apply to companies, LLPs and partnerships.

Reportable taxes are corporation tax, income tax, PAYE and VAT. The original proposals to include duties, IPT, SDLT and other taxes covered by the SAO regime have been dropped.

No disclosure is required if the transaction is disclosable under DOTAS or is subject to open enquiry by HMRC.

A business is also not required to make separate disclosure if HMRC is already aware of the uncertainty unless it is treated differently to HMRC's recommendation.

The tax outcome of uncertain items must be more than £5 million otherwise there is no requirement to disclose. This is an increase from the original proposal of £1 million.

If the tax related to the uncertain item is more than £5 million, this is then compared to the expected HMRC position and disclosure is only required if the difference between the two positions exceeds £5 million. If HMRC's position is unknown, then disclosure is required if the tax related to the uncertain items exceeds £5 million.

Nil returns are not required and there will be separate notifications for different taxes.

Information to be reported

1. A concise description of the transaction;
2. Nature of uncertainty;
3. Periods affected by the uncertainty;
4. An indication of the amount of tax relating to the uncertainty;
5. Date of transaction/event giving rise to the uncertainty;

Due dates

The due date for a corporation tax uncertain tax position is the normal filing date for the CT600 tax return, i.e., 12 months after the end of the chargeable period.

For quarterly returns (e.g., VAT), the normal filing date is the due date for the last return in the year

For example, if a company files VAT returns for quarters to 31 July, 31 October, 31 January and 30 April each year, the due date of a VAT uncertain tax position return would be based on the 30 April return due date, i.e. 7 June.

Uncertain tax position triggers

1. The interpretation is different from HMRC's known position (e.g. different from HMRC's guidance - which is not the law of course);

2. The position was arrived at other than in accordance with known and established industry practice;

3. The transaction has been treated differently from the way in which an equivalent transaction was treated in a previous return, where case law or the legislation has not changed;

4. The position taken is novel such that cannot reasonably be regarded as certain

5. Provision has been made in the accounts under GAAP to reflect the probability that a different tax treatment will apply;

6. The position results in a deduction greater than the amount incurred or income received which is not reflected for tax purposes, unless clearly permitted/required by tax law (e.g. 130% super-deduction) or HMRC is known to accept the treatment;

7. The position was taken on professional advice (not protected by legal professional privilege) which contradicts other advice received or which was not followed for tax purposes.

Penalties

There is a £5,000 penalty for not making notifications when required. This is chargeable on the company not the individual responsible for filing the return.

The penalty is appealable and subject to a reasonable excuse defence.

The original proposal for a £5,000 penalty for not naming the person responsible for filing the UTP returns has been withdrawn.

Contributed by Malcolm Greenbaum

Claiming land remediation relief

Summary – Remediation relief claimed on expenditure incurred in replacing and improving the mains pipes under private streets was denied as the company had at least partial responsibility for the contamination itself.

Northern Gas Networks Ltd appealed against HMRC's decision to refuse its claim for land remediation relief (FA 2001, Sch 22). In essence, the taxpayer claimed relief in respect of expenditure incurred in replacing and improving the iron mains pipes under private streets.

The First Tier Tribunal dismissed the taxpayer's appeal.

The company appealed to the Upper Tribunal arguing that the contaminated state of the relevant land arises because of the combination of iron pipes under the relevant land and the gas transported within those pipes.

Decision

The Upper Tribunal stated that the problem with the company's argument was that parliament specified that relief was not due when the land is contaminated wholly or partly as a result of the claimant company's actions. Even though NGN had not laid the pipes, the contamination arose partly as a result of the gas it was pumping through them.

On Northern Gas Networks Ltd's assertion that it had no choice but to flow gas through the pipes, the tribunal said it would have been in breach of its statutory and regulatory obligations to have stopped doing so until the problems with the pipes had been resolved. This was a 'statement of commercial reality'. Further the legislation was not concerned with the reason why a company acted, it was 'simply concerned with the question whether the land is in a contaminated state wholly or partly as a result of those actions'.

While imperfect or partial land remediation could attract relief, this seemed a different issue from one here. The legislation sought to ensure that a company should not obtain enhanced relief when the harm or risk of harm arose, wholly or partly, from the actions of the company.

In this case, Northern Gas Networks Ltd claimed enhanced relief for expenditure incurred on remedying a harm that 'quite clearly' resulted in part from its activity of distributing gas. The tribunal said there was 'no anomaly in a company having no responsibility for the contaminated state of land obtaining enhanced relief for imperfect remediation, while a company which had at least partial responsibility for the contamination obtains no such enhanced relief'.

