CONTENTS

Personal Tax

Income tax changes for 2010/11 (including discretionary trusts)

An additional tier of higher rate tax set at 50% is to be introduced for taxable incomes above £150,000 for 2010/11 onwards (Cl 6 FB 2009). This will apply to all categories of income other than dividends. It will be known as the additional rate. Dividend income above this threshold will be liable at 42.5% and so there will then be three possible rates of tax for dividends:

1. 10% for dividends falling within the basic rate band;
2. 32.5% for dividends falling within the higher rate band; and
3. 42.5% for all other dividends.

The effective rate of tax on dividends where taxable income exceeds £150,000 will therefore rise from 25% to 36.11%.

For example:

Dividends (x 100/90)	£1,000
	£
Tax @ 42.5%	425
Less: Tax credit	100
	——
	£325
	——

This produces 325/900 x 100 = 36.11%.

This change will not alter significantly the advantage of a dividend over a bonus in the case of an owner-managed company paying corporation tax at either the small companies rate or the full rate.

Two points follow from the Chancellor's decision:

- Tax-deductible outgoings such as allowable interest and Gift Aid payments will become even more valuable for top rate taxpayers.
- The considerable difference between income tax and CGT rates will encourage entrepreneurs to ensure that value is realised as a capital gain. Given that very few deals are being done in the current economic climate, the message from the Budget, as one commentator has pointed out, is:

  'Invest now to grow for the future and limit the amount taken out.'

In terms of tax planning, the following strategies should be considered for 2010/11 onwards:

- Where one spouse is a high earner and the other is not, think about making an outright transfer of all of the first spouse's income-producing assets to his other half – two incomes of £150,000 will suffer significantly less tax than one income of £300,000.
- Where married couples are in business together, it will be sensible for partnership profits or dividends to be shared as evenly as is appropriate – remember that, following the taxpayer's success in the case of *Jones v Garnett (2007)*, the Government's income shifting proposals, which were intended to be their counter, have been put on hold for the time being.
- With a private trading company, a shareholder who sells his shares back to the company can usually, with careful planning, enjoy either CGT or income tax treatment for his disposal

proceeds. Given the disparity between CGT and income tax rates, the former will be preferred in virtually every case.

- The same planning point holds good for companies which are about to go into liquidation. A pre-liquidation distribution is always subject to income tax, whereas any distribution made after the winding up process has commenced is a capital transaction.
- Where an original subscriber of shares in an unquoted trading company disposes of his shares at a loss, it is possible to make a claim under S132 ITA 2007 to set the resulting loss against his total income for the year of the loss and/or the previous year, thereby converting it from a capital loss into an income loss.

Discretionary and accumulation trusts will not be immune from the tax rate rise. In 2010/11, the trust rate goes up to 50% for income above the standard rate band limit (currently £1,000) and the dividend trust rate becomes 42.5%. It will therefore be worth converting existing discretionary trusts into trusts with a revocable life interest ahead of the 2010/11 tax year. Not only will this end the anomaly of the very high tax rate suffered by discretionary trusts in receipt of dividend income but it will also remove the need for beneficiaries with taxable incomes of less than £150,000 to claim tax repayments. There should be no CGT or IHT drawbacks to the creation of a revocable life interest.

Article by Robert Jamieson

Lecture P541 (20.09 Minutes)

Withdrawal of UK tax allowances for certain non-UK residents

Cl 5 and Sch 1 FB 2009 provide for the withdrawal of personal reliefs and allowances from income tax for individuals who are not resident in the UK but who have an entitlement to those reliefs and allowances solely by virtue of the fact that they are Commonwealth citizens.

Generally, individuals who are not resident in the UK have no entitlement to claim reliefs such as the personal allowance. However, there are a number of conditions, either set out in statute or under double taxation agreements, which allow certain people who are not resident in the UK but who are liable to pay UK income tax (because they have income here) to claim the benefit of personal reliefs and allowances.

That list currently includes:

- a citizen of the UK, the Republic of Ireland or the Commonwealth;
- a resident of the Channel Islands or the Isle of Man;
- any EEA national;
- a person who previously resided in the UK and who is resident abroad for the sake of their health or of the health of another family member who lives with them;
- a person employed (or previously employed) in the service of the Crown;
- a person whose late spouse (or civil partner) was employed in the service of the Crown; and
- anyone employed in the service of a territory under Her Majesty’s protection.

With effect from 6 April 2010, a provision is being introduced (as mentioned above) to remove the right of individuals to claim personal reliefs and allowances in the UK solely by reference to their Commonwealth citizenship status. The existing regime is apparently not compliant with human rights legislation because it gives Commonwealth citizens greater rights than those who are not. Of course, many such individuals will continue to qualify under one of the other headings or because of the terms of a double taxation agreement between the UK and their country of residence.

The Treasury have published a list of the countries whose citizens are most likely to be affected by this change:

Bahamas	Niue
Cameroon	St Lucia
Cook Islands	St Vincent and the Grenadines
Dominica	Samoa
Maldives	Tanzania
Mozambique	Tonga
Nauru	Vanuatu

Article by Robert Jamieson

Lecture P542 (5.19 Minutes)

Higher rate tax relief for pension contributions

Higher rate tax relief is being restricted for contributions made by or on behalf of individuals to qualifying pension schemes. Relief will be progressively reduced, from 6 April 2011 onwards, for taxpayers with incomes of between £150,000 and £180,000 so that those with incomes in excess of £180,000 will only benefit from relief at the basic rate in respect of their contributions. The precise mechanism for operating these rules has yet to be announced.

Provisions applying with effect from 22 April 2009 will prevent the forestalling of this new restriction (Cl 71 and Sch 35 FB 2009). For 2009/10 and 2010/11, individuals whose 'relevant' incomes (that is, total incomes less trading losses, allowable interest, individual pension contributions up to £20,000 and the grossed up amount of Gift Aid donations) are at least £150,000 for the tax year in question or for either of the two preceding tax years could potentially be affected. Steps taken to reduce income to below the £150,000 limit by entering into salary sacrifice arrangements set up on or after 22 April 2009 will be negated by the simple expedient of adding back the amount sacrificed. It is not clear whether a "dividend sacrifice" is caught so care should be taken if advising along these lines.

Where such individuals increase the level of their pension contributions beyond what HMRC call their 'normal regular ongoing pension savings' (and this could include contributions by an employer), they may be subject to a special annual allowance charge. The special annual allowance has been set at £20,000 for each tax year – it represents a permitted de minimis limit. Contributions in excess of this threshold will be taxed at 20% (40% – 20%) for 2009/10 and the tax will be collected via the normal self-assessment procedure. For 2010/11 when the new 50% rate takes effect, the indications are that the special annual allowance charge will go up to 30% (50% – 20%).

Illustration

Edward has a total income of £175,000 for 2009/10. During that tax year, he contributed £50,000 to his personal pension scheme. Edward's contributions reflect a regular payment of £2,000 on the last day of each month (as in previous years) and a single one-off payment of £26,000 made in February 2010.

Edward's income for 2009/10 exceeds the £150,000 income limit and his aggregate pension contributions are greater than the £20,000 special annual allowance. His normal regular contributions are not subject to the special annual allowance charge, but the additional payment of £26,000 will be caught.

There is one unfortunate trap with these proposals. Despite the HMRC Press Release implying that individuals will never be affected if they continue with their normal pattern of contributions, this does not appear to be the case. HMRC's term 'normal regular ongoing pension savings' is defined as contributions which are made quarterly or more frequently. Those accustomed to making annual contributions (eg. on receipt of a bonus or profit share) will not qualify and any such contributions, even at an identical level to previous years, will be charged to tax if they are in excess of £20,000.

The Conservatives proposed a late amendment to these provisions (increasing the £20k to £50k and changing "normal contributions" to the three year average) but the original provisions were agreed without amendment.

Article by Robert Jamieson

Lecture P543 (18.03 Minutes)

Wright v Revenue and Customs Commissioners TC32

The appellant performed groundwork services on a sub–contract basis for main contractors and in performing that work he used his own workers. HMRC formed the view that the workers were employees for income tax and national insurance contributions (NICs) and raised assessments under reg 49 of the Income Tax (Employments) Regulations 1993 and the Social Security Contributions (Transfer of Functions, etc) Act 1999 against which the appellant appealed to the General C ommissioners. The General Commissioners found as a matter of fact that workers were engaged by the appellant to work on specific contracts with the main contractors rather than on a continuous basis. Payment was made by the appellant to the workers at an hourly or daily rate. In most cases hand tools were provided by the workers themselves; materials and heavier plant and equipment were provided by the appellant or the main contractors, or by arrangement with the appellant. The General Commissioners came to the conclusion that the workers were self–employed under contracts for services rather than employed under contracts of service. The reasons given for that conclusion were that the terms of engagement were oral only and that there was no formal contract protecting the worker, nor any minimum requirement to pay the worker irrespective of demand or weather and that payment for the worker's service was effected strictly on a work done basis. HMRC appealed by way of case stated to the High Court on the ground that the General Commissioners had misdirected themselves as to the legal test to be applied. The High Court ([2007] EWHC 526 (Ch), [2007] STC 1684) allowed the appeal on the basis that the correct test was whether the appellant had sufficient day–to–day control over his workers to make them his employees. In his judgment the judge stated that he supposed that the appellant did not have a sufficient right of control to justify the conclusion that the workers were employees of the appellant, as the site foreman decided the hours of work and gave precise on–site instructions and instructions on the use of machinery, and health and safety compliance lay with the main contractor. However, he remitted the case to the General Commissioners in order that they could ascertain whether the appellant had sufficient rights of control over the workers to justify the conclusion that they were his employees. The case came before the First–Tier Tax Tribunal. The appellant did not attend. At the hearing two workers of the appellant gave evidence on behalf of HMRC. They stated, inter alia, that they were both engaged by the appellant over the telephone and had no prior experience in the building industry; they were driven to and from the site by the appellant and were shifted between sites without notice; two weeks' notice was required for time off, and they were not paid during time off; and the appellant was usually on site to give instructions, which in his absence would be given by his brother–in–law or his foreman.

The tribunal judge found that the appellant regularly exercised control, either personally or through other trusted workers of his, over his work–force. Applying the judicial direction as to the significance of control, the workers were employees of the appellant and on that basis the appeal was dismissed.

However the tribunal judge went on to consider the question of degree of control that might have been exercised by main contractors. That question and distinction was very significant to the relevance of the control. It was clear in the present case that the main contractors performed the role of project managers and co–ordinators, and sub–contracted everything to other entities or traders. It was not the case that those other entities or traders were simply supplying workers who worked entirely in the business of the main contractor. The reality was that in a case like the present one, the control exercised by the main contractors was essentially to co–ordinate the various sub–contractors, and to make it clear to each sub–contractor what had to be done in accordance with the building plans, and in what order different jobs had to be done. In the performance of their various sub–contract roles it was each sub–contractor who exercised the control that was material for tax and employment purposes, and the overall co–ordination was fairly irrelevant to those tax and employment tests. The position was quite different to that where a person's/company's trade was simply to supply workers to work directly in the business of a third party. In that situation the supplier of the worker might be responsible for supplying a satisfactory worker for the type of work contemplated, but since the worker was to work directly in the trade of business of the entity to which his services were provided, and the supplier would have no clue as to what it was intended that the worker would be required to do, the agency type of case was quite different from the sub–contract case with which the present case was concerned. It was the control by the appellant that was material and that co–ordinating control exercised by the main contractors was not relevant to the control over the appellant's workforce. Consistent with the sub–contracting reality, it was the appellant, his brother–in–law or his foreman who exercised most of the direct control over the appellant's workforce.

Furthermore the tribunal judge considered it was appropriate to consider the employment status issue more widely to ascertain whether on an alternative basis the same conclusions reached, especially as recent authorities had stressed that numerous points were relevant in considering the status question. Whilst the "own business" and "control" test were perhaps the most important factors in determining the status point, it was also necessary to consider the third test specified in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497—namely "the other provisions of the contract [to see whether they were consistent] with its being a contract of service". Viewing matters generally the workers in the present case were employees. The two most significant factors were that that workers were not in business on their own account in the sense of taking risk and of drawing up some form of accounts; and they worked under the control of the appellant. On the evidence, the appellant had engaged people in a casual manner without much attention to what their skills were, and it was inconceivable to argue that they were in business on their own account. Even on the "standing back" approach and looking at all factors generally, the workers in the present case were employees. Although they were not paid for time off, holidays, or sick pay, there was virtually no flexibility to take time off—even though they would not be paid when not working. The appellant considered he could terminate engagements without notice and the actual working hours were fixed by him by virtue of the fact he took the workers to and from the site. The workers were engaged before they knew where they would work, and sometimes they were switched to different sites without notice, so the proposition that they were engaged for specific projects was very dubious.

Appeal dismissed.

