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Personal Tax

Was director's car a pool car?

The taxpayer was a director of a company that provided her with the use of a Mercedes. At a meeting with HMRC, the business claimed it was a pool car.

It was kept in garaged at the company; no log was maintained of the journeys taken in the vehicle. HMRC claimed the car was not a pool car and was in fact available for the exclusive use of the taxpayer. The department raised assessments accordingly.

The taxpayer appealed.

At the tribunal hearing, the taxpayer said she had another company car on which she paid tax and she also owned a car privately. She used the Mercedes to visit clients only.

The company claimed a log had been kept in respect of journeys made in the car but that it had disappeared. The taxpayer had kept details in diaries of journeys, which were shown to the tribunal.

The tribunal was not satisfied that the diaries were complete, because they were very clean and showed little sign of the wear and tear that would be consistent with them having been kept in the car.

The tribunal concluded they were not a 'contemporary record of journeys made by the Mercedes car on company business'.

There was no evidence to show that the vehicle was a pool car, so the tribunal found it was used solely by the taxpayer.

The taxpayer's appeal was dismissed.

A Ryan-Munden (TC889)

Company car, pool car or emergency vehicle?

The issue before the Tribunal was whether the provision of a saloon car and fuel gave rise to a charge to car benefit and car fuel charge on Mr McKenna and, in consequence, to a corresponding Class 1A NIC charge on the company. This determination covers both appeals whose facts were inter-related.

The saloon car and fuel were provided by the company to Mr McKenna who used the car for journeys between his home and the company's business premises.

The appellants' argument was that there should be no charge on either the company or Mr McKenna because:

- Mr McKenna was on 24 hour call resulting in no home to work travel
- The car was taken home so that if Mr McKenna had to visit a site early, then he could travel directly rather than having to drive to the office first;
- There were security concerns with leaving the car overnight at the office;
- The car was a pool car as other employees could use it if necessary; and
- The respondents contended that the car was available for Mr McKenna's private use, was used for normal home/office commuting which was a form of private use, thus creating a chargeable benefit. It was not a pool car, let alone an emergency vehicle.

Findings

The Tribunal found that the evidence heard by it showed plainly that

- Mr McKenna was the main user of the company car

- Mr McKenna was not "on call" as that term was normally used but simply responded to rare emergencies as part of his executive position. The car was not essential to enable him to perform his work.
- The company car was a 4 door saloon fitted with seats and thus was not a van in law;
- Nor was it a "pool car" as defined in Section 167 of the Income Tax (Earnings and Pensions) Act 2003, because Mr McKenna's private use of the car was daily on weekdays and it was kept overnight at his home;
- Nor had the car the special characteristics required for an "emergency vehicle" as defined in Section 248A of the same Act;
- Mr Richard McKenna's use of the company car between his home and his place of business was voluntary and was ordinary private commuting, albeit for a distance of under 2 miles each way.

The appeals of McKenna Demolition Limited against the determinations issued on 12 June 2009 under Section 8 of the Social Security Contributions (Transfer of Function, etc) Act 1999 (Class 1A NIC) amounting to £9,195.06 and the associated penalty determinations issued on 23 September 2009 amounting to £4,800 were dismissed.

The appeals of Mr Richard McKenna against the discovery assessments issued on 15 October 2009 under Section 29(1) of the Taxes Management Act 1970 amounting to £24,904.34 and the associated penalty determinations issued on 7 December 2009 amounting to £2,491 were dismissed.

TC01204: Mckenna Demolition Ltd

RELEASE DATE: 23 MAY 2011

Car fuel benefit– should it have been charged?

The case

James Buchan Little (JBL) and his wife own the company Northside Precision Tooling Limited (NPT).

In the tax years 2005-06 and 2006-07 there were two company cars provided for the directors of NPT, JBL and his wife, being a Porsche and a Renault.

From 2005 JBL used the company provided Porsche for private use and the privately owned Subaru for business purposes.

This is an appeal by JBL against assessments in respect of car fuel benefit issued by HMRC.

JBL claimed that a Porsche Carrera S motor car which was owned by NPT, was for his private use only and no fuel was provided for it by NPT and, consequently, no tax was payable on car fuel benefit.

Decision

The Tribunal accepted that JBL had arranged the purchase of the Porsche through the company as this was a means of financing its purchase that might not otherwise have been possible and noted that JBL accepted that the provision of the car was taxable as a benefit and was returned on the P11D and tax was paid.

JBL stated that there was only private use and the Tribunal accepted this evidence. This therefore left the issue of the fuel charge which had not been included in the P11D forms.

The Tribunal accepted that where ownership of the car belonged to the company, the fuel charge followed in terms of Section 149 of ITEPA 2003.

The next step was for the Tribunal to consider whether the benefit would be at a nil rate under Section 151 ITEPA 2003 which required Condition A or B to be met:

- Condition A required JBL to make good to NPT the whole expense of NPT providing any fuel in connection with the provision of JBL's private use and for JBL actually to make good that expense.
- Condition B would be met if the fuel was only made available for JBL's business use and as there was no such use this did not apply.

The Tribunal were persuaded by the evidence that NPT accepted that there was a fuel charge applicable to the Porsche car under a signed declaration that this was payable because "of the failure of the company to meet all its obligations under the relevant acts and regulations" in a document signed by Mrs Little on behalf of the company on 27 October 2008.

The Tribunal were not minded to accept that this act and payment were erroneous. The Tribunal therefore were of the view that a fuel charge did attach to the use of the Porsche and noted that this had been accepted by JBL's accountants.

The Tribunal considered whether the car fuel benefit charge applied automatically because fuel is provided for a car that is made available for private use to an employee who is not in excluded employment. The legislation provides that the charge applies automatically where fuel is provided for the car and places the onus on the taxpayer to prove a negative, that is to say, that no fuel is provided for the car. Albeit that it may be difficult to do so, this is what must be done to shift this presumption. In relation, therefore, to the position where fuel for cars is being paid for by company credit cards, detailed records must be kept not only of the business mileage but also of any private use to also ascertain whether or not the nil rate applies.

JBL stated that no fuel was made available for the Porsche for business use but there was no evidence to support this claim, nor was there evidence from NPT that fuel purchased using company credit cards was used exclusively for business purposes. Accordingly, the Tribunal found that the JBL did not meet the tests to result in the car fuel benefit charge being at a nil rate.

The Tribunal considered the arguments put forward by HMRC and JBL in relation to the use of premium unleaded fuel and normal unleaded fuel but were unable to draw any conclusions from this as no credit card receipts or statements were available to confirm which fuel was used in which car and so to corroborate JBL's statement that the Porsche required premium unleaded fuel.

No evidence was shown in the form of private bank or credit card statements or fuel receipts in respect of the fuel payments made in cash nor was there evidence that the premium unleaded fuel was always purchased for the Porsche.

The Tribunal noted the position of JBL in relation to receiving a car fuel benefit charge for an amount which appears to be in excess of the estimated likely actual fuel cost of £700 per annum and of his understanding from the HMRC guidance that no reporting requirements and no tax or national insurance contributions would be payable if the taxpayer bought their own fuel for private use.

This guidance, however, relates to reporting requirements which are not the same as the requirements to keep proper records "as may be requisite for the purpose of enabling the taxpayer to make and deliver a correct and complete return for the year or period".

The case was dismissed due to lack of evidence.

TC01184: James Buchan Little

RELEASE DATE: 16 MAY 2011

Medical benefit payments

The taxpayer agreed with his employer, in December 1997, that he would retire in January 2000. Upon retiring, he received a company pension and part of that included medical benefit payments.

Until 2006, these payments were not taxable. However, the employer wrote to the taxpayer advising him that, from 2006, the payments became taxable under ITEPA 2003, s 393B, introduced by FA 2004.

The taxpayer therefore included the payments on his self-assessment tax returns for 2006/07 and subsequent years.

It was only after he filed his 2006/07 return that the Employer-Financed Retirement Benefit (Excluded Benefits for Tax Purposes) Regulations were made to define 'excluded benefits'. The regulations took effect from 2006/07.

The taxpayer continued to include the medical benefit payments in his returns.

However, he subsequently submitted a claim for repayment of tax relating to the medical benefit under the error or mistake legislation. HMRC refused the claim. The taxpayer appealed.

It was agreed that the taxpayer's medical benefit payments, which formed part of his retirement package, fell within the definition of 'relevant benefits' in s 393B(1), and were taxable, unless they were excluded benefits.

The taxpayer relied on para 11 of the Schedule to the regulations as characterising the medical benefit payments as excluded payments.

HMRC agreed with the taxpayer that the payments would be excluded, except that they considered his employment was terminated after 1998.

The taxpayer argued that his employment was terminated in December 1997, when he signed an irrevocable agreement with the employer that he would retire on a certain date.

The First-tier Tribunal said that para 11 of the Schedule to the regulations applies only where termination of employment occurs before 6 April 1998.

It was therefore logical to assume that the purpose of including that date was to ensure that non-cash benefits that are currently provided, but which were material to a tax regime in force before 6 April 1998, should not be taxed now as relevant benefits.

The question for the tribunal was therefore whether the medical benefit payments made to the taxpayer were in some way relevant to a tax regime in force before 6 April 1998.

It concluded that there was nothing to suggest that the taxpayer could have been liable to tax on his retirement benefits in 1997, when he entered into the irrevocable agreement to retire.

The tribunal decided that the taxpayer's employment terminated on the actual day he ceased to be an employee, i.e. in January 2000, and not the date the agreement was signed. Thus the benefit payments were not excluded benefits.

The taxpayer's appeal was dismissed.

Colin Swingler (TC1106)

Share and cash incentive plans

The taxpayer was made redundant from the London branch of BNP Paribas in October 2005. Under the terms of his redundancy his shares in the bank's share incentive plan (SIP) and cash from its cash incentive plan (CIP) were released.

The issues before the First-tier Tribunal were whether the SIP and CIP were tax-approved plans, so that the shares and cash were exempt from tax and National Insurance.

The tribunal found that the evidence against the plans being tax approved was 'overwhelming'.

The taxpayer could produce no evidence of his participation in the plans, there was correspondence from HMRC's Employee Share Schemes Unit that the bank had not applied for tax approval, and the rules of one of the SIPs made it clear that the plan would not be capable of receiving approval.

There was no UK tax legislation for tax approved cash remuneration plans, and a letter to the taxpayer about the transfers of shares and cash specifically stated the payments were taxable.

The tribunal found that the transfer of shares to the taxpayer under the SIP and the cash payments from the CIP were liable to tax and National Insurance.

The taxpayer claimed further that a compromise agreement had been reached with HMRC that the SIP was not taxable. The tribunal found that no legally binding agreement had been reached.

The taxpayer's appeal was dismissed.

Lars Sjumarken (TC914)

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Meeting of IR35 Forum

The IR35 Forum was established following the Government's announcement at Budget 2011 that it was committed to making clear improvements in the way IR35 is administered. It met for the first time on 6 May 2011.

The Forum’s role includes advising on improvements in the administration of IR35 and in a transparent manner to assist HMRC in:

- identifying specific areas for improvement in the administration of IR35
- developing an overarching strategy for dealing with the administration of IR35
- designing specific approaches and steps within the overarching strategy
- identifying and agreeing measures of success against which to judge improvements
- monitoring the implementation of the new strategy and progress against agreed measures of success
- reporting on progress in implementing improvements to the administration of IR35

Customer segmentation

There was concern that the proposed approach to Customer Segmentation did not sufficiently recognise the distinct customer group of employers.

The view was also expressed that the approach to customer segmentation proposed did not adequately recognise that there were professional contractors and temporary workers in the labour market. Some temporary workers use agencies because it was often the only way they could obtain work. There were big differences between professional contractors and temporary workers, but it was not always easy to identify them. There were circumstances where IR35 was clearly relevant e.g. where a well paid employee decided to leave allegedly to set up in business on their own account, but then merely sold their services solely to their previous employer. But there were occasions when what HMRC regarded as attempts to avoid tax were simply a reflection of what some people had to do to get work.

Other approaches to segmentation were discussed including segmenting by reference to contractual relationships. HMRC agreed to consider how the segmentation model might be expanded to reflect wider considerations.

HMRC compliance

HMRC said that it was aware that there was a perception among some commentators that it merely 'stuck pins' in lists to decide who should be subject to an IR35 review. The reality was that in fact all IR35 reviews were conducted on the basis of risk assessment which operated consistently across the country. HMRC said that it would be glad to investigate any evidence suggesting that IR35 cases had been selected or reviewed in an inconsistent way.

There was a discussion about whether there should be greater transparency about HMRC's criteria for risk assessment, and how it selected cases for IR35 reviews. HMRC agreed that providing greater transparency about the process might provide greater reassurance to those fearful of being subject to review on a purely random basis.

HMRC agreed that those who were clearly outside the ambit of IR35 should be given assurance through clear guidance that that they did not need to worry about IR35 and said that it would value the Forum's help in commenting on its draft guidance.

Broad strategy

HMRC said that it believed that the broad strategy should be to:

- Enable taxpayers to decide whether HMRC viewed them as low, medium or high risk (and to make sure that that segmentation was transparent);
- Provide effective targeted guidance for each segment; and

- Where reviews of high risk cases were undertaken, to ensure such reviews were carried out as quickly as possible with as least disruption as possible

Gateway Test

There was a discussion about whether it would assist taxpayers in gaining certainty about their position under IR35 if a 'gateway test' with elements similar to those proposed in the PCG's submission to the OTS was developed for incorporation into HMRC guidance.

It was suggested that it would be very useful if HMRC could, with the help of the Forum, develop a tool analogous to the Employment Status Indicator. It was agreed that HMRC would draft guidance and outline 'gateway test' model for comments.

Helpline and contract review service

HMRC addressed concerns expressed about whether contacting the helpline would automatically render the enquirer vulnerable to a formal review. HMRC reiterated that cases were only taken up for review on the basis of risk assessment by officers who were not involved in dealing with queries on the helpline.

HMRC agreed to investigate the scope for recording calls and providing those who contacted the helpline with a reference number that could provide a clear audit trail of them having sought HMRC's views before entering into contracts.

Engagement with other stakeholders

HMRC mentioned that it had received approaches from other individuals and bodies keen to participate in the Forum.

It was agreed that increasing the size of the Forum beyond its current size might make it unwieldy, but that other bodies should be encouraged to contribute to its deliberations, particularly if they had particular expertise or information.

Charitable giving (*Lecture P661 – 21.27 minutes*)

The 2% Gift Aid supplement

The 2% Gift Aid supplement for charities, which was introduced in order to soften the blow caused by the basic rate reduction from 22% to 20% on 6 April 2008, came to an end on 5 April 2011. This means that net donations will in future be less beneficial to their charity recipients.

Benefits associated with charitable gifts

The Gift Aid rules for individual and corporate donors allow charities (and community amateur sports clubs) to provide their donors with a modest level of benefits without affecting that person's eligibility to tax relief on the donation.