The appeal was dismissed.

Northern Gas Networks Ltd v CRC, Upper Tribunal (Tax and Chancery Chamber), 1 July 2021

Adapted from the case summary in Taxation (15 July 2021)

Supreme Court rules on FII litigation

The Supreme Court considered a number of issues arising in the long-running litigation concerning the compatibility of the UK's pre-April 1999 dividend tax regime with EU law.

The first issue concerned the quantification of the claim for restitution representing the time value of advance corporation tax (ACT) unlawfully charged which had been subsequently utilised against lawfully charged mainstream corporation tax. In effect, for such ACT, there was a premature payment of tax lawfully due.

At an earlier stage of the litigation HMRC had accepted that the restitution should consist of compound interest but following the decision in Prudential Assurance Co Ltd v HMRC [2018] UKSC 39, HMRC had sought and been granted, permission to withdraw its concession on this point.

The claimants argued that HMRC was barred from denying their entitlement to compound interest under various legal principles including res judicata, issue estoppel and abuse of process. The court rejected all these arguments and went on to consider the claimants' substantive argument, that they were entitled to simple interest under the Senior Courts Act 1981 s 35A rather than, as HMRC argued, under FA 2019 s 85. It found in favour of HMRC that s 85 applied, with the effect of restricting the claims to the ACT in question to amounts paid after 1 January 1996.

The other issues before the court were:

- Whether the UK's double tax relief regime prior to the introduction of the eligible unrelieved foreign tax (EUFT) in 2001 was in breach of TFEU article 63 (free movement of capital) in so far as it prevented the carrying forward of unused DTR credits.

  The court ruled that the regime was in breach so that a claim for restitution could be made to recover tax paid as a result of the inability to carry forward credits.

- Whether tax credits allowed to the ultimate shareholders receiving dividends should be taken into account in reducing HMRC's enrichment from unlawful ACT.

  The court dismissed HMRC's appeal, holding that no such reduction should be made.

- Whether double tax credits allowed to a non-resident parent should be taken into account in reducing HMRC's enrichment.

  The court held that no such reduction should be made and the claimants appeal on this issue succeeded.

- Whether the UK's rules for dividends from non-UK resident companies continued to be protected from TFEU article 63 by standstill provisions in TFEU article 64 after the EUFT rules were brought into operation.

  The claimants' appeal succeeded; the enactment of the EUFT rules meant that the tax regime for foreign-sourced dividends was not that which had previously existed and the derogation from free movement of capital provided by art 64 ceased to apply.

- When and to what extent should unlawfully charged ACT be regarded as surrendered to a subsidiary. The claimants argued that unlawful ACT should be treated as first surrendered to subsidiaries with unlawful mainstream corporation tax against which it would be utilised.

  The court dismissed the claimants' appeal, holding that surrenders of ACT should be treated as having been composed of lawful and unlawful ACT on a pro rata basis.

Test Claimants in the FII Group Litigation v HMRC [2021] UKSC 31

Adapted from the case summary in Tax journal 30 July

OECD model reporting rules for digital platforms (Lecture B1271 – 20.30 minutes)

From January 2023, these rules will require platforms to report information about the income of sellers providing goods and services to help sellers get their tax right and to enable HMRC to deal with non-compliance.

Broadly, the OECD model requires platforms to collect details about their sellers, including information to identify who the seller is and where they are based, and report the information, including the seller's income, to the tax authority annually by 31 January. Platforms must also give that information to the sellers, so that they can use it to help them complete their tax returns.

The tax authorities then exchange information with other tax authorities where the sellers are resident and use the information to ensure that sellers are complying with their tax obligations and to tackle non-compliance if they are not.

The government is consulting on the implementation of the OECD's model reporting rules for digital platforms. The consultation sets out the details of the rules and invites views on the optional elements and the UK's proposed implementation. HMRC also asks for comments on how the information to be reported could be used to help taxpayers get their tax right, as well as on any practical issues.

Adapted from Taxation (5 August 2021)

https://www.gov.uk/government/consultations/reporting-rules-for-digital-platforms

VAT and indirect taxes

Capital services, not capital goods (Lecture B1271 – 20.30 minutes)

Summary – Input tax on building services supplied by builders was not recoverable as the company was operating VAT under the flat rate scheme.