Revenue and Customs Commissioners v Banerjee

From 7 October 1996 until 13 March 2001, the taxpayer was continuously employed as a specialist registrar in dermatology by two NHS trusts in South West London. Throughout her period of employment by both trusts, the written statement of the terms and conditions of her employment included a training clause which required her to continue to hold a national training number and to attend meetings, courses and conferences 'in carrying out the duties of her employment' as prescribed by the supervisor and programme director for dermatology specialist registrars in the South Thames area. The courses and training that the taxpayer attended were compulsory and a pre-requisite of her maintaining her post and employment. Her training period lasted for five years and the obligation to hold a national training number continued throughout the training period. The taxpayer claimed deductions, under s 198 of the Income and Corporation Taxes Act 1988, from her pay as a specialist registrar in dermatology in the three tax years 1997/98, 1998/99 and 1999/00 in respect of expenditure incurred by her in attending educational courses, conferences and meetings, including associated costs of travel and accommodation. The total expenditure claimed by the taxpayer for each of the three years were £2,700, £3,750 and £2,050 respectively. The amounts were disallowed by the Revenue by way of amendments to the taxpayer's self assessment tax returns. On 31 December 2003, the taxpayer appealed against the amendments. The majority of the general commissioners allowed the taxpayer's appeal on the ground, inter alia, that the training had been an objectively necessary requirement of her employment. The Revenue appealed pursuant to s 56(6) of the Taxes Management Act 1970.

The issue for determination was whether the amounts claimed had been expended by the taxpayer wholly, exclusively and necessarily in the performance of the duties of her employment.

The appeal would be dismissed.

In order to fall within s 198 of the 1988 Act the deduction claimed by the taxpayer had to be related to an objective necessity imposed by the duties of the employment itself, in the sense that, irrespective of what the employer might prescribe, the duties themselves involved the particular outlay. Further, the expenditure had to have been incurred in the actual performance of the duties of the employment, and it also had to have been wholly and exclusively so incurred (see [28] of the judgment).

The majority of the general commissioners had been fully entitled to take the view that attendance at the courses was an objectively necessary requirement of the taxpayer's employment. It had not merely been a collateral contractual obligation undertaken by her at her employer's request, nor had it been an 'extra-curricular' obligation that she had chosen to undertake in order to qualify herself to do her job, or improve her prospects of promotion. There was no basis for saying that the commissioners had erred in law in taking the view that they had. To assert the contrary would amount to saying that, as a proposition of law, it was impossible for the test in s 198 to be satisfied in any case where the taxpayer was paid to undergo training. Stringent though the section undoubtedly was, there was no reason why it should be construed in such an extreme way (see [34] and [35] of the judgment).

High Court, 22/06/2009

Capital Gains Tax

Furnished holiday lettings - abolished

The Budget 2009 announced a change in policy in relation to Furnished Holiday Lettings (FHL). A pretty dramatic change. FHL are to be abolished.

As you will be aware, certain properties that fulfil specified conditions currently qualify as FHLs and therefore are treated as a property trade and are subject to tax and reliefs much as any other trade.

To qualify as a FHL the property must also meet the following three conditions in order to qualify as 'holiday accommodation':

- It must be **available** for commercial letting to the public, generally as holiday accommodation, for a total of 140 days in a 12 month period
- **It must be actually let** for at least 70 days in the 12 month period - where more than one qualifying furnished holiday let is held, it is possible to average the number of days all properties are let in total in order to meet this condition, provided the other two conditions are met in relation to each property separately
- In any seven month period the property must **not** be let out to the same person for a **continuous** period exceeding 31 days

HM Revenue and Customs (HMRC) has clarified that occupation by the owner outside the holiday season does not prejudice relief.

Why a change now?

It has been suggested that the availability of FHL, being limited to UK property only, would contravene EU law. As a result, the Government has decided to abandon the FHL scheme in its entirety with effect from 6 April 2010.

Conversely, until that date, properties in the European Economic Area (EEA) that would qualify as a FHL if they were situated in the UK will now qualify as FHL, with all associated tax treatment.

Claims to treat a property in the EEA may only normally be made by amending the relevant return. For personal tax returns, this limit is normally 31 January, 21 months after the end of the tax year, and for companies, two years after the end of the relevant accounting period. However, HMRC will accept late amendments until 31 July 2009 in respect of:

- Personal tax returns for the tax year ended 5 April 2007
- Corporation tax returns for accounting periods ending on or after 31 December 2006.

In certain circumstances, where the normal time limit for a relief associated with FHL, such as holdover or rollover relief from capital gains tax, is a longer period, this time limit will take precedence.

Reliefs for FHL

The loss of FHL will be a blow to many taxpayers due to the related reliefs that they will no longer receive.

The profits/losses of any letting business (and not just a furnished holiday let) are calculated according to the normal trading rules. In other words, expenditure is allowable if it is incurred **wholly** and **exclusively** for the purposes of the letting business. However, FHLs also qualify for capital allowances on certain plant and machinery items. In addition, the loss can be offset against total income of the current year and the prior year, which is more generous than the loss relief rules for normal letting.

There are a number of capital gains tax (CGT) reliefs available to furnished holiday lettings but most particularly it is treated as a trade for the purposes of Entrepreneurs' Relief (ER). Therefore ER will be available provided the qualifying conditions are met. ER was introduced as part of the changes to the CGT rules on 6 April 2008 and gives an effective tax rate of 10% on certain business disposals, up to a lifetime limit of £1 million of gains per individual.

Other CGT reliefs include the possibility of hold over relief and roll-over relief. Also the principal private residence relief that exempts gains on disposals of an individual's own residence may apply. If the property involved is, or has at some point been, the individual's main or only residence, then part of the resulting gain may be exempt under principal private residence relief and also under the letting exemption.

In some circumstances FHL will qualify for business property relief thus ensuring no Inheritance Tax (IHT) arises in respect of the property. This will very much depend on whether it actually constitutes a 'business'.

What do I need to do?

Each of these reliefs may make it appropriate to undertake action prior to 6 April 2010. Where there is an intention to cease carrying on a FHL activity and to sell the property concerned, then there will be an incentive to accelerate this to prior to 6 April 2010 in order to take advantage of entrepreneurs' relief. However, there may also be an incentive to roll-over into a FHL property prior to 6 April 2010. Care must be taken that the qualifying conditions are met.

For succession planning purposes within a family one option would be to gift a FHL property prior to 6 April 2010 in order to take advantage of hold-over relief under s 165, TCGA 1992. So long as the donor survives seven years, then it will be possible to avoid both CGT and inheritance tax IHT.

Article by Francesca Lagerberg

Lecture B541 (6.23 Minutes)

Adams v Revenue and Customs Comrs TC48

In May 1999 the company, an unquoted company in which the appellant was the majority shareholder, was sold to C in exchange for cash and shares. On 23 April 1999 the then appointed tax advisers of both the appellant and company applied to the capital gains tax clearance section of the Inland Revenue (now HMRC) for clearance under TCGA 1992 s 182 in respect of the proposed acquisition of the company in exchange for cash and shares, and disclosing the earn out rights. The letter asked for confirmation "that the Board are satisfied that the provisions of section 137 TCGA 1992 will not apply to affect the operation of section 135 TCGA 1992 as extended by section 138A to the transactions …" It stated that the company shareholders would acquire the right to the earn out to receive further shares up to the value of £2m contingent on performance targets. Clearance was given restricted to the question whether the conditions of TCGA 1992 s 137(1) were satisfied. It stated that whether s 135 actually applied and all other taxations consequences remained for the determination of the Inspector after the transactions. In his 1999/2000 tax return the appellant's tax advisers, who were not the firm who made the clearance application, included computations showing the proceeds received by him as £1,661,716 in cash, £553,907 in shares and "deferred consideration £913,572". The capital gain was calculated on the cash element only, thus excluding the shares and deferred consideration. No enquiry was opened into that return. In his self-assessment tax return for 2002/03 the appellant included the disposal of the shares received on the earn out, amounting to £913,000. It was an agreed fact that the return was made on the basis that an election had been made earlier under TCGA 1992 s 138A. HMRC opened an enquiry into the 2002/03 return and they subsequently issued an assessment for £246,465.80 capital gains tax for the year 1999/2000 under TMA 1970 s 36 on the basis of negligent conduct by the appellant or of a person acting on his behalf in submitting an incorrect tax return in that it did not include all the consideration due on disposal of the shares. The appellant appealed contending, inter alia, that (i) the tax return and the computations read together with the clearance application constituted an election under TCGA 1992 s 138A which was notified under sub-s (5). The computation was an irrevocable election by the appellant; and (ii) the principles in *Gallic Leasing Ltd v Coburn (Inspector of Taxes)* [1991] STC 699 applied. HMRC submitted that an election had to be contained in a notice by the taxpayer that s 138A was to apply, although it did not have to be in any prescribed form and did not have to be in the return, and that there was no notice in the return or in any other document. HMRC had to be alerted to s 138A; it was not enough for a taxpayer to make a return giving effect to an election if he did not do so in terms, although they accepted that there was no possible explanation for the exclusion of the deferred consideration of £913,572 in the computation accompanying the return other than the application of s 138A.

The tribunal judges considered that a valid election was made under TCGA 1992 s 138A. The requirement for a notice of election served no other purpose than that of alerting the inspector to the fact that reliefs were sought by the appellant. Any officer with sufficient knowledge of the law who received the return with the computation could not have been under any misapprehension that the appellant wished s 138A to apply, even if unaware of the clearance application. It followed that the appeal would be allowed; *Gallic Leasing Ltd v Coburn (Inspector of Taxes)* [1991] STC 699 applied.

Appeal allowed.

Coll and anor v Revenue and Customs Commissioners TC28

The appellants, who were married, were the sole directors of the business, G, which supplied nursing and auxiliary staff to the NHS and private hospitals. In August 1997 the appellants appointed B to provide tax advice in connection with the proposed sale of G to N. B advised about the consequences of a sale using loan note arrangements and how capital gains tax ("CGT") might be avoided if loan notes were redeemed by someone who was not UK tax resident. In September 1997 B applied on the appellants' behalf for CGT clearance under TCGA 1992 s 138. The application stated, inter alia, that the appellants' marriage had broken down irretrievably and that they were to divorce and had accordingly decided to sell the company; that as part of the settlement the husband was to become the majority shareholder in G; that the shares were to be exchanged for loan notes; and that the husband was to move to the Republic of Ireland. On 27 October 1997 the appellants were informed that the application had been refused by the Board of the Inland Revenue, which was subsequently upheld by the Special Commissioners. On 20 November 1997 the appellants sold the shares in G to N for £2.5m which was paid in bank guaranteed loan notes which constituted non-qualifying corporate notes. The appellants claimed that once they decided to sell the business they decided to give their marriage another go. In January 1998 the appellants put their home on the market. In June 1998 the appellants appointed new tax advisers, P, to advise them regarding CGT planning, and who advised on a possible move to Belgium. P mistakenly thought s 138 clearance had been obtained on the disposal of the shares and as a result the appellants' self-assessment tax returns for 1997–98, which were prepared by P, contained a statement that the disposal of shares was made as an approved paper for paper transaction under TCGA 1992 s 138 "which had received Inland Revenue clearance during November 1997". The appellants redeemed the loan notes on 30 September 1998 and 31 March 1999 when they were tax resident in Belgium. In 2000 the appellants returned to the UK. In 2005 the error about the s 138 clearance was discovered. In September 2006 HMRC issued assessments to CGT in the sum of £497,400 each, plus interest, on the ground that the exchange in shares in G for the loan notes in N was a chargeable disposal by the appellants for tax purposes pursuant to TCGA 1992 s 137 ("the s 137 issue"). The assessments were discovery assessments issued under TMA 1970 s 29 on the basis of fraudulent or negligent conduct on the part of the appellants or persons acting on their behalf. As the assessments were issued outside the six-year time limit HMRC relied upon the extended time limit of 20 years under TMA 1970 s 36. In December 2007 HMRC also issued associated penalty determinations—assessed at 85% of the CGT in issue—in the sum of £425,000 under TMA 1970 s 95(1) in respect of the appellants' tax returns ("the penalty determination issue"). The appellants appealed contending that (i) there was no scheme or arrangement with a main purpose of avoiding CGT. On 20 November 1997, the date of the exchange, they had no intention of redeeming the loan notes whilst non-resident; (ii) their relocation to Belgium where they redeemed the loan notes free from CGT was as a result of a loophole in FA 1998 which was not known on 20 November 1997; (iii) N had insisted upon the use of loan notes for the purchase of their shares in G; (iv) the error in their tax returns was due to the incompetence of P. They had disclosed to P all the information about the application and assumed P would check its accuracy; they did not understand the technicalities associated with clearance applications; and (v) HMRC were seeking to uphold the CGT assessments on the basis of the appellants' fraudulent conduct, so the onus of proof was on HMRC to prove the fraudulent conduct on which the assessments were based and given the seriousness of allegations of fraud, the evidence had to be more than would be sufficient merely to raise a suspicion ("the burden of proof issue"). HMRC submitted—

(i) the appellants were the prime movers in structuring the G sale with the use of loan notes, which was chosen after receiving advice on the tax implications of the sale; (ii) the original plan was for the husband to take up residency in the Republic of Ireland but that plan was thwarted by the refusal of the clearance application under TCGA 1992 s 138; not their purported reconciliation. They expressed scepticism about the divorce; (iii) further the appellants maintained their intention to become non-resident during the period of deferral offered by the loan note arrangement, which they realised by moving to Belgium; (iv) the appellants either told P that s 138 clearance had been granted or deliberately allowed them to labour under the mistaken belief that it had been granted; and (iv) the burden for establishing the assessments for CGT were wrongly made fell on the appellants. There was no obligation on HMRC under the assessments to allege or prove any fraud or dishonesty and the appellants were wrong to submit that HMRC were seeking to uphold the assessments on the basis of their fraudulent conduct. The fact that HMRC were suggesting that the appellants had lied to HMRC or their advisers as part of their case on the s 137 dispute did not transfer the burden of proof back to them. However HMRC accepted that they had the burden of proving fraud or negligence in respect of the penalty determinations.