The value of the permitted benefit depends on the relative size of the donation. The maximum amount allowed was:

1. for donations of £100 or less, 25% of the amount of the gift;
2. for donations of more than £100 but not more than £1,000, £25; and
3. for donations of more than £1,000, 5% of the amount of the gift.

In addition, the total value of the benefits received by a donor in respect of all his gifts to that charity in any one year could not exceed £500 – this restriction, which was intended to ensure that these limits could not be circumvented by the making of multiple gifts, kicked in for donations in excess of £10,000.

In relation to gifts made on or after 6 April 2011, the £500 limit has been increased to £2,500 (Cl 41 F(No3)B 2011). Thus the cap now applies to charitable donations of more than £50,000 per annum. For corporate donors, the equivalent starting-point is the accounting period ended on or after 1 April 2011.

This measure is expected to affect only a few hundred donors each year. Examples of benefits typically given by charities to their donors include discounts and theatre tickets.

Reduced rate of IHT

A reduced rate of IHT will apply where 10% or more of a deceased person's net estate (ie. after deducting any IHT exemptions and reliefs together with the nil rate band) is left to one or more charities. In these circumstances, the rate of IHT applicable to the chargeable estate will be reduced from 40% to 36%. This new rate will apply to deaths occurring on or after 6 April 2012.

Illustration 1

Poulter has an estate worth £1,200,000 at the time of his death. He leaves £600,000 to his widow, £20,000 to the RSPCA and the rest to his son.

His net estate comprises:

		£	£
Total assets			1,200,000
Less:	Spouse	600,000	
	Charity	20,000	
	Nil rate band	325,000	
			945,000
			£255,000

10% of this comes to £25,500 and so the rate of IHT on the residuary legacy to Poulter's son is 40%. Thus the son will receive £325,000 + £255,000 – £102,000 = £478,000.

If Poulter had increased his RSPCA bequest to £25,000, the estate will qualify for the reduced IHT rate. The son will then receive £325,000 + £250,000 – £90,000 = £485,000.

The Government plan to issue a consultation document on the relevant details of the scheme later this year. It seems likely that this proposal will prompt a number of taxpayers to revisit their testamentary bequests with a view to increasing the amount which they leave to their favourite charities.

Tainted charity donations

The changes made by Cl 27 and Sch 3 F(No3)B 2011 replace large parts of the 'substantial donor transactions' legislation (see Ss549 – 557 ITA 2007 and Ss502 – 510 CTA 2010) in respect of charitable gifts made on or after 1 April 2011. The new anti-avoidance rule ensures that the normal tax reliefs are not available where donors enter into arrangements to obtain a financial advantage from the charity in return for their donation. It is based on a purpose test which considers the reason why the donor (or someone connected with the donor) entered into arrangements with the charity and the extent to which those arrangements were attempting to obtain a financial advantage from the charity.

The new legislation introduces the concept of a 'tainted charity donation'. Three conditions (known as Condition A, Condition B and Condition C) must all be met in order for a charitable gift to be treated as a tainted charity donation. Where these conditions are satisfied, the donor loses any tax relief which they would otherwise have been entitled to claim. For individuals, an additional charge to tax may also arise where the donation would have been eligible under the Gift Aid scheme.

Condition A is simply that a donation and arrangements entered into between the donor and another party are connected with each other. If this is not the case, the gift will not satisfy Condition A and so it cannot be a tainted charity donation. If, however, the donor and another person do enter into a connected arrangement, it will be necessary to consider Condition B.

Condition B examines the donor's purpose in entering into the arrangement which fell within Condition A. If the main purpose (or one of the main purposes) was for the donor or for someone connected with him to receive a financial advantage directly or indirectly from the charity, the donation is caught by Condition B. The donor will therefore need to have regard to Condition C.

Condition C specifically excludes donations from 'qualifying charity-owned companies' and 'relevant housing providers' (both terms are defined in the new legislation) from being treated as tainted donations. Thus wholly owned trading subsidiaries of charitable companies, which generally donate their entire profits to their parent charity each year, will not, for example, be caught by the anti-avoidance rule.

Illustration 2

A conservation charity offers donors who make gifts of £5,000 or more a special membership package which they call their 'gold scheme'. This entitles each member to the following benefits:

1. opportunity to attend event at which well known expert will talk about topical conservation issues;
2. four quarterly newsletters; and
3. a charity-branded coffee mug.

In this illustration, the gift is unlikely to be caught by the new tainted charity donation legislation. The gift of, say, £5,000 and the receipt of the resulting benefits package may well be arrangements caught by Condition A. If the circumstances are such as to suggest that the donation would have been made with or without the benefits package, Condition A will not apply. However, such packages are typically designed to incentivise the donor to make a larger gift and, in that case, it is reasonable to assume that Condition A is in point. It would then be necessary to see if the donor received a financial advantage from the arrangement (Condition B). The legislation gives examples of circumstances in which a financial advantage can arise. It should be noted that such an advantage is ignored if it falls within the Gift Aid benefit limits discussed in (b) – (e) above. It is extremely likely in this situation that the value of the package will fall within those limits, given that they are normally designed with just that in mind.

This donation will not fall foul of the new anti-avoidance legislation.

Illustration 3

Schwartzel, a wealthy top rate taxpayer, is a trustee of two charities, Charity X and Charity Y. Charity X is responsible for running an educational college and Charity Y provides financial support for that college. Schwartzel also controls a company called Master Your Sport Ltd which runs a leisure facility (swimming pool, gym, squash and other indoor sports). This facility is used by the students of the college during school hours and by fee-paying members of the public at other times. Master Your Sport Ltd wishes to expand the leisure facility to allow opening to the public during the school day and to provide more up-market amenities. In other words, this is a wholly commercial development.

In order to finance this, the company offers some interest-free loan stock. Schwartzel makes a Gift Aid donation of £100,000 to Charity X. Charity X subscribes for £125,000 of the loan stock and requests that it be issued in the name of Charity Y.

In this illustration, the gift will surely be caught by the new tainted charity donation legislation. There is an arrangement in place that, in connection with the donation, Charity X will provide an interest-free loan (ie. by buying loan stock) to a company connected with the donor and the donation would not have been made and the arrangement entered into independently of one another. Therefore, Condition A has been met. The main purpose of entering into the arrangement was for the donor to obtain a financial advantage – in this instance, an interest-free loan for his company – and so Condition B is satisfied. Finally, the donor is neither a charity-owned subsidiary nor a relevant housing provider, which means that Condition C has been complied with.

The gift is a tainted charity donation and so Schwartzel is denied any tax relief in connection with his payment of £100,000.

Contributed by Robert Jamieson

Childcare relief (*Lecture P662 – 9.28 minutes*)

Relief for employer-supported childcare in the form of childcare vouchers or care other than in a workplace nursery was originally introduced in 2005/06. It is subject to a tax exemption (and corresponding NIC disregard) of £55 per week. It is estimated that some 450,000 parents qualify for the relief.

Hitherto, higher rate taxpayers benefit from double the amount of income tax relief which basic rate taxpayers receive and individuals who pay at the top rate do even better. Around one-third of the Government's funding for employer-supported childcare goes to parents who pay tax at 40% or 50%. In the Treasury's words, 'this is badly targeted and it is unfair that those on higher incomes should benefit disproportionately in this way'.

Rules reform

Accordingly, the Chancellor has decided to reform the regime so that all taxpayers receive relief at the equivalent of 20% (Cl 35 and Sch 8 F(No3)B 2011). This is to be achieved by reducing the exemption for 40% taxpayers to £28 per week and for 50% taxpayers to £22 per week (ie. giving everyone relief of £11 per week).

The new rule applies to individuals joining employer-supported childcare schemes on or after 6 April 2011 – employees who were members of schemes prior to that date retain their 'old' levels of relief.

Practical problem

Although employees already participating in a scheme are not affected by this change, employers will henceforth be required to undertake and maintain, in respect of all new employees, records of a 'basic earnings assessment'. Provided that the employer used the best available information at the time, this assessment will be considered to be accurate for that tax year, even if it is later found to be incorrect.

In this regard, one commentator has remarked:

> *'The introduction of the "basic earnings assessment" requires employers to evaluate the tax bracket applicable to all new participants of a childcare scheme and employers must also maintain these records as they will be reviewed as part of an employer compliance review.*
>
> *That employers are only required to use the best available information is a welcome concession. However, employers will need to consider how they demonstrate that they are following these requirements.'*

Open to all employees

One of the main conditions for childcare relief is that the employer's scheme must be open to all employees generally or at least to those at a particular location. Given that the vast majority of these schemes are delivered through salary sacrifice or flexible remuneration arrangements, this has meant that employees with earnings at or near the national minimum wage cannot participate in their employer's scheme because to do so could cause their pay to fall below the requisite legal minimum. Although employers do, of course, have the option of providing the benefit on top of the individual's salary (this is known as a 'salary plus' arrangement), many are not prepared to do this and so, strictly speaking, such schemes should lose their tax relief.

However, individuals with earnings at or near the national minimum wage will almost certainly receive financial support for childcare costs in the form of the childcare element of the Working Tax Credit. As a result, it has been decided to modify the qualifying conditions for tax relief so that employees with earnings at the lower end of the scale can be excluded from employer-supported childcare schemes because of the alternative availability of the childcare element of the Working Tax Credit (Cl 36 F(No3)B 2011). This amendment sensibly applies for 2005/06 onwards in order to remove any outstanding tax liability for schemes which previously did not meet all the required conditions.

Contributed by Robert Jamieson

Statutory Residency Test – Initial thoughts (Lecture P663 – 15.24 minutes)

On 17 June the Consultation Document (ConDoc) was released relating to the proposed new Statutory Residency Test (SRT). If enacted then the new test will be effective from 6 April 2012 replacing the more subjective current rules applied by HM Revenue & Customs. The new rules are designed to ensure a definitive answer as to one's residence status in most cases.

To assist in drafting a clear test several of the old words and phrases have been clearly defined as well as introducing two new important definitions. These are:-

Arriver – Someone coming to the UK who **was not** resident in the UK for any of the previous 3 years

Leaver - – Someone leaving the UK who **was** resident in the UK for any of the previous 3 years

The new test is designed in three parts, and works sequentially so once a condition is satisfied and the status is determined then there is no need to progress any further. The 3 arms of the test are outlined below.

Part A – This is for non-residence status and the condition are:-

- Not UK resident in any of the last 3 years and less than 45 days in the UK in the current year
- Resident in the UK in any of the last 3 years and less than 10 days in the UK this year
- Leaves the UK for full time employment and in the UK for no more than 90 days of which fewer than 20 days working in the UK.

Part B – This is for Residence status and the conditions are:-

- Present in the UK for more than 183 days in the current year
- Have only one home and it is in the UK, or if more than one home they are all in the UK
- In full time employment in the UK

Where conditions in both Part A and Part B are met then Part A takes precedence.

Part C – This is the tiebreaker and only applies if both Part A and Part B are not satisfied.

This test works on the basis of a combination of days present in the UK and satisfying certain factors. In essence the greater the days in the UK the fewer factors need to be satisfied to acquire residence. The factors are:-

- Family is UK resident
- Accommodation is accessible in the UK
- Substantive work is done in the UK
- UK presence in previous years (90 days or more)
- More days spent in the UK than in any other single country in same tax year.

When considering the applicable factors Arrivers can ignore the last test.

Certain other matters are addressed in the ConDoc such as anti-avoidance and Ordinary Residence.

Conclusion – This test, if enacted in this form, will give a greater clarity to UK Residence status.

Contributed by Paul Bramall, Gabelle LLP

Capital Taxes

Good news for entrepreneurs (*Lecture P664 – 11.21 minutes*)

Whilst there has been an increase in the headline rate of CGT for middle and high earners, the lifetime limit for Entrepreneurs' Relief has continued to increase, first from £2 million to £5 million from midnight 22 June 2010 and then again to £10m in the March 2011 Budget.

As a result, an individual who qualifies for the relief should only pay CGT at a rate of 10% on the first £10 million of qualifying gains. Taking into account the increase in the highest rate of CGT to 28%, the relief which started in April 2008 as a welcome but modest £80,000 tax saving is now potentially **worth £1.8m**.

So how is ER working out?

Entrepreneurs' relief has now been in force for three years. Although very different from the old taper relief it replaced, this also means that it has been possible to structure business sales and achieve a 10% rate for 13 years. In other words, this rate is becoming an entrenched feature of the UK tax system.

The danger is that a 10% tax rate has become an expectation and it is not always easy to explain to those who are about sell their business they may not actually be entitled to that.

Sometimes there is nothing that could ever have been done and it is simply a matter of managing expectations as best one can. However, there a number of key actions we all need to take to ensure that the opportunity to make a claim is not lost unnecessarily.

Need for early action

The first point is common to all types of business structure. It is vital to remember that steps to obtain and preserve entrepreneurs' relief need to be taken at least one year before any sale (TCGA 1992 ss169I(3) & (4), 169J(4) and 169K(4)). Realistically, this means as soon as possible. It is a very dangerous strategy to leave any consideration of Entrepreneurs' Relief until a sale looks like it is going to happen. In the old taper relief regime this might not have been so much of an issue, because it was frequently possible to extend the qualifying period. This strategy is not generally an option with Entrepreneurs' Relief.

Trading status

If shares in a company are to be sold, then it is fundamental that the trading status of the company or the group be preserved. Since the test has remained the same since the old days of taper relief, it is should be familiar. The legislation (TCGA s165A) merely states that non-trading activities cannot be 'substantial.' HMRC's practice in this regard is fairly well understood and is documented in the Manuals at CG64090.

The best strategy is to avoid investments building up within a trading company in the first place or to distribute them out if they have accrued. If a substantial portfolio has already accumulated then, to avoid a large income tax charge, one possibility is to break up the company by means of a demerger ie usually the so-called 'section 110' demerger.

Indeed, if a sale may happen at some point in the future, it is unlikely to make commercial sense to have a trade and investments mixed together in single corporate vehicle. Moreover, being a trading company can offer other CGT benefits, such as the ability to make hold-over elections and to claim the substantial shareholdings exemption.

Although not good, the loss of trading company status need not actually be fatal to Entrepreneurs' Relief. Provided the condition has been satisfied within the last three years, this will be acceptable. (See TCGA 1992 s 169I(7)). So, if trading status is ever lost, the shareholders might not only consider how they can regain that status, but also how they can effect a disposal in the next three years. If the company has stopped trading because it has come to the end of its life, then that could include winding up the company.

Employment status

Assuming the company is trading, the next thing which can be done is to ensure that as many of those with 5% or more of the shares are employees of the company. Sometimes this will be commercially undesirable, but in many cases, particularly with family companies, it can make sense.

Since there is no minimum amount of hours for which the employee is meant to work, any employment will suffice, although it seems intuitively right that it must have proper commercial substance. People could also be brought onto the board as directors, since officers of the company also count. This includes the office of company secretary.