Mr and Mrs Turner were equal directors and shareholders of Trans Wales Trails Ltd, a VAT registered company that ran a horse-riding holiday business. The company accounted for VAT under the flat rate scheme.

In 2013, the couple acquired a farm with a small cottage and two flats. The plan was to convert the properties into guest accommodation to be used to house customers of the horse-riding business in the summer but also to provide bed and breakfast accommodation in the winter.

Work undertaken by two builders was invoiced to Trans Wales Trails Ltd, with total input VAT suffered of £9,856.14. On the advice of their accountant, the company claimed the input tax on their VAT return. HMRC denied the claim as the advice was wrong. Operating under the flat rate scheme, input VAT can be recovered on capital goods exceeding £2,000 but not on capital services such as building work.'

Subsequently, the couple were advised to register their guest accommodation business for VAT and reclaim the input tax through this partnership. Once again, HMRC disallowed the claim. This time on the basis that the partnership did not hold valid VAT invoices as the invoices concerned had been made out to Trans Wales Trails Ltd and not to the partnership. It was also the company, rather than the partnership, who had settled the invoices.

The partnership appealed to the First Tier Tribunal on the basis that the input tax related to the partnership activities and so should be recoverable.

HMRC stated that the services had been supplied to the company and so only the company could reclaim the input tax suffered, which in this case was not possible due the use of the flat rate scheme.

Decision

The First Tier Tribunal found that the partnership did not hold a valid VAT invoice nor could it provide alternative evidence of the supply being made to it. Had this been the case "HMRC could, using its discretion, treat (it) as alternative evidence of a supply (having been made) to it".

In this case, the supply of services had been made to the company and the case was dismissed. Sadly, the horse had already bolted. Had the services been supplied and invoiced to the partnership, and not the company, the input tax would have been recoverable.

Blaenau Bach Farm V HMRC (TC08134)

Postal charges (Lecture B1271 – 20.30 minutes)

Summary – To be able to reclaim input tax, a VAT invoice must be or have been held by the taxpayer that separately states the amount of VAT charged.

This is a test case in respect of supplies of services by Royal Mail that were wrongly treated as exempt. The total value of the claims made against HMRC amounts to between £500 million and £1,000 million.

Zipvit Ltd supplies vitamins and minerals by mail order. During the period 1 January 2006 to 31 March 2010, Royal Mail supplied Zipvit Ltd with a number of postal services under contracts which had been individually negotiated.

Article 132(1)(a) of the VAT Directive (Schedule 9, Group 3, paragraph 1 VATA 1994) provides that Member States are to exempt 'the supply by the public postal services of services other than passenger transport and telecommunications services, and the supply of goods incidental thereto'.

Initially, this was interpreted as covering all postal services supplied by Royal Mail. However, in *TNT Post UK* (C-357/07, EU:C:2009:248) it was found that the postal services exemption did not apply to supplies of services for which the terms had been individually negotiated. Such services should be standard rated and so in this case, Royal Mail should have charged Zipvit Ltd a total price plus standard rate VAT and Royal Mail should have accounted and paid the VAT over to HMRC.

Zipvit Ltd sought to recover the uncharged input VAT from HMRC. The claim was disallowed on the basis that Zipvit Ltd did not pay any VAT.

Decisions at the First Tier Tribunal, Upper Tribunal and Court of Appeal found in HMRC's favour. The Supreme Court, prior to Brexit, requested a preliminary ruling from the CJEU, which is the subject of this case.

Decision

The CJEU held that to be able to make a valid reclaim of input tax, the taxpayer needed to hold, or have held, an invoice that separately stated the amount of VAT being charged.

Zipvit Ltd was never issued with a valid VAT invoice setting out the VAT charged on the services.

Zipvit Ltd v HMRC Case C-156/20

Loan administration services

Summary –Third-party loan servicing is not within the VAT exemption for financial services. The services were not 'transactions concerning payments or transfers', and loan accounts were not current accounts.

The Target Group Limited provided loan servicing to a bank. Once the bank had originated the loan, the company set up a loan account, facilitated payment with the borrower (including setting up the direct debit), processed other repayments made, calculated the amount of interest due, applied fees, reconciled and credited the payments to the loan

accounts and closed the account once the loan had been repaid. Target Group Limited was not involved in the provision of the initial loan or any further advances.

The First Tier Tribunal and Upper Tribunal held that the loan servicing services provided were liable to VAT and not, as the company had argued, exempt as transactions concerning payments or debts or the operation of a bank account under Schedule 9 Group 5 VATA 1994.