The tribunal judge found there was a scheme or arrangement within the meaning of TCGA 1992 s 137 and that the main purpose of the arrangements was to avoid liability to CGT. The fact that the appellants had not finalised the details of the alternative non-resident routes as at 20 November 1997 did not affect the analysis that TCGA 1992 s 137 applied. The appellants had a substantive intention to become non-resident which was demonstrated by their subsequent actions. That conclusion was based on the following facts—(i) the appellants initiated the use of the loan notes after receiving advice on reducing their tax liability on the proposed sale of G shares. The purpose of those arrangements was to avoid CGT altogether on most of the loan notes; (ii) the original plan involved the transfer of majority shareholding to the husband with him taking up residence in the Republic of Ireland. That specific plan was abandoned immediately before completion of the share sale because the Special Commissioners upheld Inland Revenue's refusal of the clearance application; and (iii) on 20 November 1997 the appellants retained their intention to redeem the loan notes when they were non-resident. They took immediate steps after the sale of their business to break their ties with the UK by selling the family home, and sought advice from another firm of tax advisers, P, who identified the Belgian route. They realised their intention of redeeming the loan notes when they were non-resident by moving to Belgium before the first redemption date and did not account for CGT on the disposal. The adoption of the Belgian route was not a chance occurrence but a fulfilment of their intention as at 20 November 1997 to redeem the loan notes when they were not resident in the UK. Therefore whilst at 20 November 1997 the appellants did not have an intention of residing specifically in Belgium, they did have an intention of living outside the UK so as to avoid CGT on the redemption of loan notes. It followed that the appellants' appeal on the s 137 issue would be dismissed.

The tribunal judge considered that in respect of the s 137 issue the burden of proving the assessment was wrong rested on the appellants. In respect of the penalty issue, the burden was on HMRC to show that the appellants fraudulently or negligently made an incorrect return for 1997–98. The burden of proof was on the balance of probabilities and not the criminal standard.

The tribunal judge found that, on the balance of probabilities, the evidence adduced by HMRC in support of their allegation of fraud was insufficient to displace the evidence relied upon by the appellants of having no fraudulent intention when they completed the 1997–98 returns. The husband's act of sharing details of the clearance application and its refusal with P before they prepared the 1997–98 tax returns was not an act normally associated with a fraudulent intention to deceive the professional advisers. However, on the evidence the appellants were negligent. The 1997–98 returns contained a material inaccuracy regarding the status of the clearance application which in turn understated the tax due on the transaction. P drafted the returns with a material inaccuracy. The appellants were under an obligation to check the accuracy of the returns and they knew that clearance for the transaction under TCGA 1992 s 138 had been refused. The appellants saw the statement on clearance in the returns but assumed it was correct and they did not question P about the statement before signing the returns. As a result of that negligence, a penalty was merited, fixed at 30% of the tax due under the disposal of the G shares for each appellant.

Appeal allowed in part.

Inheritance Tax and Trusts

Gordon Douglas Cairns (personal representative of V Webb dec'd) (TC8)

HMRC brought an information and draft summons against the appellant claiming that he had 'fraudulently or negligently delivered, furnished or produced to the board an incorrect account, information or document relating to value transferred by a chargeable transfer…'.

They wanted to impose a penalty of over £33,500. A Special Commissioner had signed the summons and the appellant appealed.

At the appeal hearing, the Special Commissioner said the summons failed to specify at all what charge was being laid against the appellant. He dismissed the summons on those grounds, but in case he was wrong, he considered the merits of the case.

The facts of the case were that the appellant, a qualified solicitor, was asked by the local council to act as guardian for an individual who later died.

As part of his duties he had to draw up an inventory of the deceased's estate and this included providing a valuation of the deceased's property.

He obtained a valuation of £400,000 from a chartered surveyor but this was qualified as the property was in very poor condition and needed substantial renovation.

He knew that once the property was sold, that price would be the one agreed to be the date of death value.

The property was eventually sold for £600,000 and the appellant paid the inheritance tax due.

HMRC thought that the appellant should have obtained another estimate of the property's value and failure to do so constituted wilful default and careless breach of duty.

The commissioner said that there was no reason why the appellant should have obtained another valuation. He could not have foreseen what the property would have eventually sold for and, in any event, he had kept HMRC informed and paid the tax.

His only failure was not to have described the £400,000 figure as a provisional estimate.

The proportionate response from HMRC would have been to point this out This would not have led to the imposition of a penalty or the instant proceedings.

The summons was dismissed on the grounds that it was wholly lacking in specification.

But if this was the wrong decision, then the appellant had been guilty only of a narrow, technical failure to comply with the legislation and the penalty should be reduced to a nominal amount accordingly.

Administration

Senior accounting officer provisions

Clause 92 and Schedule 46 of the Finance Bill 2009 introduces controversial and additional obligations making senior accounting officers personally liable for verifying their company's systems for tax purposes.

This announcement only affects 'large' companies. This originally would have caught about 15,000 companies but changes are to narrow this to around 2,000.

For accounting periods beginning on or after the date on which the Finance Bill receives Royal Assent, a senior officer within a large company will have to certify annually that the accounting systems in operation are adequate for the purposes of accurate tax reporting. If they are unable to do so, the officer will have to specify the nature of any inadequacies and confirm to HMRC that these have been notified to the company's auditors.

The legislation specifies a certification process although again amendments remove the complicated two-tier system originally proposed.

Senior accounting officers will need to take reasonable steps to establish and monitor systems within the company to ensure they are adequate for accurate tax reporting. This will mean they will have to stand back and objectively review the internal systems and controls in place. While the company's annual audit will go some way to giving officers comfort on these issues, the reference to 'accuracy' in reporting will invariably require something more than a level of materiality sufficient for audit purposes.

Companies will also have to identify the senior accounting officer to HMRC. By notifying the identity of the company's senior accounting officer, HMRC will be able to levy penalties on that person, as well as on the company. Penalties are also to be introduced where an incorrect notification or certification is given carelessly or deliberately.

HMRC's view is that responsible companies will already have sufficient systems in place so that this announcement will not introduce a further administrative burden. Commentators have argued that the provision will by necessity lead to more of a burden as Boards of large companies will demand detailed proof that the provision is being complied with.

Another criticism is that the UK is introducing a burden not found in many other jurisdictions so therefore are we making ourselves less competitive?

As ever, where taxpayers are required to behave 'reasonably', an element of uncertainty will arise over precisely what HMRC's expectations are and there may be doubts over the likelihood that these are the same as the companies affected. When a company is undergoing a period of change in their systems, for example after acquiring another business, this obligation will exert additional pressure.

Article by Francesca Lagerberg

Lecture P544 (7.47 Minutes)

Budget 2009 and Finance Bill update on powers

Brown's 'Black List'

The Chancellor has announced new rules which allow HMRC to name and shame individuals and companies penalised for deliberate errors in their tax affairs leading to a tax loss of more than £25,000.

Errors include the understatement of tax, over-statement of claims or losses, or VAT/excise wrongdoings. but the legislation will not apply to tax credits.

This move ties in with the new penalties and powers regime, and a 'deliberate' error will involve more than simply a 'lack of reasonable care'. This should not, therefore, apply to innocent errors or mistakes.

Where full disclosure of the details of the deliberate action is provided, either in response to questions raised by HMRC or entirely unprompted, within a time period (to be specified by HMRC) the taxpayer will also be able to escape publication.

Any taxpayer in this situation will be informed by HMRC prior to publication of their details and they will have the right to appeal to an independent tribunal against the publication. Taxpayers will also be able to make representations to HMRC, and details will not be published until all possible avenues of appeal against tax or penalties are exhausted or expired.

The details published will be sufficient to identify the taxpayer, and will include:

- name and address
- trade, profession or sector
- amount of tax, interest and penalties
- the period covered.

Details will be published quarterly within one year of the penalty becoming final, but will be removed 12 months after publication. The new provisions will apply from a date to be determined. No details of taxpayers who committed defaults prior to the effective date will be published.

Additions to the new regime for non- or late compliance

The new penalty regime which is outlined above covers income tax, corporation tax, PAYE, National Insurance Contributions (NICs), Construction Industry Scheme, stamp duties, inheritance tax, pension schemes and petroleum revenue tax., but excludes tax credits.

The Budget confirmed the following:

- £100 penalty for late returns (irrespective of whether the tax has been paid on time)
- daily penalties of £10 per day on annual returns (maximum of 90 days)
- penalties of 5% of tax due for prolonged failures (over 6 months and at 12 months)
- higher penalties of 70% of the tax due where a person fails to submit a return for over 12 months and has deliberately withheld information necessary to assess the tax due

  (100% penalty if deliberate with concealment).

Late payment penalties where the obligation is annual or occasional include:

- penalties of 5% of the amount of tax unpaid, generally one month after the payment due date (or at the filing date of the relevant return for CT and IHT)
- further penalties of 5% of any amounts of tax still unpaid at six and 12 months
- suspension of late payment penalties where the taxpayer agrees a time to pay arrangement (where a tax debt is paid over time) with HMRC.

There are specific rules for late filing of Construction Industry Scheme returns and late payment of tax under PAYE, including the prospect of 'in-year' penalties for those who consistently pay PAYE late and this will be done on a risk assessment basis.

Finally, there will be a new uniform regime for interest which accrues on tax repayments and late tax payments. The new regime will come into operation from April 2010 in stages. This change will remove some of the differences in taxes which were formerly administered separately by the Inland Revenue and Customs and Excise prior to their merger.

The differential between interest on repayments and overdue payments will be based on the Bank of England base rate. A single rate of simple interest on sums due to HMRC and a similarly calculated rate on overpayments of tax will operate across a wide range of taxes, duties and penalties except for corporation tax Quarterly Instalment Payments.

Debt collection through PAYE

HMRC has announced it will have the power to collect small debts it is owed through the PAYE system.

Disclosure of tax avoidance schemes

The legislation surrounding certain tax planning that is required to be reported to HMRC is to be subject to further consultation with a view to possibly extending the number of situations in which HMRC has to receive notification of planning. This notification procedure was first introduced in 2004 and has been the subject of amendment since then, the consultation process now announced suggests that further change is to be expected.

In addition HMRC is to consult on introducing tougher sanctions for non-compliant taxpayers and agents.

Taxpayer Charter

As a balance to the review of their powers, HMRC has agreed to introduce a Charter for taxpayers. This is to be in place by 31 December 2009.

The Charter seeks to set out standards of behaviour and values to which HMRC will aspire in dealing with taxpayers and others. HMRC will also be required to report on its performance in meeting the Charter standards each year.

Article by Francesca Lagerberg

Lecture P545 (9.38Minutes)

Deadman and anor (TC44)

The taxpayers were husband and wife and were partners in a partnership. HMRC opened an enquiry into the husband's self assessment tax return and the partnership return for 2005/06.

They said information showed that the husband had undeclared offshore bank accounts and that he had not declared the relevant interest.

Notices under TMA 1970, s19A were issued requesting statements in respect of the offshore accounts as well as his other personal bank accounts. The husband and partnership appealed against the s 19A notices.

HMRC subsequently issued further assessments, against the husband and wife charging them an additional share of partnership profits, and charging the husband additional bank interest. The taxpayers appealed.

Meanwhile, separately from the enquiry, the taxpayers' accountant wrote to HMRC's offshore disclosure unit stating that the couple had only just become aware of the offshore disclosure arrangements and requesting extra time in which to provide details of interest.

The resulting disclosure related to the years 2000/01 to 2006/07, and £6,761 was remitted in respect of tax, interest and a 10% penalty. This payment was accepted by the unit.