Achieving the 5% threshold

In addition to making shareholders into employees, one can also try to ensure that employees hold at least 5% of the shares or, more specifically, 5% of the ordinary share capital and voting rights in order that the company is their 'personal company'. This may be just a simple matter of ensuring that employees are given enough shares. However, often the majority owners of the company are unwilling to give away this much of a stake to any given employee.

There, may still be things which could be done to secure Entrepreneurs' Relief for the employees. Given the broad definition of 'ordinary share capital' i it might be possible to allot shares that satisfy this definition, but that do not actually carry 5% of the economic value of the company.

Another strategy might be to group together all the employee shares in a special holding company, owned just by the employees. Provided that holding company itself owns at least 10% of the underlying trading company and each employee has more than 5% of the holding company, in principle the employees could then gain the ability to enjoy entrepreneurs' relief (see joint venture provisions at TCGA 1992 s165A(7). Of course there are a number of issues with creating such a structure so this should be pursued with caution.

A more radical solution potentially is to trade through the medium of a partnership, maybe an LLP, since there is no 5% threshold there. However, obviously all the other consequences of operating this way need to be considered as well.

Making multiple claims

For many, the lifetime allowance of £5 million will be plenty. Equally, there will be others who expect over their lives to realise much larger gains, which leads to the question of how they can claim more relief. The answer is to split holdings up between members of the family. Doing this between spouses and civil partners is one obvious strategy, since they are typically a single economic unit anyhow and transfers can be made without triggering a CGT charge. Provided the recipient also satisfies the conditions for the relief for a one year period after the transfer, it will create the opportunity to use a second lifetime allowance.

Transfers could also be made to other family members (for example adult children), provided this fits in with how the family wishes to share wealth.

Assets held outside the company

Sometimes assets used by the company will be owned personally by one or more of the shareholders. In principle these can qualify for Entrepreneurs' Relief under the associated disposal provisions. The key thing is that rent should not be charged, because this will restrict the relief. Payment for use of assets prior to 6 April 2008 is acceptable, but anything subsequent to that causes a loss of relief. So if rent is currently being charged, serious consideration should be given to stopping it. It is true that it provides an efficient method of profit extraction, but this comes at a cost in terms of increased CGT and the two should be weighed in the balance.

Trusts

Trusts create some particular issues for Entrepreneurs' Relief (see TCGA 1992 s 169J). First, there is no relief at all where shares are held on discretionary trusts; only life interests will do. So, where shares which might otherwise qualify are held on discretionary trusts, due consideration should be given to where this is still the most appropriate structure and whether the loss of Entrepreneurs' Relief is still a price worth paying for the other benefits which might accrue from this type of trust.

The second issue is that a life interest is not enough in itself; there needs to be a beneficiary whose personal company it is and that beneficiary needs to be an employee or officer of that company. Consequently, it might be necessary to consider advancing enough shares to the life tenant so this holds good.

Changes in share capital

Any change in a company's share capital should prompt the adviser to carry out a fresh review of the entitlement to Entrepreneurs' Relief. If share capital reduces, then this may tip shareholders over the magic 5% threshold (which may in turn mean fresh consideration ought to be made to making them employees).

Unfortunately increases in share capital which dilute interests could have the opposite effect. Share option schemes will typically automatically entail a future increase in the total number of shares and hence a dilution of holdings. Ideally any Entrepreneurs' Relief calculations ought to be based on the assumption that all options are exercised to ensure nobody is compromised.

When the sale arrives

What if an unexpected sale arrives and the conditions are not met? All is not necessarily lost if one does arrive before the qualifying conditions have been met for the requite one year period.

One course of action is to attempt to defer the sale. Sometimes this may work, although most vendors will be extremely reluctant to have any delay, lest the whole deal be prejudiced. If it is to be done, then postponing completion alone is not sufficient, because the CGT disposal is crystallised when contracts are exchanged on an unconditional basis (TCTA 1992 s28).

A slightly more realistic alternative might be to use put and call options to ensure neither side can unilaterally pull out of the transaction, whilst not actually triggering a disposal for tax purposes. HMRC appears to accept the analysis. In its Manuals at CTM6030 there is a reference citing the authority of J Sainsbury Plc v O'Connor 64 TC 208.

Another option might be to transfer shares between spouses and civil partners. Suppose the shares of a trading company are held equally between a husband who qualifies for Entrepreneurs' Relief in respect of his holding and a wife who does not in respect of hers (perhaps because she is not an employee). If the wife were to transfer her shares to the husband before the sale, then entrepreneurs' relief might be obtained on these as well.

Deferred consideration

Sometimes company sales are structured so that elements of the consideration are to be paid at some future point. This may either be a fixed sum defined at the outset, or it may in some way depend upon the performance of the business (an 'earn-out').

The traditional approach with deferred consideration has been to issue loan notes, principally because this should normally defer the CGT disposal (and hence tax liability) until such time as the loan notes are redeemed. This remains true, but unfortunately entrepreneurs' relief complicates the position. Since the individual seller will not satisfy the qualifying conditions in relation to the loan notes, if he or she uses them to defer tax, the opportunity for an entrepreneurs' relief claim will be lost unless they retain a qualifying shareholding in the company.

The way round this is to elect to disapply the share re-organisation provisions which create the deferral, which allows an entrepreneurs' relief claim to be made. Unfortunately, this is at the expense of having to pay tax earlier than would otherwise be the case. It is worth noting that the facility to have both a deferral and Entrepreneurs' Relief by the use of qualifying corporate bond loan notes has now been withdrawn as part of the 2010 changes.

Enterprise investment scheme (EIS)

Another victim of the 2010 changes was the ability to lock into Entrepreneurs' Relief when EIS re-investment relief was claimed. Now, the gain which ultimately crystallises when the EIS shares are disposed of will only qualify for Entrepreneurs' Relief if the conditions are satisfied in relation to those EIS shares (F(No. 2)A 2010 Sch 1 para 9). Again, the message is that deferring the tax can come at a price of having to eventually pay a higher rate of CGT.

Ensuring capital treatment

The final point to make in relation to company sales is that a relief like Entrepreneurs' Relief can only be claimed if the gain is subject to CGT in the first place; the relief will not do anything to mitigate an income tax liability. Usually this is obvious, but with companies there are various ant-avoidance provisions. Probably the one that trips people up most often in practice is a purchase of own shares; there are quite restrictive conditions to satisfy before this will be held to be capital. The transactions in securities provisions cannot be ignored, either.

Partnerships and sole traders

A number of points we have already made in relation to companies apply equally to sole traders and partnerships. The need for planning at least a year before any sale is definitely just as fundamental. Where partnerships are concerned, the point about rent restricting the availability of Entrepreneurs' Relief on assets held outside the partnership by individual partners also holds good.

Perhaps the most significant new point concerns the manner in which a sale is carried out; it is important to sell the 'whole or part' of a business to qualify. The mere sale of individual assets will not be good enough. Sometimes the line is not clear. If individual assets are to be sold, then it might be better to cease trading first.

Contributed by Francecsa Lagerberg

An entrepreneurs' relief loophole (*Lecture P665 – 9.25 minutes*)

It is well known that, if a business asset such as a shareholding in a family company is held in a discretionary or accumulation trust, a subsequent sale of those shares can never qualify for entrepreneurs' relief. In other words, the trustees' CGT will always be at the rate of 28%.

However, the sale of a business asset held in an interest in possession trust where there is a 'qualifying beneficiary' (as defined in S169J(3) TCGA 1992) can attract this valuable relief provided that the life tenant is prepared to surrender all or part of his personal entrepreneurs' relief entitlement, in which case a 10% rate will be in point.

In order for there to be a 'qualifying beneficiary', three separate conditions set out in S169J(4) TCGA 1992 must be satisfied throughout a period of at least 12 months ended in the three years up to the date of the trust disposal:

(i) the company to which the shares relate must have been a trading company or the holding company of a trading group;

(ii) the life tenant must have been an officer or employee of the company in question; and

(iii) the life tenant must have personally held at least 5% of the company's ordinary share capital and voting rights.

Note that there is no requirement for the trustees themselves to pass the 5% test.

Where the requirements above are met and where the life tenant is willing to assign the benefit of all or part of his lifetime limit to the trustees, they can claim entrepreneurs' relief of up to £10,000,000 and the trust gain will only be chargeable at 10%.

The above suggests that business assets held in a non-interest in possession trust can never be eligible for relief, but this is not the case. Interestingly, as a result of an oversight, there is no rule which says that the life tenant must have been a 'qualifying beneficiary' for at least a 12-month period. That is to say, it is possible for a discretionary trust to 'parachute in' a suitable beneficiary for a short period, during which time the shares are sold. If the life interest is subsequently revoked, this does not cause the entrepreneurs' relief claim to fail. This can be a very useful procedure.

Contributed by Robert Jamieson

No error in drafting a wills

The late Mr A and Mrs A, who died in 2007 and 2004 respectively, had four children. The claimants were their daughters; Mr A and Mrs A's son was P.

In November 1990, Mr A executed a deed of gift by which a property became vested in the joint names of himself and Mrs A on trust for themselves as beneficial tenants in common in equal shares.

On the same date, they executed wills in matching terms. Under the will, P was entitled to the whole of the property, and the residuary estate of Mr A was divisible between the claimants and P in equal shares.

The solicitor who had drawn up the wills subsequently wrote to Mr and Mrs A outlining the provisions in the wills.

These were that on the death of the first of Mr and Mrs A, that person’s share in the house and land went to P. If he had died before Mr and Mrs A then it would go to any children of his and would vest in them when they reached the age of 23.

On the death of the second of Mr and Mrs A, the other half of the house and land and all the rest of their estate was divided equally between their children. Mr and Mrs A said they were satisfied with the arrangements.

The claimants commenced proceedings arguing that Mr and Mrs A had not intended the wills to have the effect they did and that Mr A’s will should be rectified under Administration of Justice Act 1982, s 20 so that on his death, as the survivor, the whole of his estate, including his half share of the property should be divided equally between the claimants and P, who supported the argument.

The judge did not accept that an error had been made in the drafting of the wills, so the claimants appealed.

The Court of Appeal said that, according to the evidence, it seemed probable that the wills were in line with the instructions given by Mr and Mrs A.

However, Mr A, when he read the solicitor’s letter, had not noticed the error. The High Court judge had been right to refuse to rectify the will.

Boswell and others v Lawson and others, Court of Appeal

PPR: Where did the Appellant stay mainly?

The appeal

This is an appeal against the amendment made by HMRC to the Appellant's self assessment return for the tax year ended 5 April 2004.

- HMRC concluded that the purchase and sale of a property in Brighton amounted to a taxable trading transaction and increased the tax payable by £12,981.67.
- In the alternative HMRC contended that if not a trading transaction the Property did not qualify for Principal Private Residence Relief.

The facts

The Appellant stated that since graduating in 1983 he had always been employed full time as a software engineer but he stopped working full time in 2000 when he was made redundant and divorced by his wife. He wanted to be available to look after his daughter as his ex-wife worked largely overseas. At the time he was made redundant he had been earning a basic salary of some £120,000 per annum.

In 2003 he started to look for a property which was detached and could be modernised. As an engineer he could "put lots of effort" into a property which could become a family home for himself and his daughter. He found the Property and worked with an architect prior to its purchase. He told the owners that he wished to purchase their property but before doing so he wished to submit the planning application.

The application for planning permission was submitted on 27 February 2003 and approval was granted on 1 May 2003. His plan was to buy the Property and move in and he then would have two years to decide how to finance the redevelopment of the Property and replace the business loan with a mortgage. The purchase of the Property was completed on 16 May 2003.

He had been very traumatised by the divorce and then his sister fell seriously ill. Her husband was by then living largely in Wales running a restaurant and so he spent most of his time with his sister who lived at 2 College Gardens, Brighton. His sister died on 22 May 2003 with her husband in Wales. Whilst the Appellant was working on the plans for the Property he went back and forward to his sister.

The Appellant stated that he had lived at the Property and produced evidence to show that his household goods were moved from the storage facility to the Property on 2 June 2003.

However, the Appellant confirmed that following the death of his sister he took a long time to recover and spent most of his time at his sister's old home in College Gardens where he felt closest to her and which gave him comfort.

The Property was advertised for auction showing vacant possession in December 2003 and sold on 20 January 2004 for £280,000.

Findings

The tribunal found that the Appellant never had any intention of purchasing the Property to make a quick sale with resultant profit.

However the death of his sister had a profound effect on him and by his own admission he started spending his time at what had been her home at 2 College Gardens which was where he felt closest to his sister. He no longer had any enthusiasm for his project at the Property. This was confirmed by his architect who stated that after the death of his sister the Appellant decided not to go ahead with his plans for the Property.

They found that after the death of his sister the Appellant's stay at the Property lacked the degree of permanence for it to qualify as his principal private residence as by his own admission he spent most of his time at 2 College Gardens. As a result of this they found that the Property was not his only or main residence for principal private residence relief purposes

The appeal as dismissed on the basis that whilst there was no trading activity, there was a liability to capital gains tax on its sale without the benefit of principal private residence relief.

TC01170: David Lowrie

RELEASE DATE: 10 MAY 2011

Marks v Revenue and Customs Comrs TC 1086

The appellant carried out his retail clothing business through two separate companies (S and F), which both owned a number of trading subsidiaries. On 31 March 1982 he beneficially owned 101,032 (100%) shares in S (the original S shares) and 100 shares (100%) shares in F. On 25 October 1983, immediately before they were floated on the Unlisted Securities Market, the F shares were exchanged for 25,325 further shares in S (the new S shares). As a result of that "share for share" exchange, F became a wholly owned subsidiary of S. Between the tax years 2000/01 and 2004/05 the appellant disposed of a number of shares. The appellant reported chargeable gains in his self-assessment returns in respect of the disposals. HMRC issued closure notices amending the returns on the basis that the value of the two companies, at 31 March 1982, was £3.1 million for S and a nominal £100 for F. The appellant appealed contending that the total value of the companies at that time was £8.425 million. The following issues arose for consideration: (i) whether the two companies were to be valued separately (as HMRC contended) or together (as the appellant argued), having regard to TCGA 1992 ss 126(1) and 127 and FA 1996 s 96(2) which applied where a disposal took place after 6 April 1988 of an asset which was held on 31 March 1982; (ii) the extent to which, if one was considering the sale of S by a hypothetical vendor, the appellant, as the owner of F, was in the market (or vice versa); and (iii) the correct value of the companies.