Target Group Limited appealed to the Court of Appeal.

Decision

In reaching its decision, the Court of Appeal followed HMRC's argument that it should adhere to the most recent CJEU decisions, now reflected in UK law under EU (Withdrawal) Act 2018 following the end of the Brexit transition period. The legislation enables the Court of Appeal to deviate from EU retained case law, but this should only be done in narrow circumstances and in this case, the Court of Appeal decided to follow later EU case law culminating in *DPAS* (Case C-5/17) and effectively distinguishing the decision in *FDR* [2000] EWCA Civ 216.

The court concluded that the services provided by Target Group Limited could not be viewed as fulfilling the functions of a financial transaction. The company did not make loans or further advances. It did not assess the credit worthiness of the applicant, it did not credit/debit the account holder directly and the payments and transfer of funds were executed by a third party. None of the activities undertaken by Target Group Limited changed the legal or financial position of the parties, which is crucial when determining whether the financial services supplied are exempt from VAT.

Target Group Limited supplied a debt collection service, provided credit management services on behalf of the grantor, and the operation of loan accounts. All these supplies are liable to VAT.

The appeal was dismissed

Target Group Limited v HMRC [2021] EWCA Civ 1043

Adapted from the case summary in Taxation (22 July 2021)

Best judgment assessment **(Lecture B1271 – 20.30 minutes)**

Summary –HMRC's best judgment assessments had been raised on a reasonable basis using the evidence that had been presented to them.

Kingsley Douglas was a sole trader who ran a business selling cigarettes, tobacco, and newspapers and was almost permanently in a VAT repayment position.

Considering this to be highly unusual, HMRC initiated an enquiry into his VAT affairs and ultimately made best judgment assessments on the basis that Mr Douglas did not have the till rolls relating to sales made in his business. HMRC raised assessments for the VAT quarter to 09/09 for £7,319.17 and for the VAT periods 06/10 to 12/13 totalling £132,693.00.

The taxpayer appealed to the First Tier Tribunal who concluded that in the absence of full records, HMRC were correct that the only option available was to carry out a business economic exercise and that reasonableness was a matter that had been taken into account.

Kingsley Douglas appealed to the Upper Tribunal, claiming that the First Tier Tribunal had erred in making findings outside the agreed issues and in concluding that there was no evidence upon which they could conclude that Mr Douglas had shown the assessments to be wrong.

Decision

The Upper Tribunal stated that it was clear that the reliability of Mr Douglas's records 'was front and centre in the appeal'. The Tribunal concluded that the First Tier Tribunal had 'clearly considered all of the evidence in the round'.

It was a matter for the First Tier Tribunal as to what weight to attach to any particular piece of evidence and, it was not for Upper Tribunal to interfere with the First Tier Tribunal's evaluation where the evidence had been properly taken into account.

There was clearly evidence before the First Tier Tribunal on which it was entitled to make the finding that it did.

The appeal was dismissed.

Kingsley Douglas v HMRC [2021] UKUT 0163 (TCC)

Construction of new dwelling **(Lecture B1271 – 20.30 minutes)**

Summary – Retrospective planning consent for the construction of a new dwelling was not enough to permit zero rating of the construction services provided.

CMJ (Aberdeen) Limited is a joinery and construction services company.

In June 2012, an initial planning application was made for the "demolition of existing dwelling and garage and reinstatement with new build dwelling and garage". To gain approval, the application was amended and referred to as 'an extension and a garage' with the newly designed house sitting within the same footprint as the existing house and retaining two of its original walls.

In February 2013, when the roof was taken off, it was discovered that the walls were not suitable to hold the weight of the proposed new extension and so they were demolished and rebuilt with modern replacements.

On 10 November 2014 the Council granted full planning permission for "Demolition of existing steading and erection of new dwelling house (retrospective) at [the property]".

In summary, this meant that when construction started, the planning permission in place did not relate to the construction of a new dwelling but rather 'alterations and extension' to the existing dwelling. However, the final result was that the company supplied construction services to build a new dwelling with retrospective planning permission granted.

For the construction services to be zero rated under Schedule 8 Group 5 VATA 1994, one of the conditions is that 'statutory planning consent' must have been granted for a new dwelling before the work starts. As this was not the case, HMRC raised an assessment, treating the supplies as standard rated.