No mention was made by the accountant of the enquiry, and he did not tell the Inspector running the enquiry about the disclosure to the unit.

HMRC next applied to the General Commissioners for consent to issue a TMA 1970, s 20(1) notice for documents relating to the offshore accounts. These were not produced, so HMRC imposed a £300 penalty for non-compliance. The husband applied for a closure notice in respect of the enquiry.

In connection with HMRC's penalty application, the tribunal found that the notice was clear and that the penalty for failure to comply should go ahead. This was a modest penalty compared with the tax in issue.

With regard to the taxpayers' appeals against the s 19A notices, the judge said the notices were reasonable and not unreasonably onerous.

As to the application to close the enquiry, the judge found that as HMRC were unable to reach a conclusion on the matters under enquiry, there was no reason to issue a closure notice.

The taxpayers' appeals were dismissed, although the appeals against the further assessments were postponed, pending the results of HMRC's enquiries

Business Tax

Advancing income

With increases in tax on the horizon clients will need to consider whether they want to pay tax earlier at a lower rate or later at a higher rate.

Examples: advancing income
Harry earns £120,000 a year. If he advances £20,000 from 2010/11 into 2009/10, he will avoid the loss of his personal allowance in 2010/11. He will pay £8,000 more for 2009/10 but at least £10,590 less for 2010/11 (£8,000 plus 40% x £6,475). That is a good rate of return, not least because it is tax-free.

Harriet earns £200,000 a year. If she advances £50,000 from 2010/11 into 2009/10, she will avoid the 50% rate in 2010/11. She will pay £20,000 more for 2009/10 but £25,000 less for 2010/11. Again, that is a good rate of return.

There are many standard ways of advancing income to an earlier year, and they are probably all well-known:

- reducing retained reserves by paying dividends from a small company prior to 6 April 2010;
- advancing payments of salary;
- deferring expenditure which is allowed on a paid basis, e.g. staff bonuses;
- making sure that stocks and WIP are fully accounted for at the last year-end before the 2010/11 basis period;
- paying distributions from trusts;
- claiming for losses in a later year rather than an earlier year;
- closing a bank account early to trigger the receipt of accrued interest.

One particular area in which the timing of income should be considered is illustrated by the following example.

Example – accounting date
George is an architect who has been trading for many years with an accounting date of 30 April. His business has grown substantially in recent years; his overlap relief brought forward is only £16,000, but he estimates that his profits are likely to be:

Year to 30 April 2008	£120,000
Year to 30 April 2009	£150,000
Year to 30 April 2010	£180,000
Period to 31 March 2011	£150,000

He intends to retire on 31 March 2011.

George's problem is that the 30 April year-end means that the increases in his income are deferred into later years when the tax rates will be higher. If he does nothing, he will be taxed on the following profits:

2008/09	£120,000
2009/10	£150,000
2010/11 (£180,000 plus £150,000 less £16,000)	£314,000

£164,000 of profit will be taxed at 50%.

If we assume that profits accrue evenly in the accounting periods, consider the effect of changing the accounting date to 31 March 2009:

Year to 30 April 2008	£120,000
Year to 30 April 2009	£150,000
Period to 31 March 2010	£165,000
Year to 31 March 2011	£165,000

The tax charges change as follows:

2008/09	£120,000
2009/10 (£150,000 + £165,000 – £16,000)	£299,000
2010/11	£165,000

Only £15,000 of profit will be taxed at 50%. There is a significant advancing of tax liability, but the cash flow comparison is still likely to be favourable:

	If the change is made	
2009/10	**£149,000 more taxed at 41%**	**+ £61,090**
2010/11	**£149,000 less taxed at 51%**	**– £75,990**

That is a very good rate of return.

Of course, someone with a 30 April year end and overlap relief which is very small in comparison to the current level of profits was always going to suffer badly on cessation; but the problem is exacerbated considerably by the increase in tax rates.

Article by Mike Thexton

Is it time to reconsider short life assets?

Following the significant changes to capital allowances introduced in Finance Act 2008, it may now be worthwhile reconsidering the availability of short-life asset treatment for qualifying expenditure on relevant assets.

Claiming short-life assets have often been discounted due to the potential complexity of identifying relevant assets and the ability to track the disposal of assets. However, with the reduction in rates for general plant and machinery from 25% to 20% per annum on a reducing balance basis, from 1 April 2008, the period over which approximately 90% of qualifying expenditure is now written off for tax purposes increases from 7 years to 11 years. With short-life asset treatment, a disposal within the 4 year period will allow the full cost of an asset to be written off for tax purposes over 4 years or less. Therefore accelerating the rate of which tax depreciation is available.

For certain companies it may not be practicable for individual capital allowances computations to be maintained for each and every short-life asset particularly where these are held in very large numbers. HMRC published a Statement of Practice in 1986 (SP 1/86) detailing options that can be adopted to simplify the process for capturing short-life assets where the identification of short-life assets acquired in a chargeable period can be either impossible or possible but impractical. Where this occurs it is possible to deal with the assets in batches of acquisitions and base the short-life asset treatment on average actual life of assets. Alternatively where assets costing similar amounts can not be identified individually and are not tracked separately then disposal proceeds can be regarded as relating to the earliest period for which short-life assets remain in the pool.

With the changes in rates, it may be worthwhile revisiting the opportunity of claiming short-life assets for any relevant expenditure and if applicable the possible approaches to capture and track relevant expenditure. (It is worth remembering that Finance Act 2008 withdrew the availability of short-life asset elections for any plant and machinery qualifying as integral features). Successfully identifying and claiming short-life assets could result in accelerated tax depreciation being available.

It should be noted however that cars cannot be treated as a short life asset.

Steve Watts, Director at Bourne Business Consulting LLP writing in AccountingWeb, 24 June 2009.

Morgan and another v Revenue and Customs Comrs TC46

The appellants, M and S, were chartered accountants and partners and members of the limited liability partnership ("the partnership"). As such they were bound by the fundamental rules and the regulations made under the rules which governed the constitution of the partnership. In accordance with r 3.2 of the rules, relating to compulsory retirements, M and S were asked to withdraw from the partnership on 31 March 2001 and 31 December 2001 respectively as outlined in departure letters sent to them and setting out the terms of their withdrawal. The normal practice was that a partner who was asked to retire would receive, under reg 2.2 of the regulations, his share of profits calculated under a points basis up to the date of his retirement. In addition, under r 3.2 of the rules the retiring partner could also receive an approved further payment, which was described in para 6.2 of the Partners' Handbook as a "special allocation of profits which were usually paid gross". Under the terms of his departure M received "a further payment" of £338,000. In his tax return ending on 5 April 2001, M included the payment as a profit share but he subsequently took the view that it was a non-taxable ex gratia payment and duly amended his form. The partnership return for 2001/02 contained a partnership statement stating an amount which was M's share of profits, which included the further payment. Under the terms of her departure, S was paid a fixed profit share, and a "special allocation" of £350,000. The partnership return for 2002/03 contained a partnership statement stating an amount which was S's share of profits, which included the further payment of £350,000. After they withdrew from the partnership M and S were bound by r 3.7 covenanting not to undertake any business in competition with the partnership for 12 months and r 7 provided that no value should be ascribed to goodwill. S and M appealed from the decision of HMRC that the further payments received by them from the partnership was chargeable to income tax as profits of the partnership under TA 1988 s 18. They argued, inter alia, that: the further payments received by them did not constitute profits of the partnership and so were not chargeable to income tax; they should have been deducted by the partnership in computing the amount of its profits under TA 1988 s 74; and the further payments were entirely collateral payments made to them otherwise than in their capacity as partners. HMRC submitted that the further payments were payments of profits and the constitutional documents—the rules, regulations and the Handbook—made it clear that the partnership could make special allocations of profits before the divisible profits were allocated by reference to the points basis, and were binding on the partners. The departure letters were also consistent with the conclusion that the additional payments were profits of the partnership.

The tribunal judge considered that in determining whether payments made by a partnership to an individual partner were profits of the firm, or expenditure which should be deducted from the profits, it was necessary to decide whether the payments were received by the individual partner in his capacity as a partner in the firm and whether that was "the very justification for the receipt". What an individual partner received out of the partnership funds was part of his share of the profits unless he could demonstrate that it represented a payment to him in reimbursement of sums expended by him on partnership purposes or an entirely collateral payment made to him otherwise than in his capacity as a partner. In addition, in considering the contractual documents it was necessary to bear in mind that the meaning of words did not always depend upon the words used. Applying those principles to the facts in the present case, the constitutional documents indicated that the payments made to partners leaving the firm could include both special allocation of profits as well as profits calculated by reference to the points basis and the partnership accounts confirmed that the further payments made to retiring partners were in fact made out of profits. In addition, the fact that the further payments made to M and S were made and received within the context of the partnership agreement, the rules and regulations, which provided that such payments were only made to partners, indicated that the payments were received by M and S in their capacity as partners. Furthermore the further payments were not entirely collateral payments made to M and S otherwise than in their capacity as partners. The fact that in making the further payments, the partnership recognised that, by asking a partner to withdraw, it was taking away his immediate livelihood and that it might be some time before he found alternative employment and thus the payments provided some financial security and a source of income at a difficult time; and the fact that the further payments alleviated the hardship caused by the fact that restrictive covenants meant the partner might be unable to practice as a chartered accountant for a 12-month period, did not amount to an entirely collateral bargain so as to result in the payments being made to M and S otherwise than in their capacity as partners. M and S had accepted the terms of the departure letters and in any event they had become bound by the restrictive covenants when they became partners. Accordingly, the further payments made to M and S were made in their capacity as partners and thus were payments of profits and so chargeable to tax under TA 1988 s 18; they were not amounts which should have been deducted by the firm in computing its profits under TA 1988 s 74. It followed that the appeal would be dismissed.

Appeal dismissed.

Corporation Tax

Taxation of foreign profits

Major changes were proposed in the recent Budget and the Finance Bill 2009 to the legislation dealing with the taxation of foreign profits, in particular in relation to exemptions for dividends, and restrictions on the tax deductibility of certain financing expenses.

The proposals, as currently drafted, will come into effect during 2009 and 2010, and will have a significant impact on the tax profile of many international groups with UK operations. However, the impact of the changes needs to be considered by UK only groups as well. The aim of the legislation is to enhance the UK's competitiveness on the global stage. While some groups will indeed benefit from the new legislation, particularly from the dividend exemption, for many the legislation on financing expenses will represent a large additional administrative burden and could significantly increase their UK tax charge.

It is important for companies to start considering now the effect of these proposals, both to determine the likely impact on the group tax rate going forward, and to consider planning opportunities prior to implementation of the new rules. With careful structuring, companies can proactively manage their tax rate in the light of the changes.

Dividend exemption

Exemptions for a wide range of dividends are being introduced. This is welcomed, and it will reduce the overall UK tax burden of some UK companies with overseas subsidiaries, particularly where those subsidiaries are subject to lower tax rates than the UK rate. It should also simplify the complex tax administration in relation to double taxation relief on overseas dividends.

Care is needed however to ensure the exemption applies to specific dividends. In particular it is important to note that the general exemption for all UK dividends is to be repealed, so all companies, not just international groups, will need to ensure that dividends received from UK subsidiaries meet one of the new exemptions.

Start date

The new rules will apply to dividends received from 1 July 2009.

Small companies

The key development is the extension of the exemption to small companies. 'Small' is defined for these purposes broadly as companies with less than 50 employees and either turnover or balance sheet of no more than €10 million, with the exception of some investment funds. While dividends received from small companies will potentially be exempt, they must be received from companies resident in the UK or territories with which the UK has a double taxation treaty which includes an appropriate nondiscrimination clause. Furthermore the dividends cannot be received from dual resident companies - this latter restriction could cause problems where overseas companies are controlled from the UK, and there is no treaty tie-breaker clause.

In relation to medium and large companies, many dividends are in principle exempt, including the following:

- Dividends from companies controlled by the recipient of the dividend
- Dividends from portfolio holdings (ie less than 10% holdings)
- Dividends from non-redeemable ordinary shares - this is a very narrow definition and needs careful review
- Dividends which satisfy a motive test, ie the profits were not diverted to a company where a reduction of UK tax was a main purpose of the diversion
- Dividends from shares accounted for as liabilities by the issuer under generally accepted accounting practice but not taxable on the recipient under the loan relationship rules

Particular care will be needed with joint ventures (11 - 50% holdings) to ensure that shares meet the definition of non-redeemable ordinary shares, or that the motive test is met. Care will also be needed where companies acquire control of a subsidiary and pay a distribution out of pre-acquisition profits.

Notwithstanding these general exemptions, there are numerous exclusions, which will also require careful consideration.