The appellant held two separate assets on 31 March 1982, which on their deemed disposal on that date were to be valued separately. Under TCGA 1992 s 126(1)(a) and (b), the F shares were the

“original shares” and the new S shares were the “new holding”. The original S shares were neither since they were not “concerned in the reorganisation”. Therefore the “reorganisation”, under s 127, was not treated as involving a disposal of the F shares but the new S shares (taken as a single asset) and the F shares (taken as a single asset) were treated as the same asset acquired as the F shares were acquired. The base value of the new S shares was the same as the base value of the F shares. Immediately after the share for share exchange, the appellant owned the original S shares and new S shares which had two separate base values. Under FA 1988 s 96, the assets held on 31 March 1982 were the original S shares and the F shares. There was nothing to say that the original S shares and the new S shares were to be treated as one asset. The cases on death duties under which related assets could be grouped together in order to obtain a better price for both had no application to capital gains tax.

The concept of a hypothetical purchaser did not require one to ignore the characteristics of any actual potential purchasers from the market. Therefore the appellant, as owner of one company, could be included as a potential purchaser of another company. Although the actual owner's information about the asset being valued was bound to be greater that the information a prudent prospective purchaser might reasonably require, there was no theoretical difficulty in assuming that the actual owner could not use any information beyond that reasonably required in deciding how much to offer. The appellant had an interest in buying the company being valued from the hypothetical vendor so he could continue to own both companies and continue the existing relationship between them. One company would require the existence of the other to continue to make profits in the same way as the past. Accordingly the valuation was on the basis that the business would continue as before. On the facts the correct valuation was £3.709 million for S and £443,000 for S. The appeal would be allowed to the extent of the increase over the valuation used in the closure notice.

Appeal allowed in part.

Was Appellant both the legal and beneficial owner?

Facts

HMRC identified that the Appellant was in receipt of rental income and may have been liable to capital gains tax in respect of a property. As a result, a tax return was issued for the year ended 5 April 2006 on 21 July 2008.

The return was received by HMRC on 22 October 2008 and showed employment income, income from property and a taxable capital gain (after the annual exempt amount) of £7,442.59. The rent shown was £2,000 and after expenses the net income from renting was £32.32 which was covered by losses brought forward of £2,690.83. The Appellant's agent provided a supporting calculation showing that the taxable capital gain included a double claim for the annual exempt amount on the basis that the Appellant's husband, Mr Lawson, was entitled to a half share of the gain.

HMRC opened an enquiry into the return under Section 9A Taxes Management Act ("TMA") 1970 on 8 December 2008. On 14 May 2009 the enquiry was closed by notice under Section 28A (1) and (2) TMA 1970. HMRC concluded that the Appellant was the sole legal and beneficial owner of the property at Southampton Road and consequently the whole of the gain is assessable on her.

Issue

The Appellant did not dispute that she was the legal owner of the property. The issue for the Tribunal to determine was whether, as contended by the Appellant, Mr Lawson was also a beneficial owner of the property.

Evidence

The Appellant explained that the property was bought primarily as a residence for her daughter who was attending college and working part-time in Northampton. Mrs Lawson stated that the money used to purchase the property had come from a combination of inheritance she had received from her mother as a beneficiary of the will and family savings. The inheritance was combined with proceeds of an endowment policy in Mr Lawson's name which was then used to purchase the property at Southampton Road.

The Tribunal accepted the Appellant's evidence that when the property at Southampton Road was purchased, the couple agreed that Mr Lawson would pay towards the mortgage on Southampton Road and the Appellant would continue to pay the mortgage on the family home.

The Appellant stated that her daughter would pay towards the bills but that the contributions varied and were dependent on her daughter's financial state at the time. The Appellant confirmed that the mortgage payments were in the region of £400 per month, and that she and Mr Lawson had calculated the amount that Mr Lawson was able to afford to contribute towards the mortgage payments and bills.

The Appellant stated that having been married for over 20 years, the properties are considered by the couple to belong to each in equal shares; by way of example the Appellant stated that the legal title of the premises from which her husband practices is held by Mr Lawson and that the mortgage had been paid by the Appellant on the basis that it is jointly owned. The Appellant explained that her husband is self-employed and has only one account. Consequently all of the couple's money, including contributions from Mr Lawson towards mortgage payments and joint savings, are put into the Appellant's account.

The Appellant stated that the family home and the premises from which her husband practices are held in Mr Lawson's sole name, but that they are jointly shared by the couple. The Appellant stated that the same view was held by the couple in relation to the property in Mrs Lawson's name; namely that it was jointly owned.

Submissions

HMRC submitted that the factors taken into account by HMRC in assessing whether a beneficial interest is held by a third party are:

(a) Legal title;

(b) Occupation of the property;

(c) Receipt of rental;

(d) Provision of funds to purchase;

(e) Receipt of proceeds on disposal.

HMRC's view as that the Appellant as both the legal and beneficial owner. They relied on the fact that the property at Southampton Road was purchased using the Appellant's inheritance, that the Appellant is the legal owner and that there is little documentary evidence provided by the Appellant in support of her assertions. Mrs Robinson also noted the reference in correspondence to Mr Lawson amending his tax return and the fact that he had not included his purported share in Southampton Road in the first place.

In closing, the Appellant reiterated that the mortgage on Southampton Road had been paid by her husband. Mrs Lawson submitted that there is no legal requirement as to how a couple should manage their finances and that after in excess of 21 years of marriage the trust between the couple is such that, irrespective of whose name is on the legal title to a property, all possessions are jointly owned.

Decision

The Tribunal accepted that at face value, all indicators pointed towards the fact that Mrs Lawson was the legal and beneficial owner the property at Southampton Road.

However, it was quite clear that the true purpose of purchasing the property at Southampton Road was to provide stable and secure accommodation for Mr and Mrs Lawson's daughter as opposed to being held for investment purposes.

They had no doubt that the Appellant and her husband shared all assets between them and held an equal beneficial interest in all properties owned. They found as a fact that this went beyond an "agreement" or "understanding"; it was the basis of the relationship which had extended over a significant number of years, irrespective as to who held the legal title.

They accepted the Appellant's evidence that the property was in effect, a second family home to be used by Mr and Mrs Lawson's daughter. They accepted that no "rent" as such was received from Mrs Lawson's daughter, who contributed to bills as and when she could afford to do so.

They accepted Mrs Lawson's evidence that the money used to fund the purchase came from two sources; the inheritance she received and the couple's savings. It was significant that the savings included the proceeds of an endowment policy which had been held solely in Mr Lawson's name. In such circumstances, they found that the provision of funds with which the property was purchased came from both Mr and Mrs Lawson and that Mr Lawson was the beneficial owner.

The appeal was dismissed

TC01206: Yvonne Lawson

RELEASE DATE: 25 May 2011

Agricultural property relief- 'character appropriate'

The Executors appealed against a determination that the deceased's residence at Blue Gate Farm, Whittington, Lichfield, Staffordshire, was not at the date of the deceased's death on 4 March 2007 agricultural property within the meaning of section 115(2) Inheritance Tax Act 1984.

Issues

Both parties had agreed that the house was a farmhouse. The issue to decide was whether the farmhouse at Blue Gates Farm was of a "character appropriate to the property....".

The Facts

The farm had been farmed by his father to various degrees since 1940. The farm was much the same as it was in the early days. His father modernised the stables and put up corrugated sheds for the farm implements. It has been agreed that the outbuildings, adjacent to the farm are agricultural buildings. His father did not require an elaborate or large dwelling. The farmhouse was simply his home, his office and his workplace, and merely an extension to and an integral part of the land he farmed. He brought up his family who lived off the farm. His father had acquired 3 further acres of land from the South Staffordshire Water Company, which was conveniently situated close to the farm and gave his father the opportunity to expand his farming operation He told us that his father had some 600 free range chickens; 7 to 10 cattle; harvested fruit off the fruit trees and grew vegetables. The farm produced milk and grew wheat, barley and oats for sale. The farm had a cold room and the apples were stored in the bedroom. During cross-examination Mr Golding conceded that the position changed in the 1980s. His sister was married in 1985 and moved out of the farmhouse. His mother died in the same year and the lease for the additional 3 acres of land expired and was not renewed.

His father lived in the farmhouse on his own and no longer required the same level of income that he had done previously. He was content to maintain a straightforward rural life and to do what he enjoyed most- farming. Mr Golding said that his father still kept hens and sold the eggs from the farm gate. He had several regular customers. His father had purchased a new tractor and bailer two years before he died. He had been bailing hay just before he died aged 81 years.

The farm income, from the 1990s, was not sufficient for Mr Golding's father to live off. He did not keep any animals nor provide any hay. He only provided a limited production of eggs from a flock of approximately 70 free range egg laying hens.. The Tribunal were satisfied that in a very limited way he was still working on the farm when he died. Mr Golding confirmed that his father had carried out some remedial work to the farmhouse, principally re-rendering it.

Executors' case

Mr Clive Beer gave expert evidence on behalf of the Executors and referred to the five tests proposed by Dr Nula Brice in *Lloyds TSB (personal representatives of Antrobus, deceased) v Inland Revenue Commissioners* [2002] STC (SDC) 468;

1. Was the farm appropriate by reference to its size, content and layout of the farm buildings and the 16.29 acres farmed? He considered that it was. The farmhouse had been so used for the last 70 years and the farm buildings are adjacent to the farmhouse.

2. Was the farm proportionate in size and nature to the requirements of the farming activities? He considered that it was. The agricultural land and buildings had been used for arable,

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hay, poultry and fruit production in various forms of intensities over a long period of time. The DEFRA statistics demonstrate a good number of similar size holdings being used as agricultural units.

3. "One knows one when one sees it"- otherwise known as the elephant test. Effectively this is a gut reaction test as to whether or not someone would reasonably see something as being character appropriate. When he looked at the physical features of the farmhouse, the farm buildings and the farm, the listing definitions and the particular history, it is clear that the house was historically part and parcel of the land.

4. The farm as seen by a countryman; This is the informed opinion of a reasonable person with rural knowledge (i.e.) would the educated rural layman regard the house as a farmhouse with land which would be character appropriate? The point here, is does the land dominate the house or vice versa. His view was that the land dominates the house within the context of the physical factors of the farm buildings and the land surrounding the farmhouse.

5. The factual historic evidence was clear, simple and overwhelming. This was an agricultural holding and has been for upwards of 70 years.

HMRC's expert view

Mr Coster, for HMRC, considered that a three-bedroom detached property occupied with 16.29 acres with a limited range of old buildings was not suited to modern farming practices. He did not consider that it was appropriate to require a dwelling house to be present in order to farm the land. He produced details of 6 comparable farms the bulk of which had been sold by auction. It would appear that only the first farm on the list was of a comparable size being 18.64 acres.

He considered that the relevant factors in deciding whether the dwelling house is 'character appropriate', are the level of farming activity and the functional requirement or otherwise of the dwelling house.

The decision

The tribunal decided that the farmhouse was 'character appropriate' to the 16.29 acres of land farmed with it.

Although not required to decide whether the house was a 'farmhouse', had they been asked to do so, they would have so decided. From the photographs provided by the experts, it seemed that the state and condition of the farm was such that it would only be acceptable as a farm house. The kitchen was spartan; apples were stored in one of the bedrooms; there was no electricity in any of the bedrooms upstairs so that they could only have been functional for sleeping and it storage of farm produce; the bathroom was downstairs, which would have been very convenient for Mr Golding, when coming in having worked on the farm. They were satisfied that the educated rural layman would also agree that the house was a farmhouse.

They accepted that the farm was not profitable. It would appear that the deceased was prepared to live off that profit and such savings as he had inherited or accumulated. These were not large, but he chose not to seek any government assistance, so they must have been sufficient for his purposes. We are assured that he was content to work the farm, to the limit of his capabilities, and to sell a few produce to his remaining loyal customers. The fact that he latterly purchased a small tractor and bailer is further evidence that he was content to work on the farm.

As Dr Brice indicated in *Lloyds TSB (personal representatives of Antrobus, deceased) v Inland Revenue Commissioners* [2002] STC (SDC) 468 the fact that the farm only made a small profit does not in our view alter the position. In Dr Brice's case the farm made substantial losses.

The question to be asked was "was the deceased farming"? At 80 years of age, it would be unreasonable to expect that to be an extensive activity. In fact if one did, there would be very few farms which would qualify as 'character appropriate'. The Tribunal suspected that as farming is very much a vocational activity, farmers are prepared to forego luxuries. Farms do make losses from time to time for a variety of reasons; crop failures; low market prices; over production; amongst others,

and capital expenditure set off against the small profits. They did not accept that the lack of a substantial profit is detrimental to a decision that the farmhouse is 'character appropriate'.

The Tribunal decided that Blue Gates Farm had been a working farm since 1940. The tribunal did not believe that anyone would purchase the farm other than for the purpose of working it up to its earlier potential. The farmhouse has been worked with the farm over the years and is of a size and proportion suitable for the farming of the 16.29 acres. The deceased worked the farm to the best of his ability up to his death and relied on its produce and income to supplement what was, by any standards, a meagre income.

They therefore allowed the appeal and dismissed the determination.

TC01211: A F Golding and J A Middleton (executors of the will of Dennis Golding deceased)

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Administration

Late submission of CIS return

The taxpayer appealed against a penalty imposed by HMRC for the late submission of a monthly construction industry scheme return.

He explained he ensured that the returns were posted on the 13th day of each month, with the correct postage paid. He could not provide proof but claimed any delay in the return arriving at HMRC's office was due to inefficiency on the part of Royal Mail.

Furthermore, the taxpayer claimed his recent compliance history indicated that his returns were submitted on time.

HMRC said that, while proof of postage was not legally required where delay was cited as a reasonable excuse, some evidence of postage should be produced. The department pointed out that the taxpayer had appealed against a late filing penalty on a previous occasion.

That appeal had been allowed, but an 'educational letter' had been sent to him, informing him that evidence of postage would be required in future.

The First-tier Tribunal concluded that, in light of the appellant's earlier appeal, he did not have a reasonable excuse.

The taxpayer's appeal was dismissed.

E Heatley (TC918)

Do Revenue have discretion to cancel gross payment status registration?

In January 2010 HMRC wrote to the appellant notifying him that his gross payment status under the Construction Industry Scheme (CIS) was being cancelled under FA 2004 s 66 on the basis of ten compliance failures. At the hearing HMRC accepted that eight of those were, in fact, problems relating to allocation of those payments by HMRC and not compliance failures at all. HMRC also accepted that, as regards one other compliance failure, the appellant had a "reasonable excuse" within the meaning of FA 2004 Sch 11, para 4(4), and that it should be disregarded. The remaining compliance failure related to late payment of income tax which was made over 30 days late. The tribunal decided ([2010] UKFTT 377 (TC)) that the appellant did not have a reasonable excuse in respect of that failure. The issue then arose as to whether FA 2004 s 66(1)—which provides: "The Board of Inland Revenue may at any time make a determination cancelling a person's registration for gross payment"—gave HMRC a discretion to cancel the appellant's registration for gross payment status or whether, in making that determination, no discretion existed and the cancellation was automatic.