The company appealed arguing that statutory planning consent had been obtained for the construction by dint of a combination of the planning consent and a construction building warrant which it had obtained from the relevant authority and which allowed for the construction of a new building.

HMRC's view was that a building warrant was 'not sufficient' for zero-rating purposes because it was not statutory planning consent.

Decision

The First Tier Tribunal agreed with HMRC confirming that verbal planning consent and a building warrant granted before the work started was insufficient.

On a strict interpretation of note (2), zero rating was not allowed.

The company's appeal was dismissed.

CMJ (Aberdeen) Limited (TC08140)

Black cab taxi hire and insurance (Lecture B1271 – 20.30 minutes)

Summary – The taxpayer made a mixed supply consisting of standard rated vehicle hire and exempt insurances services.

Black Cabs Services Limited leases London Hackney cabs to self-employed drivers. By leasing rather than buying black cabs, the drivers do not have the hassle of maintaining, financing and insuring the vehicle themselves.

The black cabs are insured under a "motor fleet policy" taken out by Black Cabs Services Limited and all cabs owned by the company are covered. There is usually no requirement for the details of the drivers to be sent to the insurer. Although drivers have the option of using their own insurance, his drivers have never used their own insurance policies as the company's policy was cheaper and had more benefits than an individual driver could negotiate himself.

Insurance formed a small part of the overall cost of running a vehicle (£30) with the majority of the cost comprising finance and maintenance. No invoices were issued to the drivers, just receipts with the cost of insurance set out separately.

Having originally treated the insurance element as a taxable supply, they later claimed that this was a mixed supply and that the insurance element was an exempt supply.
Consequently, Black Cabs Services Limited submitted a VAT error correction claim for £43,245 for the 12/2013 - 03/2016 periods.

HMRC disagreed and determined that the company was making a single standard-rated supply of a fully insured taxi and refused the claim. It would be artificial to split the costs.

The company appealed.

Decision

The First Tier Tribunal accepted that although the economic realities of the purchase of "block policy" insurance meant that this option was cheaper and so all drivers were insured under their policy, drivers were always given the option of using their own insurance.

Drivers were aware of the added cost of insurance because not only was it set out in the agreement, but the receipt separately set out the hire amount and the insurance amount. The First Tier Tribunal concluded that the average driver was likely to conclude Black Cabs Services Limited two supplies: an exempt supply of insurance services and a standard supply of vehicle hire.

HMRC were wrong to deny the repayment claim and the appeal was allowed.

Black Cabs Services Limited v HMRC (TC08141)

Effect of subsidy payments on input tax (Lecture B1271 – 20.30 minutes)

Summary – In line with other decisions, a business making taxable supplies and receiving grants that were outside the scope of VAT did not need to restrict its input tax recovery.

Colin Newell traded as a hot air generating business and received periodic support payments under the renewable heat incentive scheme. It was accepted by both parties that these payments were outside the scope of VAT.

HMRC determined that, because the receipts were a significant part of Colin Newell's business, and he would not be profitable without them, his input tax should be reduced by apportioning the input tax between the taxable and outside the scope supplies. HMRC raised an assessment disallowing 47% of the input tax for the period November 2014 to January 2017 and 29% for the period from February 2017 to April 2018.

Colin Newell appealed arguing that there was no need to restrict his input tax because he had no exempt supplies, only taxable business supplies.

HMRC claimed that all expenses were a cost component of the sales made by the business, as well as the periodic support payments that the business received. There was a direct and immediate link between costs and both income sources.

Decision

The First Tier Tribunal considered five historic cases heard in the CJEU and the question 'Is there an activity taking place that generates the subsidy income, or is the business only involved in making taxable business supplies?'

The Tribunal stated that there was a direct and immediate link between purchases and taxable supplies, as the goods and services on which input tax were incurred were used to generate heat and make taxable supplies. This forms the basis of the entitlement to recover his input tax. The Tribunal decided that the fact that the business might not be viable without the subsidies was 'irrelevant to his entitlement to deduct input tax'.

The appeal was allowed.

Neil Warren, independent VAT consultant, said:

> 'HMRC has always accepted that an activity can be either business or non-business but not both. Non-business income, for example some grant income, can be used to support business activities. This does not mean that the supported business activities become partly non-business and partly business. Using non-business income simply makes them subsidised business activities.'

Colin Newell v HMRC (TC08149)

Adapted from the case summary in Taxation (12 August 2021)

VAT issues when converting property (Lecture B1275 – 23.39 minutes)

Practitioners are starting to experience an increase in clients contemplating residential developments – often from existing properties. Whilst there have not been any recent changes to the law it is worth reviewing what the critical VAT issues are.