Planning opportunities

- Review the draft legislation to ensure dividends will fall within the exemption regime where possible, and restructure as appropriate
- In the short term, companies should consider the timing of dividend payments to the UK. Delaying payment of certain dividends until after enactment of the new legislation may be beneficial where this would mitigate incremental UK tax (eg for dividends from controlled subsidiaries in lower tax jurisdictions)
- In limited circumstances, acceleration of dividend payments ahead of enactment may therefore be beneficial (eg where companies wish to specify the period out of which dividends are to be paid or where the company or group can use excess eligible unrelieved foreign tax before 1 July 2009)
- Operating structures should be reviewed. Where companies operate for bona-fide commercial reasons in low-tax jurisdictions, consideration should be given to incorporation, as this could result in a permanent reduction of tax
- Intermediate holding structures should be reviewed, to ensure incremental overseas taxes (eg withholding taxes) are minimized as appropriate. While these may have been recoverable against UK tax in the past, such taxes now become absolute costs
- Particular care is needed to ensure that reduced withholding tax rates continue to apply under the relevant double taxation treaty. In some instances, it could be beneficial to be outside the dividend exemption
- Smaller companies should consider deferring dividends from non-qualifying territories, at least until the group has ceased to be small.

World-wide debt cap

While the proposed legislation has been radically changed, and somewhat simplified, from the earlier draft, it remains highly complex and will represent a significant administrative burden for companies which are obliged to undertake the detailed debt cap calculations. It is recommended that all groups consider the applicability of the debt cap to their operations, and identify appropriate ways to manage any exposure, ahead of the introduction of the new legislation which will be on 1 January 2010.

In broad terms, the debt cap operates to disallow costs of net borrowing by relevant UK companies where the finance expenses on this borrowing exceed the gross worldwide external group finance cost. The Government sees it as a measure to prevent pushing down 'excessive' debt into the UK, that is, in excess of worldwide borrowings. The resulting disallowance of finance costs will significantly increase the UK tax charge for some groups - interest can be disallowed under the cap even where the debt is used for bona-fide commercial purposes in the UK and is on arm's length terms.

Start date

The legislation is to apply for accounting periods beginning on or after 1 January 2010.

While the broad operation of the debt cap is now clear, it is important to note that there are likely to be some material additions to the legislation prior to enactment. The Treasury have already highlighted a number of areas for additional legislation (for example, to deal with the interaction of the debt cap with the controlled foreign company rules).

Article by Francesca Lagerberg

Lecture B542 (7.38 Minutes)

The dividend exemption from 1 July 2009

Cl 34 and Sch 14 FB 2009 set out the scope of the corporation tax charge on both UK and foreign company distributions. The rules for dividends received by small companies are distinct from those for dividends received by medium-sized and large companies, but, in each case, the result is that the vast majority of distributions will be exempt from corporation tax. Sch 14 FB 2009 also contains anti-avoidance rules to prevent abuse of the dividend exemption.

Because of the way in which the legislation is structured, the basic principle is that UK and foreign dividends received by companies are subject to corporation tax, unless they are specifically exempted.

In order for a dividend received by a small company to be exempt, the following conditions must be satisfied:

- The company paying the dividend, if not UK-resident, must be resident in what Sch 14 FB 2009 calls a 'qualifying territory'. This term means any country with which the UK has a double taxation treaty where the treaty includes a non-discrimination provision (ie. a provision that, say, a UK citizen will not be subject to a more onerous fiscal regime in the overseas jurisdiction than a local citizen would be).

- The company paying the dividend must not be resident in more than one jurisdiction.

- The distribution must not be interest which has been treated as a distribution by virtue of S209(2)(d) or (e) ICTA 1988. In practice, this will mainly refer to interest paid at more than a commercial rate. Para 14 Sch 14 FB 2009 ensures that, wherever possible, excessive rates of interest are dealt with by the transfer pricing rules.

- The distribution must not be a dividend which qualifies for a tax deduction in the paying jurisdiction.

- The distribution must not be made as part of a scheme, one of the main purposes of which is to obtain a tax advantage.

In this context, a small company is defined as a business which employs fewer than 50 persons and whose annual turnover or balance sheet asset total does not exceed €10,000,000 (see Annex to Commission Recommendation 2003/361/EC of 6 May 2003).

In order for a dividend received by a medium-sized or large company (ie. any company other than a small company) to be exempt, the following conditions must be satisfied:

- The distribution must not be interest which has been treated as a distribution nor must it be a dividend which qualifies for a tax deduction – these are precisely the same conditions as apply to small companies (see (d)(iii) and (iv) above).

- The distribution must fall into one of the five exempt classes outlined in Sch 14 FB 2009. A dividend will often fall into more than one of these categories, but it is sufficient to fall into *any* of them, provided that the detailed anti-avoidance legislation in Sch 14 FB 2009 cannot be invoked. The exempt classes are:

  – an exemption for dividends paid to a parent company which controls the company making the distribution;

  – an exemption for dividends paid in respect of non-redeemable ordinary shares;

  – an exemption for dividends paid on holdings which represent less than 10% of their class of share capital;

- an exemption for dividends paid out of what FB 2009 calls 'relevant profits', ie. profits which are not derived from avoidance transactions (profits earned from transactions which took place before 1 July 2008 are automatically deemed to be relevant profits – see Para 32(2) Sch 14 FB 2009); and

- an exemption for dividends paid in respect of shares which could otherwise be exempted under the loan relationship rules.

These requirements are clearly more onerous than the provisions for dividends received by small companies.

In recognition of what HMRC call 'the fiscal risks associated with distribution exemption', the anti-avoidance code referred to in (e)(ii) above is mainly designed to prevent profits which should otherwise be taxable from being turned into tax-exempt distributions.

The rules take effect for distributions paid on or after 1 July 2009 (Para 31 Sch 14 FB 2009).

The exemption for foreign dividends represents a significant move towards the development of a more competitive business tax regime in the UK. However, the new order is not limited to the taxation of dividends from overseas companies – there are potential changes to the tax treatment of UK dividend income. All companies, whether they have foreign income or not, will need to consider whether they are affected by these new rules

Article by Robert Jamieson

Lecture B543 (17.15 Minutes)

Reallocation of chargeable gains and allowable losses within a group

The intention of Cl 31 and Sch 12 FB 2009 is to provide 75% groups of companies with a simpler procedure for the matching of chargeable gains and allowable losses which arise on the disposal of assets when an election is made. The purpose of the original legislation in S171A TCGA 1992 was to remove the need physically to transfer ownership of assets around a group. Where an election was made under that section, an asset was deemed to have been transferred from one group member to another prior to its disposal outside the group.

However, the existing rule required an actual disposal to be made to a third party and it was also necessary for the third party to acquire the asset. This meant that the election could not apply in certain circumstances (eg. where a negligible value claim had been made).

As a result, S171A TCGA 1992 has been replaced by new Ss171A – 171C TCGA 1992. In order for the redesigned election to be available, three requirements must be met:

(i) a chargeable gain or allowable loss must accrue to a group company (Company A);

(ii) at the time of this accrual, Company A and the other company (Company B) must be members of the same 75% group; and

(iii) on a disposal from Company A to Company B, the tax neutrality provision in S171(1) TCGA 1992 would apply.

In other words, instead of deeming a transfer of an asset from Company A to Company B, the new legislation deems the gain or loss to be transferred. This is a welcome simplification of the group rules and one which has been sought by companies and their advisers for a long time. It will undoubtedly make it easier to move gains and losses around a group.

It should be noted that the new election, the effect of which is set out in S171B TCGA 1992, can also apply to *part* of a gain or loss – the whole amount does not have to be transferred.

This revised form of reallocation takes effect for gains and losses arising on or after the date on which FB 2009 receives Royal Assent.

Article by Robert Jamieson

Lecture B544 (5.36 Minutes)

Prudential plc v Revenue and Customs Commissioners

The Finance Act 1994 provides, so far as is material: '151(1) An interest rate contract or option, a currency contract or option or a debt contract or option may include provision under which the qualifying company (a) becomes entitled to a right to receive a payment in consideration of its entering into the contract or option, or (b) becomes subject to a duty to make a payment in consideration of another person's entering into the contract or option... 153(1) Subject to subsections (2) to (5) below, in this Chapter 'qualifying payment' means (d) in relation to any qualifying contract, a payment falling within section 151 above... (2) In this Chapter 'qualifying payment' includes, in relation to a qualifying contract (a) a payment which, if it were a payment under the contract, would be a payment falling within section 151 above; and (b) a payment for securing the acquisition or disposal of the contract... 155 (5) Where as regards a qualifying contract a qualifying company's profit or loss for an accounting period falls to be computed on a particular accruals basis (a) amount A is so much of the qualifying payment or payments received or falling to be received by the company as is allocated to the period on that basis, and (b) amount B is so much of the qualifying payment or payments made or falling to be made by the company as is so allocated'.

In 2002, the taxpayer company was exposed to two foreign exchange liabilities which it wished to 'hedge'. The first was a liability for €500m, which it was liable to repay, at the earliest, in 2011 to the holders of an issue of Euro-debt it had made in December 2001. The second was a foreign exchange exposure arising from a loan of $250m made by a subsidiary of the taxpayer, with funds provided by the taxpayer, to a subsidiary of BP plc. The first foreign exchange liability was hedged with Royal Bank of Scotland plc (RBS), the second with Goldman Sachs International (GSI). At the material time, March 2002, the sterling spot rate for €500m was £309m. The liability of the taxpayer in 2011 was hedged by two swaps, a short term swap effected on 8 March and a long term swap agreed on that date but effected on 19 June 2002. By the agreement made between the taxpayer and RBS on 7 March 2002, the taxpayer agreed to pay to RBS £65m on 12 March and £244m on 19 June 2002 in exchange for €500m delivered by RBS to the taxpayer on 19 June 2002. The taxpayer had no use for €500m on 19 June 2002. That sum was used as the first leg in the long term swap of €500m for £309m made on 19 June 2002 and repayable on 19 December 2011. At the time material for the GSI swap, August 2002, the sterling spot rate for $250m was £163m. The effective date of the swap was 23 August 2002. On the same day the taxpayer paid GSI £40m. The swap, as then agreed, was to be effected on 25 November 2002 when the taxpayer would pay GSI $250m and GSI would pay the taxpayer £203m. The swap was duly completed on 25 November 2002. Thus in each case there was a lack of symmetry between the amounts or times of the sterling payments made by or to the taxpayer. In the case of the RBS, the short term swap £65m was paid by the taxpayer in advance of delivery of the €500m by RBS to the Prudential. In the case of the GSI swap, the taxpayer paid £40m to GSI at the time the swap was agreed and that sum was added to the amount payable by GSI to the taxpayer at the time the swap was completed on 25 November 2002. In its corporation tax self assessment return for the accounting period ending 31 December 2002, the taxpayer sought to deduct from its profits as amounts B the sum of £105m, being the aggregate of the sums of £65m and £40m paid by it in connection with the RBS short term swap and the GSI swap. The Revenue and Customs Commissioners (the Revenue) rejected the taxpayer's claim on the ground, inter alia, that neither sum came within the definition of a qualifying payment contained in s 153 of the Finance Act 1994, insofar as it incorporated the provisions of s 151(1)(b) of the Act or at all. It was common ground that the taxpayer was a qualifying company, and that the two swaps in question were qualifying contracts. The taxpayer appealed to the Special Commissioners. The Special Commissioners upheld the objections raised by the Revenue and dismissed the appeal. The taxpayer subsequently appealed to the High Court. The judge agreed with the Commissioners, and dismissed the appeal. The taxpayer appealed.

The main issue for determination was whether the two 'front-end' payments were made in consideration of RBS and GSI entering into their respective currency contracts. The taxpayer submitted that the court would have to confine its attention to the terms of the contract, which the parties had chosen to make.

The appeal would be dismissed.

Mere incantation by the parties of the words of statutory qualification did not produce the desired fiscal effect (see [12] of the judgment).

A payment did not come within s 151(1)(b) merely because the parties said it did. Prepayments of part of the final principal exchange did not come within s 151(1)(b). That conclusion did not derive from a process of changing the character of the transaction. Section 151(1)(b) drew a distinction between payments made to secure a contract and the principal payments exchanged on maturity. Payments of part of the final principal did not cease to have that quality merely because it was agreed that they should be made in advance. Nor did such payments acquire that quality which payments within s 151(1)(b) would have to display, the quality of an inducement. Payments within s 151(1)(b) were those which the counter-party, required as consideration for agreeing to enter into the contract to buy or sell the foreign currency. They were conceptually distinct from the sums paid to buy or sell the currency. Only the timing of the payments of principal had created what was said to be the need for an inducement. True it was that RBS would not have agreed to sell €500m for as little as £244m but for the payment the taxpayer had made of £65m. But the taxpayer itself had created the need for the inducement by entering into an agreement to pay only £244m on maturity. GSI would not have agreed to buy $250m for as much as £203m but for the payment the taxpayer had made of £40m. But the taxpayer had created the need for the inducement, by selling $250m for £203m. GSI did no more, on maturity, than to return the £40m which the taxpayer had deposited earlier (see [12], [14]-[16] of the judgment).