On the correct interpretation of FA 2004 s 66(1) HMRC had a discretion whether to make a determination cancelling registration for gross payment. Moreover, they had to exercise that discretion in deciding whether to make a determination and could not make a determination without exercising that discretion. The disputed words in s 66(1) had to be given their ordinary and natural meaning. Placed in their statutory context it was also clear that the CIS provisions distinguished carefully between the use of the word "may" and the word "must" and Parliament had taken considerable care to distinguish between the two words. The former was invariably used to impose a mandatory obligation and the latter to confer a power or permission. Importantly the words were sometimes used in contrast to each other. Therefore the context overwhelmingly pointed to the conclusion that the words "may at any time make a determination" in s 66(1) conferred a power and did not impose an obligation. Interpreting the words purposively did not lead to a different conclusion. In addition, Hansard and the legislative history also made it very clear that it was intended to confer a discretion on the Board. Furthermore the cancellation of registration for gross payment could have very serious adverse consequences for a sub-contractor. For many contractors it was much easier to pay gross to a sub-contractor who was registered for gross payment than to deduct and account for deductions to HMRC. Many contractors would only engage sub-contractors who were registered for gross payment and cancellation would mean, in many cases, that the sub-

contractor would find it more difficult to obtain work. Also, the deduction from contract payments made to a sub-contractor whose registration for gross payment was cancelled was likely to have serious adverse cash flow consequences for the sub-contractor. In those circumstances, it was quite understandable that Parliament intended that, before a sub-contractor faced such serious consequences, some element of discretion might need to be applied. No discretion had been exercised in the instant case. It followed that the appeal would be allowed.

Appeal allowed.

Scofield v Revenue and Customs Comrs TC 1068

[2011] UKFTT 199 (TC)

Failure to submit employer's annual return

The appellant, Mr Fisher, traded as The Crispin until 28 July 2008, when the business ceased. He should have submitted an employer's annual return to HMRC by 19 May 2009 but failed to do so, and was sent a fixed penalty charge in May 2010.

The taxpayer appealed, claiming reasonable excuse. He said that, while preparing for the sale of the business, he spoke on the telephone to HMRC with regard to finalising PAYE arrangements.

According to the taxpayer, HMRC told him to send them a letter explaining about the closure of the business and that the PAYE should be brought up to date, which it was.

He said he specifically asked the person to whom he was speaking whether or not he needed to do anything else and enquired if the letter was enough.

After the conversation, the taxpayer wrote to HMRC, providing his new address and asking the department to confirm that all PAYE matters were concluded. He did not receive a reply

The First-tier Tribunal judge considered the taxpayer to have been misled by omission: 'A reasonably careful person informing the appellant of what he needed to do would have gone further and reminded him that he remained under an obligation to file an end of year return.'

He said it must have come as an 'unpleasant shock' in May 2010, when the taxpayer discovered he had been misled. The judge was sure that had the taxpayer been told to complete an end-of-year return, he would have done so.

He agreed that the taxpayer had reasonable excuse in that he had been given misleading information by HMRC.

The taxpayer's appeal was allowed.

TJ Fisher t/a The Crispin (TC1100)

Enrolment and self serve *(Lecture B661 – 12.27 minutes)/(Lecture B662 – 9.45 minutes)*

Background

HMRC's consultation launched on 31 May 2011 is probably the most important document affecting agents working in tax for the rest of their careers. Entitled "Establishing the future relationship between the Tax Agent community and HMRC" it includes proposals that will transform the way we work and our relationship with the tax authority.

In background to the consultation provided by Mike Clasper, Chairman of the Board of HMRC, Mike explained that HMRC has to balance three conflicting aspects of their operations, in the same way as most organisations, whether commercial or Government departments. In HMRC's case, these three are :

- Collecting tax and closing the tax gap
- The experience of customers, and
- Costs.

It is often difficult to balance the three and businesses will often choose one or two of these to concentrate on, at the expense of the other. Mike expressed the firm belief that going forward it would be possible to improve all three of these – not at the expense of one of them. This is in part due to a massive investment in systems, the fruits of which are presently coming on stream, and better management of internal systems.

HMRC has made clear in the consultation that the authority must work more effectively with agents, as a very significant part of HMRC's tax revenues come in from represented taxpayers, so agents are a major part of their "business model". HMRC has over the last few years adopted a segmented strategic approach to the way the organisation does business.

For example, Large Businesses are so high risk that the strategy is to deal with them on a "one to one basis". Agents remain the only large group for which the department does not have a strategy, so this new work is to establish what that strategy should look like.

Elements of the Agent strategy

The proposed agent strategy comprises three main elements. These are :

- Enrolment
- Self serve, and
- The agent view

Enrolment

One of the three main aspects of the new HMRC strategy is enrolment for the professional agent. Although some other agents (such as the voluntary organisations) will also enrol under the proposals, the broad intention is that a new "clean" database of paid tax agents who are in business will be created.

HMRC do already have much of the information that it is suggested that you provide on enrolment, but their agent database, such as it is, includes agents who have appointed themselves merely to do a tax return for a member of the family or elderly neighbour, so it is very difficult to distinguish between these agents and those who are in business as tax agents. The information HMRC has is also disparate in that they really only hold data about agents in relation to each individual taxpayer for whom they are appointed to act. It is for this reason that each time an agent contacts HMRC they have to go through a number of security questions. It is hoped that enrolment will enable a much simpler security process to be adopted.

The need to distinguish between types of agent really goes partly to security – HMRC would like to be sure that they know who the agents are that they are dealing with – and partly to communication needs. The needs of professional agents are quite different from those who have a passing knowledge of basic tax and act for only one individual.

There is also a need to protect HMRC systems from fraud. With increasing reliance placed upon an agent's work, HMRC will wish to ensure that those they rely on warrant that respect. So establishing "Who we are dealing with" might be the main objective of the enrolment phase; the subtext being "and that they are reputable persons". Note that enrolment does not seek to assess technical competence.

In terms of the initial enrolment, at the commencement of the new strategy, HMRC envisages all of those currently practising in tax as a paid agent would be entitled to enrol on the "professional agents" database. The right to enrol will not be restricted to members of particular bodies, or to those with a professional qualification in tax.

HMRC has made some suggestions as to data items they would like to be given on enrolment. Your comments on this data set are welcomed. Here are the suggestions in the consultation document.

- Name
- Business Address
- Telephone number
- Business Email address
- details of a designated bank account for the receipt of repayments on behalf of clients (if applicable)
- details of the business owner(s)/principals and their professional body membership details

- the relevant HMRC unique identifier(s) of the agent for their own tax affairs and confirmation that they have met their relevant tax obligations to file returns and meet liabilities

The reason for requesting a business bank account for client repayments (a client monies account) is to bring in controls which prevent repayments being made other than to a client's own bank account or the firm's nominated account. This is the source of a number of frauds, so HMRC is keen to close it down. If you do not handle client monies, this will not prevent you enrolling, but client repayments will always have to go direct to your client.

HMRC is also keen to explore whether enrolment should be by firm, or by member of staff, or some other structure – for large firms it might be "office of the firm" rather that the firm as a whole. Where a firm has different "agent identities" for different types of client work, a new cleansed database will allow this to be structured in accordance with the agent firm's wishes.

Is there any other information that HMRC should collect? Some suggestions I have heard include:

- Confirmation that they are registered (or otherwise regulated) for money laundering purposes
- Confirmation that they are registered for data protection purposes
- Confirmation that they hold professional indemnity insurance

In making these suggestions, practitioners considered that all of these go to show that the firm is a reputable business, and were happy to provide these assurances to HMRC.

Implementation

HMRC's proposal is that all paid agents should enrol, but the consultation document explores a number of options for the actual implementation of enrolment. These include :

- It could be rolled out at a set point in the year or staggered over a set period of time.
- It could be introduced on an incremental basis, for example by applying it to:
  - all new agent businesses, or
  - existing agents seeking authorisation to act on behalf of a new client, or
  - those seeking access to self serve options.

Your views on this aspect, as well as whether enrolment should be an annual requirement are sought. If annual renewal is not appropriate, HMRC would like to explore how the agent database is kept up to date.

Self-serve

On self-serve, Mike explained that a number of tax authorities around the world had already adopted self-serve for agents with success. The UK is somewhat late to adopt this way of working. Mike emphasised that for most agents, self-serve was not asking them to do anything they didn't already do, but was a question of giving them the tools to effect the outcome of their work directly.

Brian Redford head of the Business Customer unit (which includes agents) explained this a little later using the example of a change to a coding notice.

1. Agent computes the required adjustment to notice of coding
2. Agent writes to HMRC
3. Post outgoing from agent
4. Post incoming to HMRC
5. Letter actioned
6. Post outgoing from HMRC
7. Post incoming to agent.

At each step, time is taken, there are opportunities for delay, and of course the possibility that the message is misunderstood or not actioned correctly. Instead the agent will be able (if he wishes) to log on, enter the new code and log off again. However, this will not be compulsory – no aspect of the new strategy is compulsory except enrolment.

Full details

The consultation document sets out what may be offered as part of the self serve option for those agents who choose to adopt self-serve. IT is clear from the initial proposals that HMRC is addressing some of the key areas that agents have problems with, and seeking "transformational change" as opposed to a slight improvement in service.

It is envisaged that self-serve would require registration for this purpose (in addition to enrolment which is a quite different issue). Self-serve would be restricted to agents in business, so those filing only three or four returns a year would probably be excluded, just to keep security tight. It is possible that agents will be asked to give assurances about their IT security when they register for self serve, but no firm decisions have been taken yet.

The consultation outlines the following: (Pages 22 and 23)

"The self-serve options available to enrolled agents could include:

- Self authorisation (the ability to notify HMRC systems that agent A is acting for client B without the need for HMRC to receive a signed authority). The authority would be retained by the agent for inspection in the same way as copies of signed Self Assessment returns are retained.
- Ability to generate and amend notices of coding and manage end of year reconciliation for those outside of Self Assessment.
- The facility to see payments and liabilities across all heads of duty, for a single client in one presentation of the information.
- Online education modules to augment professional training on legislation changes and processes.
- Track and trace facilities for paper repayment claims and correspondence.
- The ability to lodge correspondence and returns/forms that are not fully online via an electronic work area."

As this is just a starting list, it is anticipated that as the process of consultation and finalisation of the strategy progresses, other ideas may be put forward. HMRC sees implementation of this project as a medium term strategy, with some aspects taking longer than others as the necessary IT developments come through. There will also be extensive pilot testing of all ideas before they are committed to, to ensure that only the best ideas are taken forward, and that the system design takes into account agents' needs.

Anticipated benefits

HMRC believes that significant time can be saved for both agents and HMRC if agents are put in a position where they can control and execute a number of basic transactions on behalf of their clients. The agent can be certain that the changes have been made promptly, and does not have to spend time chasing HMRC to check. In addition, HMRC is relieved from dealing with significant amounts of "progress chasing" post and telephone contact from agents, freeing up time to deal with other things. The consultation lists the following anticipated benefits for agents:

- information could be input once and directly onto HMRC's systems
- it would be accurately recorded, reducing the time spent in correcting errors resulting from HMRC processing, and
- agents would spend less time contacting HMRC to check that information submitted has been received and acted upon.

Planned implementation approach

HMRC will first test the concept of self-serve through a small scale pilot. The authority will invite a few agents to take part in this pilot, which would be focused on the ability to self-serve PAYE coding notices. On successful proof, HMRC then would plan to scale up to a wider number of services with at least 100 agents to provide robust evidence of the cost savings for agents and HMRC before full implementation. The effectiveness of the above pilot could be assessed by monitoring the following:

- The administrative burden savings achieved by the agents as a result of the new system
- HMRC time spent on dealing with requests addressed through the new systems and process, and
- The IT costs involved in prototyping and implementing the systems required for the pilot.

You can make your response to the consultation either directly to HMRC, or through the professional bodies. Most of the bodies involved prior to the release of the consultation document are holding special events to gather the views of members.

Contributed by Rebecca Benneyworth

Collecting debts through PAYE (*Lecture B663 – 11.34 minutes*)

Tax debts

There have been plenty of reports in recent years of taxpayers suddenly being informed by HMRC that some tax arrears have arisen and they want to collect them. This often arises when someone takes on two jobs and unknowingly has the personal allowance given to them against both sources when their employers apply PAYE. That can easily amount to tax arrears of over £1,300 per tax year (potentially plenty more than that in recent years with the large increase in the level of the personal allowance).

If this does happen the first thing to do is to see whether there are grounds for asking HMRC to apply extra-statutory concession A19 so that the tax arrears are cancelled.

HMRC guidance on delays in using information

HMRC say that if it is felt that they should have already collected the tax due in the Tax Calculation on form P800 because the information had already been provided to it and HMRC have failed or delayed to use this information, then in some limited circumstances HMRC may agree not to collect.

Main points

ESC A19 allows HMRC to not collect the tax, but it can only apply to individual taxpayers who owe Income Tax and Capital Gains Tax. It does not apply in any other circumstances where amounts owing to HMRC are in dispute.

The circumstances are that HMRC should have used the information provided within 12 months after the end of the tax year in which it is received to notify the taxpayer of any arrears.

The list below shows information that HMRC would normally use to adjust the tax code to make sure the right amount of tax is paid:

- details of a change in income
- a new job or additional job
- a taxable benefit provided by the employer, for example a company car
- start receiving a work or private pension
- receipt of state retirement, disability or widow's pension

This list is not exhaustive and each case will be treated on its own set of circumstances. This information can come from a variety of sources – the taxpayer, agent, employer or the Department for Work and Pensions.

The time limit which applies for ESC A19 is where HMRC have failed to use information received about a source of income, within 12 months after the end of the tax year in which the information is received.

In exceptional circumstances, arrears notified less than 12 months after the end of the relevant tax year may be considered where both of the following apply:

HMRC failed more than once to make proper use of information received about a source of income

HMRC allowed tax arrears to build up over two whole tax years in succession - so at least two tax year underpayments are due

A prerequisite for ESC A19 to apply, as well as HMRC considering the facts and circumstances of any claim that this concession should apply, is to determine whether it was reasonable for the taxpayer to believe (prior to receiving the Tax Calculation) that his or her tax affairs were in order.

The last time that HMRC reviewed files and sent out demands for tax arrears, it was also reported that any request that ESC A19 should apply to waive collection was met by a firm refusal from HMRC. If the taxpayer protested about that, reports suggest they were luckier second time round.

Collecting the arrears

If tax arrears are to be collected, clearly it will be fairer to the taxpayer to do so by reducing a future Code Number rather than demanding immediate payment.

The Government has consulted twice on the principle of HMRC using the PAYE system to collect more tax debts (“coding out”), and exposed draft secondary legislation for comment alongside the Finance Bill 2009 clauses that introduced this measure. These consultations received broad support and HMRC are working towards implementing this measure from April 2012 – not solely to deal with cases which are outside ESC A19 but in all other situations as well. In order to do that secondary legislation needs to be made to provide the necessary cover for HMRC to identify relevant debts to code out in Autumn 2011 and, secondly, to then begin collecting debt through the coding process in April 2012.