Converting commercial properties to dwellings

Purchase of commercial property

The purchase of a commercial property will be exempt. If an option to tax is in force the buyer will need to provide a certificate (Form 1614D) to the seller (on or before exchange) to secure exemption. The certificate should confirm the extent of dwelling use going forward e.g. two floors out of three. The option is only disapplied to the extent of the dwelling use e.g. two thirds.

Disapplying the option to tax will reduce the SDLT charge and improve cash flow. It also reduces the risk of irrecoverable VAT should the buyer not make any onward taxable supplies with the converted property.

Conversion work

Where the developer provides CIS end-user confirmation to the subcontractors, VAT should be charged at the reduced rate of 5% on qualifying services supplied in the course of the residential conversion. Generally the lower rate will apply to commercial property being converted to flats.

If no end-user confirmation was given the 5% CIS domestic reverse charge would be in point.

Building materials and certain electrical goods, supplied by the person providing the above services and incorporated into the building in question or its immediate site, are also subject to the reduced rate.

Building materials supplied in isolation will be standard rated.

Onward supply

The zero-rating legislation covers the first grant of a major interest 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 or intended for use solely for a relevant residential purpose.

This might be where someone is converting a warehouse building into flats or a barn into a house.

If the major interest grant is not present then the onward supply will be exempt e.g. 12 month rental tenancies.

Providing an onward zero rated supply is made the VAT incurred on the conversion work is recoverable. It should be noted that the blocking order within SI 1992/3222 is still in point and this will restrict input tax recovery on building materials not ordinarily incorporated e.g. fridges and cookers.

Converting houses to flats

Purchase of the house

The purchase of a house will be not be subject to VAT.

Conversion work

When end user confirmation in point, VAT should be charged at the reduced rate of 5% on qualifying services supplied in the course of certain residential conversions. In the absence of end user confirmation the 5% CIS domestic reverse charge is in point. Generally the 5% rate (or DRC) will apply to houses being converted to flats as the number of dwellings is changing.

Building materials and certain electrical goods, supplied by the person providing the above services and incorporated into the building in question or its immediate site, are also subject to the 5% reduced rate.

Building materials supplied in isolation will be standard rated.

Onward supply

The onward sale (or rental income) will be exempt.

If the house has however been empty for 10 years or more the sale can fall within the zero rated provisions as a qualifying conversion.

Input tax will not be recoverable if the onward supply is exempt.

Planning

Developers who regularly convert houses into flats should have a separate services company so as to avoid any 20% VAT on building materials. The services company will pay VAT at 20% on their building materials but will then charge their “parent” company 5% VAT on the conversion contract. The 20% VAT is recovered which minimizes the project VAT cost to just 5%.

Mixed use conversions

When converting a mixed use property we need to proceed with caution as the rules are complex.

If we consider a pub with owners accommodation on the first floor – a self-contained flat possibly.

Purchase of the property

The purchase will be exempt providing the seller has not opted to tax the property. If the seller has opted to tax the sale proceeds will be apportioned between the exempt flat and the standard rated pub element. The option to tax never affects residential property.

The buyer could issue Form 1614D confirming residential conversion intent for the ground floor. This will disapply the option to tax and the purchase of the property will be wholly exempt.

Conversion work

The conversion work should be considered on a floor by floor basis.

Converting the ground floor pub area into one or more flats should secure 5% on the conversion work on the ground floor.

The work on the first floor would also have a 5% rate if you were creating an additional flat on the first floor i.e. one flat converted to two. If the original flat was simply refurbished then the rate would be 20%. You would have to change the number of dwellings on the first floor to secure the 5% rate.

Any work that is common to the ground and first floor would need to be apportioned.

Where end-user confirmation is not given the work will be subject to a domestic reverse charge rather than VAT being charged by the subcontractors but the rates will remain the same.

Onward supply

To secure zero rating on the onward sale of the flats you would need to meet two conditions:

The flat being sold came from wholly commercial i.e. the ground floor pub element.

There must be more dwellings in the building post conversion than there were before.

This essentially means that the flat(s) on the ground floor should be zero rated on sale which will then allow input tax recovery on the conversion work for the ground floor.

The first floor flats cannot be zero rated on sale as they came from the residential element. This is so even if there are more dwellings post conversion.

Contributed by Dean Wootten