Court of Appeal, 30/06/2009

Drummond v Revenue and Customs Commissioners

A small corporate finance and investment company, L, created stock of second-hand life assurance policies by procuring an interest free loan to be made to one of its employees, S, who used the loan to effect non-qualifying policies on her life. In March 2001, S assigned the policies for a small profit. The company charged the policies as security for an overdraft and then drew down on the overdraft to pay substantial additional premiums on the policies. On 4 April 2001, the taxpayer agreed to purchase five of the policies for £1.962m of which £1m was payable that day and the balance of the consideration the next day. The policies had a surrender value of £1.751m, which was equivalent to the premiums paid. The difference between the purchase price and the surrender value of the five polices represented the scheme costs, consisting of, inter alia, L's profit and an introductory commission. On 5 April, as had been intended, the taxpayer surrendered the five policies. The process had cost the taxpayer around £210,000. The object of the process had been to create an allowable capital gains loss of £1.962m to set off against a capital gain of £4.875m which the taxpayer had made on the sale of his shares in a company, V. The taxpayer claimed an allowable capital gains tax loss of £1,962m for the year ending 5 April 2001. The Revenue disputed the calculation on the ground that the claimed loss was not a real economic loss, but rather, the taxpayer's claim was based on a tax avoidance scheme which depended upon a claimed application to the facts of 37(1) of the Taxation of Chargeable Gains Act 1992. Section 37(1) provided that there would 'be excluded from the consideration for a disposal of assets taken into account in the computation of the gain any money or money's worth charged to income tax, as income of or taken into account as a receipt in computing income or profits or gains or losses of, the person making the disposal for the purposes of the Income Tax Acts'. It was common ground that the surrender was an event which not only gave rise to a charge to income tax, but was also a disposal for capital gains purposes. Accordingly, the issue arose as to the interrelation between the treatment of the surrender for (a) income tax purposes under Ch II of Pt XIII of the Income and Corporation Taxes Act 1988 and (b) capital gains purposes under ss 37 to 39 of the 1992 Act. The taxpayer computed the capital gain arising on the surrender of the policies by deducting the entirety of the surrender proceeds of £1.751m on the basis that that was money taken into account as a receipt in computing income or profits or gains or losses for the purposes of the Income Tax Acts so that they were excluded from the calculation of the gain/loss on the disposal. The Special Commissioner rejected that argument, holding that the only amount which should have been taken into account for the purposes of the capital gains calculation was the actual chargeable event gain of £1.351.25 which was a discrete amount produced from the calculation of gain 'treated as arising in connection with the policy' and the amount, as a stand-alone figure of income, was deemed by s 547(1)(a) to form part of the taxpayer's total income. The taxpayer appealed. The judge held, inter alia, that the purpose of s 37 of the 1992 Act was to avoid a taxpayer suffering double taxation in relation to a single event occasioning a charge both to income tax and capital gains. It achieved that end by adjusting, for capital gains purposes, the consideration for the disposal by excluding amounts already charged to income tax. The judge took the view that the £1,351.25 figure arrived at by the s 541 computation was also money, being part of the proceeds of £1.751m from which other sums of money had been deducted. It did not cease to be money because it was the product of a calculation. That money was then treated as the chargeable event gain and was directly charged to tax as part of the taxpayer's income for the year without any intervening calculation. The £1,351.25 was therefore allowable in full as an exclusion from the consideration received on the surrender of the policies. The judge held that there was no warrant in s 37 for seeking some other money which might be used to create a further deduction from the policy proceeds. The taxpayer applied for permission to appeal to the Court of Appeal.

The application would be allowed. The appeal would be dismissed.

The purpose of ss 37 to 39 of the 1992 Act was to prevent the double taxation which might otherwise arise from the circumstance that the disposal of an event would or might give rise to a charge to income tax and also be a disposal for capital gains purposes. Their purpose was to prevent such double taxation by excluding from the computation for capital gains purposes amounts which, putting it neutrally, had been taken into account for income tax purposes. It was not their purpose to enable the creation of an imaginary loss that the taxpayer could set against a real gain and so reduce a capital gains liability. Their purpose was not the avoidance of taxation, but the avoidance of double taxation (see [23] of the judgment).

The interpretation of legislation involved more than black letter literalism. In a case such as the instant case, in which there was a question as to which of limbs, namely, (i) any money or money's worth charged to income tax as income of the taxpayer for the purposes of the Income Tax Acts or (ii) any money or money's worth taken into account as a receipt in computing income or profits or gains or losses of the taxpayer for the purposes of the Income Tax Acts, applied it was necessary to give the statute a purposive construction. The question was always whether the relevant provision of a statute, upon its true construction, applied to the facts as found (see [23] of the judgment).

The instant case fell within limb (i) of s 37, by regarding the chargeable event gain of £1,351.25 as money charged as income of the taxpayer. It might be that that figure was arrived at by a statutory computation, but once the computation had been performed, the resultant figure was money charged to income tax as his income. It was that figure which would feature in his tax return, in like manner as any dividends or building society interest. The limb (ii) formula did not apply at all naturally to the facts of the instant case. Quite apart from the fact that the attempt to force the instant case into limb (ii) provided a financial result which could not have been intended by Parliament, it required an interpretation of the language of s 37(1) which it could not naturally bear. Accordingly, the only exclusion from the disposal consideration permitted by s 37(1) was the chargeable event gain of £1,351.25. that produced an entirely just result, namely, to avoid the imposing on the taxpayer any burden of double taxation arising from the disposal of the policies (see [25]-[27] of the judgment).

Decision of Norris J [2008] STC 2707 [2008] All ER (D) 305 (Jul); affirmed.

25 June 2009 Court of Appeal, Civil Division

Value Added Tax

VAT Reverse Charge accounting on mobile telephones and computer chips

Who needs to read this?

Businesses buying and/or selling any of the following goods—

1 Mobile telephones

2 Integrated circuit devices, such as microprocessors and central processing units, in a state prior to integration into end user products

Further to Revenue & Customs brief 28/09 HMRC can now confirm that the Government's application to renew the derogation was formerly agreed on 5 May 2009 by the European Council of Finance Ministers (ECOFIN). The agreement has retroactive effect from 1 May 2009 meaning that legal vires for the reverse charge is unbroken.

Background

The reverse charge for mobile phones and computer chips was implemented with effect from 1 June 2007 to remove the opportunity for fraudsters to use these goods to perpetrate missing trader intra-community (MTIC) carousel fraud. As an exception to the normal accounting rules for VAT the UK has a derogation from EU law to apply this anti-fraud measure, which ran until 30 April 2009. The Government announced in its Pre-Budget Report 2008 that it had applied for a renewal of the derogation.

On 10 March 2009 the ECOFIN agreed, in principle, to the renewal of the UK's derogation until April 2011 and it is this decision that has now been formerly ratified and published under Official Journal reference 2009/439/EC.

Further information

For further information on the reverse charge for mobile phones and computer chips please see Public Notice 735: VAT Reverse charge for mobile phones and computer chips.

HMRC Brief 34/2009 18 June 2009

RLRE Tellmer Property sro v Finanční ředitelství v Ústí nad Labem

The claimant, which owned and rented out apartment blocks in the Czech Republic, also offered tenants a cleaning service for the common parts, for which the tenants were invoiced separately, but tenants had the option of making independent arrangements with a third party for the cleaning of the common parts. The claimant was assessed to VAT in respect of the cleaning services, but objected that those services and the lettings were indivisible transactions which were exempt under Czech legislation transposing article 13(B)(b) of Sixth Council Directive 77/388/EEC. The assessment having been confirmed by the defendant, the Tax Directorate of Ústí nad Labem, the claimant brought an action before the Krajsky soud v Ustí nad Labem (Usti nad Labem Regional Court), which referred to the European Court for a preliminary ruling the question, inter alia, whether the letting of an apartment and related cleaning of the common parts could be regarded as independent, mutually divisible taxable transactions.

Article 13(B) of the Sixth Directive provides:

"… Member States shall exempt … (b) the leasing or letting of immovable property …"

Although every transaction was normally to be regarded as distinct and independent, in view of the wording of article 2 of the Sixth Directive, formally distinct services could be regarded as a single transaction where one or more elements were to be regarded as constituting the principal service and others as constituting ancillary services (sharing the tax treatment of the principal service) in that they constituted for customers not an aim in themselves but a means of better enjoying the principal service, or where it would be artificial to split the supply: *Ministero dell'Economia e delle Finanze v Part Service Srl* (Case C–425/06) [2008] STC 3132, [2008] ECR I–897, paras 50–53. The letting of immovable property consisted in the conferment by a landlord on a tenant, for an agreed period and in return for payment, of the right to occupy property as if that person were the owner and to exclude any other person from enjoyment of such a right: see eg *Belgian State v Temco Europe SA* (Case C–284/03) [2005] STC 1451, [2004] ECR I–11237, para 19. Thus, even if the cleaning services of the common parts of an apartment block accompanied the use of the property let, they did not necessarily fall within the concept of letting. Moreover, such cleaning services could be supplied in various ways, such as a third party invoicing the cost direct to the tenants, or the landlord employing his own staff or using a cleaning company. In the present case, the claimant invoiced the cleaning services to the tenants separately from the rent. In such circumstances, the letting and the cleaning could be separated from each other, and so could not be regarded as constituting a single transaction.

On those grounds the court ruled: for the purposes of applying article 13(B)(b) of the Sixth Directive, the letting of immovable property and the cleaning service of the common parts of the latter had, in circumstances such as those at issue, to be regarded as independent, mutually divisible operations, so that that service did not fall within article 13(B)(b).

(Case C–572/07)

Ms S March v Revenue and Customs Commissioners (2009)

A woman (M) operated a riding school. She registered for VAT from October 2005, and applied to account for VAT under the flat-rate scheme. In 2006 she arranged for the construction of a new riding arena at the riding school. She reclaimed VAT on the construction costs. The Commissioners rejected most of the claim on the grounds that it related to supplies of services, and issued an assessment to recover the tax which she had reclaimed. She appealed against the assessment, and also applied to be allowed to withdraw from the flat-rate scheme with retrospective effect. The Commissioners rejected this application, and she appealed. The tribunal allowed her appeal, holding that the Commissioners had acted unreasonably. On the evidence, most of the supplies relating to the construction of the riding arena had been supplies of services, although the specific supply of the track surface had been a supply of goods on which the tax could be reclaimed, and the supply of delivery of the track should have been accepted as an incidental part of the principal supply, applying the principles laid down in *AJ & K Price* (VTD 20700). However, the tribunal noted that the February 2004 edition of Notice 733 (Flat Rate Scheme for Small Businesses) 'offered no guidance on the meaning of a capital asset'. Such guidance was subsequently included in the March 2007 edition, and the tribunal noted that if such guidance had been available when M applied to join the scheme, her accountants may have realised that the scheme was not suitable for her. Furthermore, the VAT officer who had visited M in February 2007 had recognised that the scheme was not suitable, and had recommended that M 'may wish to consider leaving the flat rate scheme retrospectively from 1 July 2006, in order to claim the input tax on services relating to the new indoor riding school and any capital assets less than £2,000 in value'. The Commissioners' subsequent decision not to allow M to withdraw retrospectively meant that she 'was liable for £11,175 more in VAT than under normal accounting'. The Commissioners had 'denied a proper exercise of discretion by the officer reviewing the individual circumstances of the case'. Applying the guidelines laid down by the CA in C & E Commrs v John Dee Ltd (1995 STC 941), the Commissioners' refusal to allow a retrospective withdrawal from the scheme was unreasonable. (Costs were awarded to the appellant.)

David Jacobs UK Ltd (in liquidation) v R&C Commissioners (2009)

A company which sold electrical equipment purchased a numberplate '1OO' for £300,000 plus VAT. It reclaimed the VAT as input tax. The Commissioners rejected the claim on the grounds that the company had not purchased the numberplate for the purposes of its business. The company appealed, contending that it had purchased the numberplate with the intention of reselling it at a profit. The tribunal accepted the company's evidence and allowed the appeal.

VAT administration developments

This lecture examines the changes to rules on time limits, records, inspection powers, penalties and appeals that were brought in on 1 April 2009.

All change for compliance

1 April 2009 has been set as the appointed day for the following provision to take effect:

- FA 2008 Sch.37 (new record-keeping requirements); *SI 2009/402*
- FA 2008 Sch.39 (new time limits for assessments and claims – although some provisions are deferred until 1 April 2010); *SI 2009/403*
- FA 2008 Sch.36 (powers of HMRC officers to call for information and carry out inspections); *SI 2009/404*
- FA 2008 Sch.40 (changes to penalties for incorrect returns). *SI 2009/571*

Some of these provisions are examined elsewhere in this update, and some will be examined in more detail in the next update when there will be more opportunity to assess the changes.