Increasing the coding out threshold will naturally enough ensure more taxpayers’ debts can be collected using this relatively cheap and less intrusive method. It also minimises the compliance burden on the taxpayer.

New consultation seeks views on whether the proposed secondary legislation fully implements the policy.

The policy

Completing the legislative framework to permit HMRC to code out all tax debts at its option will ensure HMRC has an additional tool available to collect older debts, and so help reduce the tax gap.

Over recent years HMRC has concentrated its debt collection resource, of necessity, on high-value debts. Unsurprisingly, say HMRC, this has led to a considerable increase in the number of small debts, particularly those less than £1,000 in value. The low value of each individual debt makes it inappropriate in most cases to take action to enforce these debts. That does not seem however to stop them threatening just that!

Where a debt is coded out by HMRC the taxpayer will be given a different tax code. This will mean that the deductions made from a taxpayer’s earnings by their employer will include an amount that will gradually reduce the debt they owe to HMRC. As such, for those in employment or in receipt of a UK-based pension, coding out provides a cheap, simple, convenient and straightforward method for clearing outstanding debts.

The intention is to increase the maximum amount that can be coded out from £2,000 to £3,000 which will clearly ensure that more people with small debts can benefit from this collection method, and HMRC can in their own words “direct its resource towards those who deliberately choose not to pay tax”.

Current position and the proposed changes

HMRC currently collects some small underpayments of tax by adjusting the tax code of the debtor if he is in employment or in receipt of a UK-based pension. This, as already stated, spreads the payment for the debtor and reduces the cost to HMRC and the administrative burden for the taxpayer of collecting small amounts.

Where a taxpayer is in receipt of PAYE income, self assessment underpayments up to £2,000 are automatically collected through the taxpayer’s PAYE code for a subsequent year.

The taxpayer can indicate, by ticking a box on their self assessment return, that they do not want the tax to be collected this way. There are plenty of stories of HMRC ignoring the ticked box.

Underpayments in PAYE cases outside the self assessment regime are similarly coded out, but a taxpayer who objects to the coding deduction either needs to make a direct voluntary payment or submit a return and self assessment in order for the underpayment to be collected through the self assessment system.

HMRC generally ensures that coding out does not result in tax deductions in excess of 50% of the gross pay for the pay period.

Finance Act 2009 widened the scope that HMRC has for coding debts out. HMRC will, subject to the draft regulations being made, be able to use the coding out procedures to collect almost all types of tax debt. Section 110 and Schedule 58 to Finance Act 2009 inserted provisions into Section 684 ITEPA to enable HMRC to collect "relevant debts" through the PAYE system. "Relevant debts" are explained at section 684(7AA) as

1. a sum payable by the payee to the Commissioners under or by virtue of an enactment, other than an excluded debt, and
2. a sum payable by the payee to the Commissioners under a contract settlement."

An "excluded debt" is defined at Section 684(7AB) ITEPA and includes tax credit debts. So if HMRC propose collecting a tax credit debt through the PAYE code, the claimant has to be given the opportunity to object to that action. Additionally all taxpayers have the opportunity to query their tax code with HMRC ahead of it coming into operation.

Next Steps

Taking account of responses to this consultation, HM Treasury will lay three sets of regulations before the Parliamentary Summer recess. This will ensure HMRC has legislative cover to begin identifying suitable relevant debts for coding out action this Autumn to then begin collection via the tax code from April 2012.

Contributed by Gerry Hart

Does an agent's error mean taxpayer is negligent?

The case

Dr Wald was paid removal expenses of £14,617 by his employer, but he did not show the excess over £8,000 on his 2006/07 tax return.

HMRC accepted that, at the time he filed that return, he had not received a P11D. However, they felt that this did not excuse him from not having realised that the excess was taxable and they imposed a 10% penalty for negligence.

Fair and just

The Tribunal commented that 'at the hearing the parties were unable to refer the Tribunal to relevant case law specifically on the meaning of the word "negligently" in TMA 1970, s 95 [4]. The Tribunal indicated to the parties at the end of the hearing that it would undertake its own consideration of relevant case law. The Tribunal left open the possibility that it might… afford the parties a further opportunity to make submissions on relevant cases identified… Bearing in mind the overriding objective in rule 2 of the Tribunal's Rules, the Tribunal has decided not to do so. The relevant cases are readily accessible, and could have been addressed by the parties at the hearing if they had so desired.'

Rule 2

Under rule 2 the overriding objective is 'to deal with cases fairly and justly' and to ensure ' that the parties are able to participate fully in the proceedings'. It does not seem fair for a Tribunal to decide a case on the basis of its own research without giving the parties an opportunity to comment on this.

The Tribunal was not prepared to attach to its decision a list of the cases that it has taken account of, even if only to seek to educate future appellants.

Readily accessible

Robert's concern was that if the Tribunal is going to do its own research, it should do it properly. The Tribunal decided that 'the obligation to file a correct tax return is on the taxpayer… If the appellant relies on an accountant to prepare and file a tax return on his behalf, then the appellant will be responsible if errors in the tax return are due to negligence by the accountant acting on his behalf'.

It quotes two Tribunal cases in support of this statement. The only problem is that these are both TMA 1970, s 29 [7] (discovery) cases, not s 95 ones. Does this matter? Surely negligence is negligence?

Well, s 29 (as it read in 2006/07) referred to the situation being ‘brought about negligently by the taxpayer or a person acting on his behalf’ whereas s 95 said, ‘If a person negligently delivers any incorrect return… he shall be liable to a penalty’.

There is no reference whatsoever there to a person acting on behalf of the taxpayer.

Taxpayer and agent

Keying ‘negligence’ and ‘penalty’ into Tolley’s Case-Link threw up 15 court cases and seven Tribunal cases with nothing in any of these cases to indicate that negligence by an agent attracts a penalty on the taxpayer.

What is the logic in Parliament seeking to punish a taxpayer for the acts of someone else and if they did, would this be compliant with the Human Rights Act?

In addition, the first HMRC consultation document on ‘Working with Tax Agents’ issued in April 2009 states (at paragraph 3.9) that ‘a taxpayer who goes to an ostensibly competent professional adviser, provides a full and accurate account of the facts, checks that advice to the limit of his or her ability and competence, and then… signs the return prepared on that basis has not been negligent.'

Nevertheless, from the cases that the Tribunal looked at, it decided that ‘the Tribunal does not find it necessary to determine precisely whether the omission… was due to an omission on the part of the appellant personally or on the part of the accountant’. On what basis could it have reached such a decision in the light of the extensive case law on s 95.

Was it an ommission?

There is nothing in the Tribunal decision to indicate what Dr Wald, who is an American, told his UK accountants. Removal expenses in the US are not taxable, so why mention them!

Worryingly, the Tribunal did indicate that it felt that a reasonable person who engages a professional accountant to complete his tax return would nevertheless personally read the 20-plus pages of guidance notes that HMRC issue with the return. Surely this cannot be true.

Why appeal?

Please remember that the penalty at issue was £264.

Dr Wald had, within a week of the inspector’s letter being sent notifying him of the error, traced a copy of the P11D and within a further week he had paid the tax outstanding.

He therefore did what a ‘reasonable man’ should do when he finds a mistake: remedy it.

Having started a formal enquiry, HMRC seemed unable to stop it. Even the internal HMRC review system, which is meant to ensure fewer cases go to the Tribunals, did not stop it. And all for a penalty of £264!

Taken from an article by Robert Mass writing in Taxation

Changes to and problems with online payments (*Lecture B664 – 19.54 minutes)*

HMRC have reminded taxpayers of a number of changes that came into play from 1 April 2011:

- Company tax returns must be filed online and in iXBRL format and all corporation tax and related payments including interest and penalties must be made electronically
- Payments of Class 2 NICs become due on 31 July and 31 January.
- HMRC now issuing late payment penalty notices to taxpayers who paid their PAYE late in the 2010/11 tax year.

- HMRC have also announced that some businesses are still filing VAT returns on paper, even though they are required to file online (i.e. were registered after 1 April 2010 or have a turnover above £100,000). From April 2011, there will be a penalty for continuing to file on paper when an online return is required:

Annual VAT exclusive turnover	Penalty
£22,800,001 and above	£400
£5,600,001 to £22,800,000	£300
£100,001 to £5,600,000	£200
£100,000 and under	£100

Working Together 21

It was also announced in the Budget that **all** remaining traders will be required to file online from 1 April 2012.

When filing VAT returns online do note that BACS or internet banking payments may take approximately three to four days to reach HMRCs bank account. This would be relevant where a business is making use of the 7 calendar day extension. The monies must be with HMRC by the 7th in order to avoid the default surcharge.

If traders make use of the direct debit option there is less of an issue as HMRC make the necessary arrangements for collecting the VAT due. These "direct debit" traders also receive another 3 or 4 days beyond the normal 7 day extension – this is why the direct debits are normally taken around the 10th or 11th of the month following the normal due date.

From 1 April 2010 all cheque payments sent by post are treated as being received by HMRC on the date when the funds clear – not the date when the cheque is received. This means that businesses must allow enough time for their payment to clear into HMRC'S bank account no later than the due date shown on their VAT return. A cheque takes three bank working days to clear – excluding Saturdays, Sundays, and bank holidays.

To allow for possible postal delays businesses should allow at least three working days for a cheque payment to reach HMRC and a further three days for the payment to clear the bank.

This change does not affect any cheque payments made by Bank Giro. Payments by Bank Giro are treated as electronic which means that businesses will get up to an extra seven calendar days for the cleared payment to reach HMRC (unless they use the Annual Accounting Scheme or are required to make Payments on Account).

In recent months there have been reported cases of traders missing the online payment dates.

The Team Brand Communication Consultants Limited TC00884

The appeal was against a default surcharge for the return in respect of the 04/10 period, in the amount of £21,636.89. The penalty had been calculated at a rate of 5%.

The Appellant is a communications agency, providing advice on refreshing brands and the development of websites. Many of its clients (approximately 50% at the relevant time) were in the public or "not for profit" sectors.

The period from February to April each year is a particularly busy time for the Appellant. Many of its public sector clients have a financial year end at 31 March and seek to spend the balance of their budgets by the end of the financial year on a "use it or lose it" basis. The VAT period 04/10 was particularly active for the Appellant with slightly over £4 million in sales.

The VAT return and payment were both received two days late on 9 June 2010. The due date, in respect of both the return and the payment, was 31 May 2010. However, because the Appellant paid electronically it was allowed an extra seven calendar days in which to submit its return and payment so that the due date was extended to 7 June 2010. The surcharge notice was issued because the return and payment were two days late.

Although the Appellant's business had been very busy in February and March of 2010 work began to fall off in the run-up to the General Election in May 2010 and even more significantly after the General Election. Mr Gilmore estimated that the Appellant's revenues dropped by 50% in this period.

It was clear that many of the Appellant's clients in the public sector were going to be affected by public expenditure cuts and in some cases the bodies themselves would be disbanded.

Mr Gilmore stated that it was apparent towards the end of May 2010 that the fall-off in work was not a short term "blip". In the last week of May the Appellant's management started to discuss redundancies and it was apparent that between 20% and 30% of the Appellant's workforce of approximately 105 would need to be made redundant.
Mr Gilmore is the financial director of the Appellant and held that post at all times material to this appeal. Although described as a "director" he is not in fact a member of the board of directors of the Appellant but holds a senior management position as an employee.

Mr Gilmore said that in the first week of June all members of staff, except directors and (all but one) senior managers were made part of one of the eight different redundancy pools. Mr Gilmore was the only senior manager to be placed in a redundancy pool. Out of a total of 105 members of staff, 92 employees were placed in redundancy pools.

Mr Gilmore had entered in his diary the due dates for VAT returns and payments. However, he was preoccupied by the threat of redundancy. He believed that his job was at risk. He had seen the redundancy pools and knew that he was the only senior manager in any of the pools and, consequently, believed that there was a real risk he might be made redundant. This took precedence in his mind over everything else. Apart from his own position, his time was taken up running through the financial implications of various redundancy scenarios for the Appellant. The commercial director was also preoccupied by the redundancy process and therefore gave little or no input into the work necessary to collate information necessary to prepare the VAT return.

He recalled seeing the prompt in his diary concerning the due date for the VAT return and payment for the period 04/10 but wrongly thought he had a further seven working days in which to submit the return and make the payment. In fact, as Mr Gilmore acknowledged the extension afforded to businesses which filed electronically was, in fact, seven calendar days. He attributed the mistake that the fact that he was preoccupied by the redundancy situation.

The Tribunal accepted this as reasonable excuse for the late return. It considered that Mr Gilmore was a credible witness; he had clearly been anxious about the threat to his job caused by the Appellant's redundancy programme. The Tribunal accepted his explanation that in his anxiety caused by circumstances beyond his control he made a mistake about the date on which the VAT return and payment needed to be made. The timing of the redundancy discussions coincided exactly with the time when the return needed to be prepared and payment made. This unusual combination of circumstances resulted in the payment and return being made two days late.

Dental IT Limited TC001002

The company submitted returns online, and was subject to default surcharge penalties for the 01/10 and 04/10 periods, against which they appealed on grounds of reasonable excuse.

The Appellant first defaulted in the 01/09 period, following which a help letter was issued to the Appellant by HMRC. Ms Beesley, a Company Director and the person responsible at that time for submitting the VAT returns and payment, was aware of the default. She made a telephone call to HMRC on 9 March 2009, a transcript of which was provided and which made clear that payment was late.

A further default occurred in the period 04/09, again relating to a late payment of VAT, following which Ms Beesley received a Surcharge Liability Notice which prompted her to call the HMRC helpline again. It is the content of this telephone call which goes to the crux of the case. Ms Beesley did not attend the hearing, having left the company in early 2010, but the transcript of the telephone conversation between Ms Beesley and HMRC on 23 June 2009 was provided, in which she stated the company had received a surcharge liability notice and that she wanted to “check what’s going on”. In summary, Ms Beesley was told that payment had been received on 10 June 2009 and was therefore late; it being due on 7 June 2009.

The HMRC representative at the VAT call centre stated that no financial penalty was attached to the

late payment and that Ms Beesley had "at the latest until the 7th" to make payment.

Further defaults occurred in respect of late payments in the periods 07/09 and 10/09 following which Surcharge Liability Notice Extensions were issued, although it remains unknown if they were received. No penalties arose as the tax due fell below the de minimis amount of £400. The payments were 3 and 4 days late respectively. The penalties subject of this appeal were issued for the periods 01/10 and 04/10. Mr McNaughton (a director of the company) submitted that HMRC had failed to make the company aware of the fact that payments took time to clear and as a result they had fallen in to default.