1 April 2010 has been set as the appointed day for the following provision to take effect:

- FA 2008 Sch.41 (single penalty regime for failing to notify chargeability to tax or to register for tax, or issuing an unauthorised VAT invoice). *SI 2009/511*

This repeals s.60, s.61 and s.67(1)(b) VATA 1994 only to the extent that the penalties there relate to dishonesty which is now penalised under Sch.41 FA 2008.

There have been numerous complaints that the changes to all the compliance procedures have been rushed through too quickly, particularly as they all take place at once: many people suspect that HMRC will find it difficult to cope with the new rules, and taxpayers and advisers will as well. There are articles by Neil Warren in *Tax Adviser* on the new penalties (February 2009) and the new rules for VAT visits (March 2009).

New time limits

Assessments

Sch.39 FA 2008 introduced rules to bring the time limits for assessments and claims for income tax, corporation tax, capital gains tax and VAT within the same statutory framework. A Statutory Instrument has confirmed that the new rules come into force on 1 April 2009.

The overall time limit for most assessments and claims becomes 4 years rather than 3. The "later of 2 years from the accounting period and 1 year from knowledge of the facts" remains, as does the 20-year limit for assessments arising from the taxpayer's dishonesty.

Transitional rules provide that assessments and claims that went out of time on 31 March 2009 (i.e. those that relate to periods ending up to 31 March 2006) do not come back into time on 1 April because of the extension of the time limit. In effect, the new rules will become fully operational on 1 April 2010.

SI 2009/403

Claims

Reg.29 SI 1995/2518 has been amended so that a taxable person cannot make a claim for input tax until he holds the evidence which is required to substantiate that claim as well as having incurred it; it is also clarified that a taxable person can only deduct a specific amount of input tax once.

The capping rules have been amended so that the time limit for making claims becomes 4 years rather than 3 with effect from 1 April 2009, although the 3 year limit continues to apply to anything for which the operative date fell up to 31 March 2006. This mirrors the new time limit for assessments.

The time will not start to run towards the limit until the due date for the first return period in which the law allows the taxpayer to make the claim, i.e. now the period in which the trader holds the evidence which is required to substantiate it. Previously it would have been the due date for the period in which the input tax was charged by the supplier as output tax (i.e. the tax point for the supply).

Similar changes have been made to the time limits for:

- correcting errors in reg.34;
- claiming pre-registration input tax in reg.111;
- using a different return from the normal one for adjusting CGS input tax under reg.115;
- claiming bad debt relief under reg.165A (becomes 4 years and 6 months after the supply rather than 3 years and 6 months).

The time limit of 3 years which used to appear in reg.38 (adjustments in the course of business) has been removed altogether. Since the cap was introduced, it has become apparent that the adjustment of VAT following an adjustment of the price charged is a Community right and cannot be restricted by UK legislation.

SI 2009/586

New record-keeping requirements

Sch.37 FA 2008 introduced rules to bring the record-keeping requirements for income tax, corporation tax, capital gains tax and VAT within the same statutory framework. A Statutory Instrument has confirmed that the new rules come into force on 1 April 2009.

The general approach of Sch.37 is to allow HMRC to prescribe in primary and secondary legislation what is required to satisfy the law. The penalties for failure to meet statutory record-keeping obligations remain the same as before, but will be brought into a comprehensive framework in due course as part of the reform of penalties. The effect of the Appointed Day Order is to bring into effect amendments to paras. 6 and 6A Sch.11 VATA 1994, thereby removing certain details of the requirements for records to secondary legislation.

The time limits for retention of records may be shortened by statutory instrument under the new legislation, but they remain 6 years at present for the VAT records of a registered trader.

SI 2009/402

New compliance checks

New inspection powers

Sch.36 FA 2008 introduced rules to bring the powers of HMRC to require information and to carry out inspections within the same statutory framework for income tax, corporation tax, capital gains tax and VAT. A Statutory Instrument has confirmed that the new rules come into force on 1 April 2009.

It remains to be seen how much practical difference this will make, in particular for VAT where HMRC's powers in Sch.11 VATA 1994 were already more extensive than they were for the other taxes. There remain the rights of entry to premises where a business is carried on and inspection of goods and records, and the restriction on searching to situations in which a warrant has been applied for and granted.

SI 2009/404

HMRC have issued a press release commenting on the new rules. Acting Chairman Dave Hartnett is quoted as follows:

"This new approach to compliance checks will improve HMRC's ability to ensure that the right tax is paid at the right time. We have consulted with taxpayers and their agents to make very sure that HMRC achieves the right balance between obtaining the information we need and appropriate use of our powers."

More information about the new checks is available in several forms:

- a podcast can be download from the HMRC podcast pages at http://www.hmrc.gov.uk/podcasts;
- a narrative explanation, with links to a number of resources including the responses to the consultation, is given on the HMRC website at http://www.hmrc.gov.uk/about/new-compliance-checks.htm;
- questions and comments can be submitted by e-mail to compliance.checks@hmrc.gsi.gov.uk.

HMRC Press Release 3 March 2009

Investigation procedures

HMRC have issued a new Notice explaining how enquiries into serious indirect tax fraud will be handled. The procedures relate to suspected missing trader or carousel fraud where HMRC have reason to believe that the person under investigation has acted dishonestly.

Notice 161

New compliance checks

HMRC have issued Frequently Asked Questions on the new compliance check procedures which came into effect on 1 April 2009. They cover:

- General
- Exercise of powers
- Authorisations
- Information powers
- Inspection powers
- Time limits
- Record keeping

www.hmrc.gov.uk/compliance/faqs.html

HMRC have also launched a new e-learning package to help agents and others to understand the new rules. It can be accessed from the HMRC website. These new administrative rules will be considered in more detail in the next quarterly update.

www.hmrc.gov.uk/e-learning/compliance-checks/Externalmodule/HTML/Externalmodule_menu.html

There are separate e-learning packages about the new information and inspection powers.

www.hmrc.gov.uk/e-learning/Compliance_Checks_External/Information_power_ex/HTML/Information_power_ex_menu.html

www.hmrc.gov.uk/e-learning/Compliance_Checks_External/Inspection_powers_ex/HTML/Inspection_powers_ex_menu.html

More on the new penalties

HMRC have published a Q&A for the penalty regime for inaccuracies in returns and documents applies to returns due to be filed on or after 1 April 2009 in respect of the main taxes, and extended to other taxes and duties for returns due to be filed on or after 1 April 2010. The new failure to notify penalty regime applies to failures occurring on or after 1 April 2010 (CT accounting periods ending on or after 1 April 2009).

The details of the 30%/70%/100% "error in return" penalties have been covered in other lectures and are not reproduced here. The main points are summarised in the lecture.

The Q&A relevant to VAT are as follows:

Q22. How will the new penalties affect the Error Correction Procedure customers can use for indirect taxes like VAT?

The VAT error correction procedure (previously the voluntary disclosure regime) corrects errors on past returns. No penalty was due if the taxpayer voluntarily disclosed the error to HMRC or if they had a 'reasonable excuse'.

Under the new regime customers are still expected to disclose errors. Most voluntary disclosures are of mistakes made despite taking reasonable care, so will still incur no penalty. If they are below the de minimis level they can be corrected on the next return. (The de minimis level was increased in the 2008 Budget, see Budget Note 75. (PDF 730K)

For careless errors, penalties can still be reduced to nil if a full unprompted disclosure is made. This means telling HMRC about the error, helping to determine the correct amount of tax due and allowing access to the figures to check the result. Simply correcting an error on the next return is not an unprompted disclosure.

If a business makes repeated disclosures of the same sort of errors then the question of whether this is failure to take reasonable care may have to be considered.

Q48. What are the VAT and Excise wrongdoing penalties?

From 1 April 2010, a new penalty regime will apply where a person:

- makes an unauthorised issue of an invoice showing VAT or an amount inclusive of VAT
- misuses a product like red diesel so that a higher rate of excise duty is due
- handles goods, such as alcohol or tobacco products, that are subject to unpaid duty

The legislation is contained in Schedule 41 of the 2008 Finance Act.

Q49. Who will they apply to?

The wrongdoing penalties can apply to any person, who is not registered, but should be registered to pay VAT or Excise Duties. They can also apply to members of the general public, who are not required to be registered to pay VAT or Excise Duties.

The penalties provide another sanction for the department to use for fraud against VAT and Excise Duties.

Q50. Why are additional penalties for VAT and Excise Duties needed?

VAT and the Excise Duties on alcohol, oil and tobacco products are subject to persistent and widespread fraud.

The wrongdoing penalties will sit alongside the range of other sanctions used against the non-compliant, including those involved in deliberate fraud. These sanctions include the forfeiture of goods, vehicles, disruption, criminal prosecutions or revoking registration.

They will enable HMRC to make a more proportionate response in some situations than at present.

Q51. What is the unauthorised issue of an invoice showing VAT?

Most commonly, this occurs when someone who is not registered for VAT or who doesn't work for a VAT registered business, issues an invoice that includes VAT.

Q54. What is reasonable excuse?

A person won't be liable to a penalty for a non deliberate wrongdoing if they can show that they have a reasonable excuse.

Supplying products knowing that they will be misused is a deliberate act. Consequently there can be no reasonable excuse for this type of wrongdoing.

Reasonable excuse is not defined in law, and what is reasonable will differ from person to person depending on their particular circumstances. It is likely to be an exceptional and unforeseen event beyond the person's control.

For example an individual detected running on red diesel may have done so unwittingly because they had that day bought a car from a third party and so could not reasonably have known how it was fuelled.

See also the examples given in Question 44 about reasonable excuse in the failure to notify penalty.

Q55. How is the penalty calculated?

The penalty will be based on the amount shown as VAT on an unauthorised invoice, or the amount of Excise Duty unpaid because of the wrongdoing. This unpaid tax or duty is the potential lost revenue.

The penalty is calculated by applying an appropriate percentage to the potential lost revenue.

The penalty is the appropriate percentage of the potential lost revenue and depends on whether the wrongdoing was:

- deliberate and concealed – maximum penalty 100 per cent, minimum penalty 30 per cent
- deliberate but not concealed – maximum penalty 70 per cent, minimum 20 per cent
- non-deliberate – maximum penalty 30 per cent, minimum 10 per cent.

The penalty is reduced if the person tells HMRC about the wrongdoing. As with the other penalties the amount of reduction depends on whether the disclosure is unprompted or prompted, and how much help the person gives to establish the correct amount of tax that is due.

Q57. When must a wrongdoing penalty be paid?

A VAT or Excise wrongdoing penalty must be paid within 30 days. The 30 days begins on the date the penalty assessment is issued.

www.hmrc.gov.uk/about/new-penalties/faqs.htm

New Tribunals

Statutory instruments

The Government has issued a series of statutory instruments setting out the way in which the functions of the existing tax appeals machinery (VAT and Duties Tribunal, General and Special Commissioners) will be transferred to the new Lower and Upper Tribunal. The new system is intended to be operational for hearings from 1 April 2009 onwards.

SI 2008/2833, 2008/2834, 2008/2835

Further statutory instruments have created the legal structure for the Tribunal and set out the rules of procedure of the new First-Tier Tribunal. Concern has been expressed that these rules have been established very late; HMRC would no doubt respond that this is because they have been the subject of extensive consultation, and they should therefore be the best possible rules as well as being free from unpleasant surprises.

There have also been changes to the rules for the Upper Tribunal (SI 2008/2698) which make minor amendments to correct and clarify the drafting.

SI 2009/196; SI 2009/273; SI 2009/274

Consultation responses

HMRC have issued an analysis of technical responses to the consultation document about the new appeals process. Many of the responses concerned the new review procedure. The following is the summary section of this document:

Chapter 2: Summary

General

2.1 Most of the comments received related to the proposed review process. The responses again welcomed the statutory but optional approach adopted and concentrated on ensuring that the review was robust and in particular that it contained sufficient legislative safeguards.

2.2 There were also a number of strong but divergent views on how best to distinguish between the two stages of the direct tax appeal process, in particular over whether it would be helpful to *introduce a term such as 'objection' to cover the stage at which the appeal is being considered by HMRC but is not within the jurisdiction of the tribunal.*

2.3 Some respondents also raised questions about the impact of review on the ability to claim costs before the tribunal. The draft Rules of Procedure for the Tax Chamber provide for a limited power for the award of costs in the First-Tier Tax Chamber: There may, at tribunal discretion, be an award of costs where a party has behaved unreasonably, or (unless the taxpayer does not wish the appeal to be within the costs regime) where the tribunal has categorised a case as falling within the complex case management track. In cases where costs may be awarded, this is limited to those incurred once the matter is within the jurisdiction of the tribunal.