Ms Beesley's role was taken over by Ms Becky Callan who attended the hearing and gave credible evidence to the Tribunal. Ms Callan described how she had received clear and unambiguous instructions from Ms Beesley as to the procedure for submitting returns and payments. Ms Callan was instructed by Ms Beesley that both the return and payment must be made on the 7th of the relevant month. Ms Callan stated that she had spent time with Ms Beesley prior to taking over the role, during which she had observed that procedure being carried out by Ms Beesley. Ms Callan stated that she found the process straightforward and that she had followed the same procedure without any doubt when she took over.

The Tribunal found as follows:

It did not accept the Appellant's submission that HMRC ought to have made the company aware of the fact that payments made by BACS can take 2 or 3 days to clear. Ignorance of the law or banking procedures involved in making payments cannot amount to a reasonable excuse and the onus must rest with the taxpayer to ensure he is aware of, and meets, his obligations under the VAT regime.

In relation to the telephone call made by Ms Beesley to the HMRC VAT call centre on 23 June 2009, the Tribunal made a finding of fact that Ms Beesley was clearly seeking assistance and clarification as to why the Surcharge Liability Notice had been issued and how the company could ensure compliance in the future. Ms Beesley was advised by HMRC that the company had "at the latest until the 7th" to make payment.

It is clear from the records produced by HMRC that following this advice, all VAT returns submitted by Ms Beesley were received by HMRC on the 7th of the relevant month. It is possible to infer from the very short default periods of payment that the tax due was paid on the same date, although not cleared until after the deadline. This is corroborated by the evidence of Ms Callan that she was told by Ms Beesley that she must submit both the return and payment on the 7th.

Ms Beesley had acted as any reasonable business person in seeking advice from the HMRC VAT call centre and that she had acted upon that advice to ensure compliance with the Appellant's VAT obligations. Although HMRC made submissions that information is widely available on the HMRC website, which warns of delays in electronic payments; however the specific advice given by the HMRC representative by telephone clearly indicated that payment by or on the 7th of the relevant month would ensure that the deadline was met. Ms Beesley acted upon that advice.

It is unfortunate that matters were no doubt confused by the fact that no penalties were imposed for the two subsequent defaults due to the fact that they fell below the £400 threshold, in all likelihood confirming to Ms Beesley that the company was fulfilling its obligations. The Tribunal accepted the evidence of Ms Callan and Mr McNaughton that the company did not receive any Surcharge Liability Notice Extension forms in respect of these defaults and as a result the Appellant (through Ms Beesley and Ms Callan) continued to follow the advice given by HMRC.

In the particular circumstances of this case the Tribunal found that the Appellant had, through the periods of default, acted on the misleading advice given by HMRC and that there was a reasonable excuse.

AUKO Limited TC01045

The company submitted returns online and paid by internet banking, but not by direct debit. In summary, the Appellant accepted that it had entered the 5% surcharge regime as the result of two previous defaults which had not attracted a penalty as the amount on the second default was below the threshold of £400.00.

The director had received the VAT figures from the company's bookkeeper on 5 October 2009, and made payment of the £16,005 59 due as soon as possible. The director was not at her office on 6 October 2009 and so could not authorise a transfer by the usual means of a secure internet connection. She telephoned the company's bank who informed her that the company could only make payments of £10,000 per day by way of internet transfer. The director therefore authorised payments in two tranches, the first for £10,000 and the second for £6,005.59. She produced a bank statement from the Appellant showing that funds had been transferred to enable the payments and that sufficient funds were available to cover the whole sum due. The bank had not offered the facility of a CHAPS payment.

Unfortunately the penalty was upheld.

Contributed by Dean Wootten

New penalty arrangements – 2012

The modernisation of the late filing and late payment penalty system continues, and Finance (No 3) Act 2010, sections 26 and 27 together with Schedules 10 and 11 include details of the new VAT penalties which will replace VAT default surcharge at some point – the changes are dependent on amendments to HMRC's computer systems and therefore will be implemented over the next few years. The new penalties dealt with here will also apply to insurance premium tax, aggregates levy, climate change levy, landfill tax and all excise duties.

Late filing penalty

The penalties will be very similar to the existing VAT default surcharge regime, but with separate penalties for late return and late payment. The penalties for late returns will be as follows:

- First late return – no penalty but penalty period starts; initial penalty period is one year
- Second late return (first late in penalty period) penalty £100;
- Third late return – penalty £200;
- Fourth late return – penalty £300
- Fifth and all subsequent late returns – penalty £400
- Each late return extends the penalty period to the anniversary of the most recent default
- Returns that are more than 6 months late attract a penalty of 5% of the amount due, with a further similar penalty at the 12 month point, and
- Those deliberately withholding returns to prevent HMRC from correctly assessing the tax due will be liable to a penalty of up to 100% of the tax due.
- Penalties for monthly returns are similar, except that the increases apply to every third late return in the penalty period

Late payment penalty

The late payment penalties are based on the VAT (or other tax) due on the return, as follows:

- First late payment – no penalty but penalty period starts; initial penalty period is one year
- Second late payment (first late in penalty period) penalty 2% of the tax due;
- Third late payment (second late in penalty period) – penalty 2%;
- Fourth late payment– penalty 3%
- Fifth and all subsequent late payments – penalty 4%
- Each late payment extends the penalty period to the anniversary of the most recent default

Business Taxes

Key man insurance – have we got it right?

There is a consensus (or perhaps not) over deductions for key man insurance premiums paid in respect of director-shareholders when the policy is to replace a hole in the company's income, rather than a policy of capital protection.

Rules have been interpreted via case law as there is no specific legislation, but are the premiums deductible or aren't they?

The Anderson Rules

The tax treatment of key man insurance premiums is often referenced as following the 'Anderson Rules', which are based on a Commons reply by the Chancellor of the Exchequer in 1944, Sir John Anderson.

> 'Treatment for taxation purposes would depend upon the facts of the particular case …... I am, however, advised that the general practice in dealing with insurances by employers on the lives of employees is to treat the premiums as admissible deductions, and any sums received under a policy as trading receipts, if:
>
> (i) the sole relationship is that of employer and employee;
>
> (ii) the insurance is intended to meet loss of profit resulting from the loss of services of the employee; and
>
> (iii) it is an annual or short term insurance.
>
> 'Cases of premiums paid by companies to insure the lives of directors are dealt with on similar lines.'

It is condition (i) of the rules above that has created the most difficulty, in relation to the potential dual benefit arguably receivable by a director in their personal capacity of shareholder, as opposed to them utilising the funds as steward of the interests of the company.

DH Williams's Executors

On the death of Mr Crawford, a director, the payout of £15,000 received by the company (plus a further amount from reserves) was distributed in full – but only to two of the shareholding directors, Mr Crawford's estate and Mr Williams (who was then alive).

Overall, the original Commissioners felt that the directors were concerned with the prospect of loss to themselves or their families, rather than loss to the company. However, the case really concerned whether payments out of the company of the insurance premium were deductible and not the premiums themselves.

Gray & Co v Murphy

In *Gray & Co v Murphy* 23 TC 225 [3] premiums were addressed as a specific issue and were held to be deductible. The proceeds of an insurance policy held in the company's name on the life of the works foreman (a non-director and non-shareholder) were held to have been revenue.

This would be the case whether the proceeds were received as an income stream or as a lump sum. The policy would pay out whether it was a work or unrelated accident as the cause of death or injury. The case was about whether premiums were deductible, whether proceeds were taxable income of the company, and whether disbursements to the widow were deductible (the answers being 'yes', 'yes', and 'no' respectively).

So, Gray allows deductions of premiums covering a normal employee, but does not deal with questions regarding premiums for shareholder-directors.

Beauty Consultants

HMRC explain their views on *Beauty Consultants v HMIT* [2002] SSCD 352 (SpC 321) [4] in the *Business Income Manual* at BIM45530, saying that 'where the key person is a director whose death would significantly affect the value of shares in the company, one of the purposes for taking out the policy may be a non-trade purpose of protecting the value of the director's shares and therefore the value of their estate ... [and are] not paid wholly and exclusively for the purposes of the company's trade'.

HMRC only refer to a disallowance where it is a shareholding-director's life that is covered.

In *Beauty Consultants* three policies were not deductible as the insurance proceeds would be payable to the directors and not the company. Those premiums clearly fail the 'wholly and exclusively for the purpose of the trade' test now contained in ITTOIA 2005, s 34 [5] and CTA 2009, s 54 [6].

Interestingly though, in respect of the third policy, Special Commissioner Dr John Avery Jones stated that 'the result might be different if the policy had been assigned to the taxpayer company, but there is no evidence that it has been'.

Instructions and interpretations

The old *Inspector's Manual* at IM476 used to refer to a disallowance of the premium where the policy would 'benefit a controlling director or shareholder'; but it is major shareholders solely to which the current *Business Income Manual* at BIM45530 refers.

HMRC instructions no longer refer to control, and therefore the waters are muddier; and we don't have a tax case that has explored the case of a non-controlling shareholder. What is the definition of 'major' anyway?

Before automatically assuming that the premiums are allowable or not, it is worth enquiring into who is the beneficiary, their relationship to the company, and the exact reasons for the policies will be worthwhile.

Taken from an article by Rob Durrant-Walker writing in Taxation

Shooting rights

Mr Harrison was offered the opportunity to organise a shoot by a landowner in Norfolk. He formed a syndicate with friends and the shooting rights were then granted jointly to Mr Harrison, who would do the paperwork for the syndicate, and Mr Tilney, who would organise practical aspects of the shoot. Some years later Mr Tilney withdrew from the arrangements and Mr Harrison became the sole licensee of the shooting rights. He also became licensee of the shooting rights to neighbouring land and organised a shoot there for a second syndicate (which was also of friends but only contained one member of the first syndicate, not Mr Harrison).

There are significant costs involved in organising a shoot, including purchasing and feeding birds, employing a gamekeeper and providing the gamekeeper with a suitable vehicle. The members of the syndicate agreed to share those costs. They met occasionally to agree the level of their contributions and to decide on unusual items of expenditure.

The aim was to break even financially, so that a surplus in one year was met with reduced contributions in the next year and a deficit by increased contributions. No attempt was made to buy or sell membership of the syndicate and no shooting was made available to non-members for a fee. However, the landowner of the first estate was allowed to shoot on a certain number of days in return for granting the rights.

HMRC took the view that Mr Harrison had exploited the shooting rights over the two estates as part of an economic activity. He had incurred all the expenses himself and had charged syndicate members fees to cover those expenses. Thus the fees in total were his income and as that exceeded the VAT registration threshold year by year, he ought to have been registered since 1 March 2003. Assessments in excess of £75,000 were raised, plus a late registration penalty.

Mr Harrison argued first that he had not exploited the shooting rights at all. He had been granted them in a fiduciary capacity for the syndicates, which had, in turn incurred all the expenses and shared those costs among their members. If he had made any supplies of services at all, those supplies were no more than of his services as an administrator, for which he received no payment.

But even if he did receive payment in the form of reduced contributions to the syndicate of which he was a member, that was a figure considerably below the registration threshold every year.

Mr Harrison then argued that if he did make supplies of shooting rights to the syndicates, the value of those rights was below the registration threshold (it could be estimated by attributing a value to the shooting enjoyed by the first landowner in return for granting the rights).

Finally, Mr Harrison argued that if he was held to have incurred all the expenses himself and made supplies of services to syndicate members in return for fees, those supplies were not made in the course or furtherance of any business carried on by him.

The Tribunal's decisions were that—

- the only supplies which Mr Harrison made were supplies of services of administering and managing shoots operated by the syndicates to which he supplied those services
- Mr Harrison did not make a supply comprising the grant of shooting rights or the provision of a shoot
- the value of the supplies of services of administering and managing shoots did not exceed the registration threshold in any year
- even if, contrary to that decision, Mr Harrison did make a supply comprising the grant of shooting rights or the provision of a shoot, those supplies were not made in the course or furtherance of any business carried on by him and hence were not chargeable to VAT and
- if the Tribunal was wrong and Mr Harrison was liable to register for VAT purposes, he had a reasonable excuse for his late registration.

Whilst the Tribunal's explanation of why Mr Harrison was not carrying on a business came after its decisions that Mr Harrison had not been the exploiter of the shooting rights and that he had not made supplies comprising all the expenditure of both syndicates, that explanation illuminates the prior decisions:

> "It was a matter of high significance in both shoots that all the members should be good friends and well-known to each other from other pursuits, like-minded and from a similar background. This was so not only in relation to the original members when the syndicates were first established, but was an important factor in bringing in new members when old members retired.
>
> "Great care was taken, when a member was prevented from taking up a day's shooting, either to exchange his place with another member, or to offer the day, at no cost, to someone outside the syndicate who was nevertheless known to the other members who would be shooting that day.
>
> "The shoots had a particular ethos which all the members wished to preserve: essentially the shoot comprised local farmers and their friends who wanted quality and well-run shooting sport in its widest country pursuit sense without the trappings and costs associated with shoots aimed at a more wealthy clientele.
>
> "A feature of that ethos was the readiness of members to contribute skills and time to provide or improve shoot facilities, and to help run a shoot day on days when they were not shooting – as one syndicate member put it in his witness statement: "everyone mucks in".
>
> "Contributions are made for the sole purpose of meeting the shoot expenses, and not to result in a profit. In any year deficits are borne rateably by members and surpluses are returned rateably to members through the mechanism of being carried forward and contribution adjustments made for the following year. No payment is made to members as they retire, and no joining fee is required of new members.
>
> "Decisions affecting the shoot, other than routine matters, are reached on an informal consensus basis by all members.
>
> "There is no advertising for new members.
>
> "No days are let."

The Tribunal also decided not only to order that the pre-1 April 2009 costs regime should apply to the appeal insofar as it was current proceedings – that is, an appeal brought before 1 April 2009 – but also that such aspects of the consolidated appeal as had been raised after 31 March 2009 should also be subject to the old costs regime. Such appeals as had been brought under the new regime were effectively incidental to the main appeals (on requirement to register and the assessments).

Comment: It is understood that this appeal arose from HMRC's “National Shooting Project”. On the assumption that this case is not atypical, other organisers of private shoots will have been assessed, as Mr Harrison was, to large sums of VAT and penalties on what might be described as a wildly unrealistic view of the law. Even with an award of costs Mr Harrison will have been put to considerable expense and it is also telling that HMRC insisted on his paying the tax assessed prior to the appeal being heard, even going so far as to oppose his hardship application. This case does not reflect well on HMRC.

Edward George Harrison TC1205

Costs of planning enquiry – capital or revenue?

This was an appeal by Market South West (Holdings) Limited against a decision of the First-tier Tribunal (TC00432) issued on 17 March 2010.

In summary, the Appellant, which operated a market, had various planning permissions that purported to restrict its right to trade to certain days of the week. The Appellant traded on other days and the local authority issued an enforcement notice against which the appellant appealed incurring fees.