Direct tax appeal process…

Review

2.8 We received a number of comments on the legislation relating to the nature, extent and conduct of a review.

2.9 In particular we received the following comments, all of which we accept, and for which legislative provision will be made:

- *additional safeguards are needed where HMRC does not notify review conclusions within 45 days or other agreed time ("the review period") so the decision reviewed is treated as upheld;*
- *HMRC should be required to consider taxpayer representations in relation to a review;*
- *HMRC should be required to give reasons for its review decision;*
- *taxpayers, as well as agents, should be notified of any decision that affects their appeal rights;*
- *that all appealable matters should be reviewable, and that this right should not be restricted to matters for which an onward appeal right exists;*
- *for VAT, third parties who could appeal should also have a right to review; and*
- *for VAT (as for direct taxes), taxpayers should be able to discuss matters with the decision maker, without the need for review, if that is appropriate, and that they should be able to do this without prejudice to their review and appeal rights.*

2.10 In particular we accept that it is appropriate to provide an additional legislative safeguard to protect taxpayers' right of appeal where HMRC does not complete the review within the review period. The Order will contain the following provisions to cater for this;

a. requiring HMRC to notify the taxpayer that the review period has expired; and

b. ensuring that taxpayers can appeal to the tribunal from the time the review period expires (whether or not they have been notified); while

c. providing that the time limit within which they must appeal to the tribunal will run until 30 days from the date on which HMRC notify the taxpayer that the review period has expired.

2.11 In addition, we received comments that the legislation should make specific provision about the nature and extent of the review, rather than this being at HMRC's discretion.

2.12 We consider that the wide variety of decisions made by HMRC, from the automatically produced penalty notice at one end of the spectrum, to the most complex of decisions (made after consideration by a large number of Departmental and sometimes external experts and legal advisers) at the other, means that a more specific statutory definition of the extent and nature of review is not practical.

2.13 HMRC will however be setting out what a review should entail in different circumstances in guidance. Draft guidance will be published for comment.

www.hmrc.gov.uk

Revised VAT Tribunals rules

A Statutory Instrument has given effect to the changes in the law required to create the new First and Second Tier Tribunals which will hear appeals on tax matters and on a range of other issues such as tax credits. The following section of the Explanatory Memorandum covers the changes which are specifically concerned with VAT:

Part V of VATA is amended to reflect the transfer of functions to the new tribunals. References are updated and provisions which have been overtaken are repealed. In addition, provision is made for review of appealable decisions, and some additional administrative changes have been made.

Section 83A (Offer of review)

This section provides that HMRC must offer reviews of decisions which are appealable under section 83 when the decision is notified to a person (P). The section does not apply to the notification of the conclusions of a review.

Section 83B (Right to require review)

This section provides that any person (other than P) who has a right of appeal under section 83 against an HMRC decision may require a review or serve notice of appeal within 30 days of the date when that person becomes aware of the HMRC decision. Case law has determined that any person with sufficient interest in a VAT decision (such as the recipient of the supply in question) has the right to appeal that decision. This section provides for these parties to require a review and clarifies the process for doing so.

Section 83C (Review by HMRC)

This section provides that HMRC must review a decision if they have offered review under section 83A and the offer has been accepted within 30 days, and also when a review has been required under section 83B. HMRC are not required to review decisions where P, or another person, has appealed to the tribunal under section 83G: they are not required to conduct a review requested by someone other than the recipient of the decision if the recipient has accepted the offer of review.

Section 83D (Extensions of time)

This section provides for HMRC to notify an extension of time to appeal or ask for review if they are asked to do so within the review offer acceptance period (set out in section 83C(1)(b)) or the 30 day period provided for in section 83B. In such cases, the 30 day time limit for appealing or asking for review begins again on the date of the notice or from a date set out in the notice or a further notice. This section replaces the effect of SI 1986/590 Rule 4(2) for appeals (but by reference to a 30 day, rather than a 21 day, period) and extends the provision to cover reviews.

Section 83E (Review out of time)

This section provides that HMRC must review a decision after the review acceptance period or the period in section 83B if they are asked to do so and are satisfied that P or the person requiring a review under s 83B had a reasonable excuse for not accepting the offer within the period, and that P or the other person made the request without unreasonable delay after the excuse had ceased to apply.

HMRC are not required to review any matter where an appeal has been made in respect of the decision.

Section 83F (Nature of review etc)

This section provides for the nature and extent of the review. Subsections (1) to (6) mirror the provisions in TMA s 49E.

Where HMRC fail to give notice of the review conclusions within the time set out in (6) or any period subsequently agreed, the decision is to be treated as upheld (subsection (8)) and HMRC must notify the party who accepted the review offer or required review under 83B of this (subsection (9)).

This provision finalises the review in such cases, ensuring that the taxpayer may appeal to the tribunal once that period of time has passed, and provides a basis on which to do so. Section 83G(5) gives the time limit for making an appeal in such cases.

Section 83G (Bringing of appeals)

This section provides a time limit for making an appeal under section 83. Appeals may be made by notifying the tribunal within 30 days of the date of the decision to which the appeal relates or, in cases where a person other than the recipient of the decision is the appellant, within 30 days of the date when that person became aware of the decision. Where the time limit for appeal has been *extended under section 83D an appeal may be made within the period provided for under that section (subsection (1)).*

In cases where HMRC are required to undertake a review, an appeal may not be made until the conclusion date. In such cases any appeal is to be made within 30 days beginning with the conclusion date (subsection (3)).

In cases where HMRC are asked to undertake a review out of time under section 83E an appeal may not be made until HMRC have decided whether or not to undertake a review. If HMRC decide to undertake a review an appeal may not be made until the conclusion date. In such cases any appeal is to be made within 30 days beginning with the conclusion date. If HMRC decide not to undertake a review an appeal may be made from the date on which HMRC so decide (subsection (4)). The conclusion date is the date of the document notifying HMRC's conclusions (subsection (7)).

If HMRC do not notify their conclusions within the review time limit, the time limit for appealing starts at the end of the review time limit and ends 30 days after the conclusion date (subsection (5)).

An appeal may be made after the end of the period specified in subsection (1), (3)(b), (4)(b) or (5) if the tribunal gives permission to do so (subsection (6)).

Section 84 (further provisions relating to appeals) is consequentially amended to reflect the new tribunal structures and related changes.

Subsection (2) is omitted to remove the requirement to have made all the returns required under the Act and paid all the amounts shown as payable on those returns in order for an appeal to be entertained.

Subsections (3B) and (3C) are inserted to provide that applications not to pay amounts subject to appeal on grounds of hardship are made to HMRC in the first instance, and that HMRC may agree such applications if they are satisfied that the applicant would otherwise suffer hardship. If HMRC and the applicant cannot reach agreement on the issue of hardship the applicant may apply to the tribunal for a determination of that issue.

Subsection (8) is omitted and has been restated in revised form in section 85A.

Section 85(1) is amended to remove specific reference to costs. This now mirrors the equivalent provision in TMA (section 54).

New section 85A (Payment of tax on determination of appeal) restates section 84(8) with modifications. The modifications remove the power of the tribunal to decide the rate at which interest is payable on any amounts found to have been over- or underpaid on determination of the appeal and provide instead that interest will be payable at the normal statutory rates.

New section 85B (Payment of tax when there is a further appeal) provides that tax is payable or repayable in line with the tribunal determination notwithstanding any further appeal (subsection (1)).

If the amount payable or repayable is altered by the order or judgment of the Upper Tribunal or court on further appeal, overpaid tax or underpayments of credits shall be refunded with such interest, if any, as the Upper Tribunal or court may allow. Or, if too little tax has been charged or too much credit has been allowed, any amount determined to be due shall be payable at the end of the 30 day period beginning on the date HMRC issue notice of the amount payable (subsection (2)). Subsections (1) and (2) mirror the restated TMA section 56.

Pending determination of the further appeal HMRC may apply for permission to withhold any payment or repayment or to require adequate security before payment or repayment is made if they consider this necessary for the protection of the revenue (subsection (3)). In such cases the tribunal may give permission or require the provision of security.

P may apply to HMRC for permission not to make payments or repayments under subsection (1) pending the determination of the further appeal (subsection (4)).

If HMRC and P do not agree, P may apply to the tribunal or court from which permission or leave to appeal is sought for a determination of the issue (subsection (5)).

In considering an application under subsections (4) or (5) HMRC or the relevant tribunal or court, as appropriate, may decide how much, if any, of the disputed amount should be paid or repaid; or *require the provision of adequate security; or stay the requirement to pay or repay under subsection (1) (subsection (6)).*

Security shall be of such amount and given in such manner as the tribunal or court may determine (but, in the case of an application under subsection (4), HMRC may agree to accept such security as they consider adequate to protect the revenue) (subsection (9)(a) and (b)). An application under this section is to be made to the tribunal or court from which permission or leave to appeal is sought (subsection (8)).

SI 2009/56

Articles summarising the new system

There is an article reviewing the new Tribunals structure in *Tax Adviser*, September 2008, as well as FAQs on the HMRC website explaining the following issues:

- *How will these reforms affect HM Revenue & Customs (HMRC) customers?*
- *How are HMRC managing this change?*
- *Why is an internal review needed?*
- *What form will the new review process take?*
- *Where is the internal review request sent?*
- *How much time is there to make a review request?*
- *What happens if HMRC fail to carry out the review within 45 days?*
- *What about differences in treatment of direct and indirect tax appeals?*
- *Can an appeal be made direct to the tribunal without having an internal review?*
- *Do customers appeal to HMRC as now?*
- *Will the circumstances for postponement of tax change?*
- *Which tax tribunals are affected?*
- *So, how are appeals going to be listed in direct tax cases which would previously have gone to the General Commissioners?*
- *When will the new tribunal system come into effect?*
- *How will the new two-tier tribunal system work?*
- *What about transitional arrangements for 'old' appeals on hand at the time of the change?*
- *How will different types of appeals be handled?*
- *What will be the costs regime?*
- *What is a Paper Hearing?*
- *Are more or less people expected to go to Tribunal as a result of these reforms?*

There is an article in *Taxation*, 22 January 2009, discussing the results of a trial of the new "review" system in the North West and Midlands Appeals Unit of HMRC. There have been positive responses to the trial, but the writer considers that there is still a great deal of work to do before the whole country is ready for a changeover on 1 April.

There is a further article in *Taxation*, 26 February 2009, explaining the new appeals process and the new two-tier Tribunal structure.

Online training

HMRC have launched a training package for their own staff to help them understand the new appeals procedure. The following comment clarifies the relationship between the old system of reconsideration and the new review:

"As now, the requirement to pay any disputed tax will be suspended during review. If the conclusion of the review is that tax is due, this must be paid before an appeal can be heard. However, if payment

would cause the customer hardship, they may ask HMRC to agree to suspend the tax until the tribunal appeal is settled. If HMRC does not agree, the customer can ask the tribunal to decide the matter.

In Customs and Excise duties and the environmental taxes, the current mandatory review will become optional, so that customers will be offered a review when an appealable decision is made. They can then decide whether or not to accept the decision, accept the offer of review, or appeal to the tribunal. However the existing mandatory review process will continue for decisions about the restoration of seized goods.

Review is not the same as local reconsideration. Review is a statutory process with strict time limits. Queries about decisions, especially in cases where the taxpayer provides new information, are not to be treated as review requests unless the customer has specifically asked for a review. In many such cases we expect to be able to reach agreement and finalise cases without a review as now."

HMRC Press Release 20 February 2009

HMRC have also issued a Brief to explain the new rules and procedures. It does not contain any details but provides links (from the website version) to more detailed documents.

R & C Brief 10/09; www.hmrc.gov.uk/briefs/vat/brief1009.htm

Transitional rules

The old VAT Tribunal could award costs to a successful appellant in all cases. The new First-Tier Tribunal will not do so. For appeals made but not heard before 1 April 2009, the procedural rules of the First-tier Tax Chamber will apply. However, the new Tribunal has the discretion to continue to apply the rules of the existing Tribunals on a transitional basis.

For indirect tax appeals made before 1 April 2009, this means the Tribunal may continue to operate the existing costs rules in the VAT Tribunal. Where this happens the practice of HMRC not seek to costs from appellants in most cases will also continue to apply on a transitional basis.

The new provisions for optional statutory review apply to indirect tax decisions (other than restoration decisions) made on or after 1 April 2009.

Where HMRC issue a VAT decision before 1 April 2009, the old provisions for non-statutory reviews (reconsiderations) continue to apply.

Ministerial Statement 10 March 2009 Hansard Col 8WS; www.hmrc.gov.uk/about/news.htm

New factsheet

HMRC have published a new Factsheet 1 which will presumably be issued with assessments and decisions from 1 April 2009. It sets out in outline the taxpayer's rights and options if the taxpayer disagrees with HMRC's decision.

Factsheet HMRC 01/09

Article by Mike Thexton

Lecture B545 (20.00 Minutes)