Issue for the First Tier Tax Tribunal

Were the fees capital expenditure incurred in order to enhance and modify an intangible capital asset or were they revenue expenses incurred to clarify and defend the existence of an original right to trade, in order to earn more profits for the Appellant?

1991 planning

Outline planning permission (the "OPP") was granted by Restormel Council ("the Council") to the [Appellant] on 21 June 1991 for an 85,000 sq ft building for non-food retail. The OPP contained no conditions limiting the days on which the market could operate.

The building was constructed in accordance with the OPP and a Reserved Matters Planning Approval (the "RMA") was granted on 9 September 1991. This did contain restrictions on the days on which the market could operate; trading could only occur on Saturdays and Sundays.

1994 extension planning

In October 1994 a further planning application was made and permission was given for an extension to "square off" the original building. This permission also restricted trading days to Saturdays and Sundays.

The market operated on other weekdays and by 1996 it was operating on Bank Holidays and for three days leading up to Christmas.

1997 planning to regularise trading

The Council considered that there had been a breach of the original planning permission due to the weekday opening and invited a further planning application from the [Appellant] to regularise trading on 11 October 1996. On 6 February 1997 planning permission was granted to allow the Appellant to trade at the site on Saturdays, Sundays and any additional 10 days in the year.

Wednesday trading

During the summer of 2001 the market traded on 18 Wednesdays. It also opened on every Wednesday from 3 April 2002. The Council issued an enforcement notice and the Appellant appealed first to the planning inspector and then to the High Court. Leave to appeal to the Court of Appeal was rejected.

The fees which are the subject of this hearing were incurred in taking these legal actions with an intention to benefit the trade of the.

First Tier Tribunal

HMRC argued that the Appellant's lack of use and lack of attempt to defend their rights under the 1991 OPP meant that no capital asset existed prior to the rights conferred by the 1997 Planning Permission.

The Tribunal would not go quite as far as to say that no asset existed prior to that date, but would agree with HMRC's proposition that the expenditure in question went beyond the mere maintenance of an existing asset.

If not creating a new asset, the 1997 Planning Permission was certainly an attempt to alter the state of the existing asset, by bringing back to life and regularising rights which had not been legally tested prior to that point.

The Tribunal concluded that, looking at the full commercial picture, the £179,071 of professional fees spent as part of what became known as the "Wednesday Market Appeal" are most properly treated as expenditure of a capital nature.

Appeal to the Upper Tribunal

The planning inspector's decision was first, that the restriction on the days' trading in the RMA was invalid (Rights under the OPP could not be taken away by the RMA) and therefore the Appellant could trade at any time between 1991 and 1997 as to the original building; the planning permissions were all valid.

The appellant contended that as a result of the invalidity of the conditions in the RMA, the Appellant had a right to trade at any time and so the expenditure was incurred in defending its right to do so, which is deductible expenditure.

Mr Davey contended that the Appellant's only right to trade was that contained in the planning permissions, the restrictions in which were valid, and so the expenditure was incurred in trying to enlarge the scope of its right to trade, which is capital expenditure.

Normally one can start with analysing whether there is an asset and whether the expenditure is on its improvement. But here the expenditure is on determining whether the Appellant already had the right to trade on all Wednesdays or whether it was acquiring a right to do so.

The principle in *ECC Quarries* applies here to the extent that the Appellant was incurring expenditure contending that it should be granted planning permission to trade on all Wednesdays on the basis that it had only the rights under the 1994 and 1997 planning permissions and so that expenditure is capital.

The principle in *Borax Consolidated* equally applies to the extent that the Appellant was incurring expenditure contending that it had the right to trade without restrictions, and that expenditure is deductible.

There should be an apportionment on the analogy of expenditure on a building that is partly an improvement and partly repairs. I consider that in deciding that the whole expenditure was capital the First-tier Tribunal made an error of law and therefore set aside their decision and remit the case to the same tribunal to determine in the light of any further evidence the extent to which the expenditure is capital or revenue.

Markets South West (Holdings) Ltd v Revenue and Customs Commissioners

FTC/49/2010

Value Added Tax

Fees paid by non- members at golf clubs

HM Revenue & Customs has lost a tax tribunal case over whether VAT is chargeable on the fees paid by non-members to use the course at golf clubs.

Supplies to members of a golf club have been exempt from VAT since 1990, but HMRC has always taken the view that 'green fees' payable by non-members should be subject to VAT at the standard rate.

However, the First Tier Tax Tribunal judgment in the case of Bridport & West Dorset Golf Club has ruled against HMRC. It said that the provision of facilities to play should have the same VAT treatment irrespective of whether the person playing paid an annual membership subscription or was a visitor to the club paying a 'one off' green fee.

As a result, the charges made to both full and temporary members are exempt from VAT.

Lorraine Parkin, head of indirect tax at Grant Thornton said: 'This is a significant decision because it was the lead case on this issue, and hundreds of claims are said to have been lodged with HMRC by members' golf clubs in the UK. It means that guest players at such courses will no longer have to pay VAT to play.'

HMRC has 56 days to appeal against the decision to the Upper Tribunal.

Accountingweb , June 13 2011

HMRC targets VAT defaulters, private tutors and e-marketplaces

New campaigns targeting VAT defaulters, private tutors and e-marketplaces will be launched by HM Revenue & Customs (HMRC) over the next year.

HMRC will use cutting-edge tools such as "web robot" software to search the internet and find targeted information about specified people and companies. Using the software, the department can pinpoint more accurately people who have failed to pay the right tax. The "web robot", used with the department's Connect computer system, also helps find people who are trading without telling HMRC.

Connect alerts HMRC to previously invisible tax evasion by matching a vast amount of HMRC and third-party data, enabling a fast and focused response to tax evasion. It shines a light onto previously hidden relationships, uncovering anomalies between such elements as bank interest, property income and lifestyle indicators before homing in on unexplained inconsistencies.

Before designing and launching the campaigns, the department will seek input from interested parties.

HMRC announced last month that a campaign targeting VAT rule-breakers trading above the £73,000 turnover threshold but who have not registered for VAT will be launched in the summer.

Other campaigns that will be launched in 2011/12 will focus on:

- Those who provide private tuition and coaching. This addresses the risk posed by all professionals who, because of their field of expertise, are able to earn money from providing tuition and coaching - either as a main or a secondary income. It covers people providing private lessons, regardless of whether they have a teaching qualification, and could include, for example, fitness/dance/lifestyle coaches through to national curriculum subject tutors and others.

- E-marketplaces. This will cover those who are using e-marketplaces to buy and sell goods as a trade or business and who fail to pay the tax owed. People who only sell a few items

and who are not traders are unlikely to be liable to tax and will not be targeted by this campaign.

- Trades. This will build on HMRC's plumbers' campaign and give an opportunity to another group of tradespeople to come forward and declare unpaid tax.

Mike Wells, HMRC's Director of Risk and Intelligence, said:

"We want to make sure HMRC listens to as many informed views as possible for our future campaigns. We want the views and experience of people and organisations outside the department to play a fuller part in the campaigns that we design for customers.

"By being open about our areas of interest for the coming year we hope to maximise that exchange of information and ensure we reduce the tax gap and help customers pay what they owe.

"We will use the information we gather to pursue people who choose not to use the opportunities we provide for them to put their affairs in order on the best possible terms. It will be more expensive if we come and find people, so I urge them to come forward and disclose voluntarily."

So far, more than £500m has been raised by HMRC from voluntary disclosures and a further £100m from follow-up activity. Previous campaigns have targeted offshore investments, medical professionals and people working in the plumbing industry.

Information on campaigns for 2011, including how people can work with HMRC to influence their development, will appear on the HMRC campaigns pages shortly (http://www.hmrc.gov.uk/ris/hmrc-campaigns.htm).

HMRC NAT 53/11: HMRC extends tax cheats campaigns

Eastwell Manor Ltd

Eastwell paid its VAT late and incurred a default surcharge of £18,453 at the 15% rate. It argued that the surcharge was disproportionate, given that the payment was only one day late.

The Tribunal noted that the default surcharge system is not disproportionate per se, that issue having been extensively reviewed in Greengate Furniture Ltd 19796. However, as explained in Enersys UK Holdings Ltd TC335, it is possible for an individual default surcharge to be disproportionate (that is, “not merely harsh but plainly unfair” – per Lord Justice Simon Brown in International Transport Roth GmbH v Home Secretary [2003] QB 728, at para 26) in exceptional circumstances. The Tribunal said in Enersys:

> “I see no inherent difficulty in the possibility that a usually reasonable and – within the bounds of the state's margin of appreciation – proportionate system might occasionally lead to an unacceptable result, one which cannot be salvaged by recourse to the proposition that because, by and large, the system produces reasonable results the occasional disproportionate outcome must be tolerated, and an individual taxpayer's rights offended, in the interests of the greater good.”

The Tribunal agreed with that analysis.

However, the Tribunal held that the penalty was not disproportionate in this case, because—

- it was only 1% of turnover;
- Eastwell had chosen not to pay HMRC on time;
- payment was in practice more than one day late (the extended due date was a Sunday and payment was made on the Monday, when Friday was the practical due date); and
- Eastwell could certainly have afforded to pay £100,000 in time and so could have reduced the penalty by £15,000.

The appeal was therefore dismissed.

Comment: The Tribunal added an interesting footnote to its decision:

"Before concluding we add a few comments on what appears to us to be a standard letter from HMRC to the taxpayer rejecting the appeal against the surcharge. It contains the following passages (with original emboldening):

- "Please note that you cannot appeal simply on the grounds that you consider a surcharge is too severe. The rates of surcharge are laid down in law, and the law grants neither this Department nor the VAT Tribunal [sic] any discretion to mitigate any surcharge …
- "The Tribunal will only remove a surcharge if:

  "(a) it is satisfied that the taxpayer had a reasonable expectation that the return and/or payment would be received by HMRC by the due date; or

  "(b) there is a reasonable excuse for the return or tax not having been sent in on time."
- "These statements are incorrect as a matter of law and could lead some taxpayers to believe that the issue of proportionality cannot be considered by the Tribunal. We trust therefore that appropriate amendments will be made."

TC1155

Irene Susan Jennings

A differently constituted Tribunal decided in case TC362 that DIY housebuilder's relief was available to Ms Jennings in relation to the construction of a holiday home. This led to the issue of HMRC Brief 29/10, acknowledging HMRC's acceptance of that decision.

However, whilst a number of other issues between them had been resolved, HMRC did not accept that Ms Jennings held a valid invoice, so the parties returned to the Tribunal.

One issue that had been resolved was Ms Jennings' insistence that HMRC should consider relief under SP 01/07: "Input tax deduction without a valid invoice". Ms Jennings was eventually persuaded that this issue was irrelevant, because the tax in question was not input tax.

On the other hand, HMRC had also misunderstood the position. The holiday home in question had been destroyed by fire and HMRC took a degree of convincing that Ms Jennings did not stand to recoup the VAT she had suffered twice: once by HMRC refund and once by insurance payout.

The remaining question for the Tribunal to decide was whether a letter describing itself as the following constituted a valid invoice for these purposes (VAT Regulations 1995 (SI 1995/2518), Reg 201(b)(ii) requires a person claiming a refund of tax in these circumstances to provide "an invoice showing the registration number of the person supplying the goods, whether or not such an invoice is a VAT invoice, in respect of each supply of the goods on which VAT has been paid which have been incorporated into the building or its site"):

> "… statement for the payments we have received for which our thanks and to confirm the outstanding balance that will be required 7 days prior to the delivery of the log house and its components. This is due for dispatch on week 30 ..."
>
> The letter continued:
>
> "Expected delivery to Norfolk site is week 31, 3rd – 4th August 2005, and we will confirm the actual day when DFDS forward to us their confirmed loading documentation."

Other than that, the letter set out the amounts of the money paid so far and the one payment which remained, as to which there was no dispute, for the "Manufacture of special design log house and sauna boat house buildings".

It was accepted by HMRC that the description of the goods was adequately amplified in linked documents. The VAT on the total payment was shown clearly and separately as £15,712. The letter was on the supplier's headed stationery and showed its VAT registration number.

Finally, the Tribunal held on the facts that the supply was of materials only and hence correctly standard-rated.

The Tribunal said:

> "We have found, and indeed it was agreed, that the letter adequately identified the subject matter of the supply. The letter correctly identified the price payable, the amount that had been paid and that which remained to be paid, and it also identified the moment at which that final payment was due.
>
> "We have looked at (though we were not referred to) the dictionary definitions of "invoice" and we find nothing to suggest that this letter should not be within the ordinary meaning of that term, namely a statement identifying a supply of goods or services, the amount payable for them and the time when payment is to be made. We find that the letter of 18 July 2005 to the taxpayer was clearly an invoice and that it is a sufficient basis to attest the refund claim under appeal. There is no suggestion that the other requirements of the regulation are not met."

The appeal was therefore allowed.

TC1160

Value Catering Ltd

Value supplied food on trays to people at events. The Tribunal had to decide whether these supplies were zero-rated supplies of food, or standard-rated supplies in the course of catering.

There were three distinct classes of supply to consider.

The first comprised supplies to trade stands at Farnborough Air Show. Broadly, these were either for the sales people manning the stands (who could not get away from their stands to eat) or for provision to staff and visitors to the stands. Value argued that sales people manning the stands were not at the event in order to be entertained, so the fact that the food was supplied in connection with an event should not raise a presumption that the supply was in the course of catering. The Tribunal disagreed, opining that it was the event which mattered, not whether the recipient of the supply was being entertained.

On the facts, the Tribunal considered the following factors pointed towards catering—

- the food was supplied in connection with an occasion or other event known to Value
- the food was made to the customer's order
- the customer could make up its own menu
- the food required no further preparation before consumption other than removing the trays from fridges and placing them on tables and removing the covers
- the food was well-presented and in a form where one would ordinarily put it on the table to be eaten with no further steps being taken
- cutlery was either provided or available as an optional extra (and in a substantial number of cases the option was exercised)
- the food was delivered at the customer's convenience
- most menus were intended to be a complete meal or provide a snack between meals.

In favour of a mere supply of food were that—

- no waiting service was provided
- customers had to place the food trays on the tables, help themselves to the food off the trays, and clear up afterwards
- the food was not consumed on Value's premises.

The Tribunal held that in this context Value supplied food in the course of catering, which was a standard-rated supply.

The second class of supply was a food delivery service advertised as making entertaining easier. In favour of catering were that—

- although the specific event was not always known to Value, it was Value's expectation that the food delivery service would be for an event – whether a private party or an office meeting
- the food was made to the customer's order
- the customer could make up its own menu
- the food would be delivered to the customer's premises at an agreed time
- the food required no further preparation before consumption other than placing it on tables and removing covers
- the food was attractively displayed
- cutlery, etc, was available as an optional extra
- most menus were intended to be a complete course or a complete meal.

Pointing to a supply of food were that—

- Value did not necessarily know about the event for which the food was supplied
- no waiting service was provided
- customers had to place the food trays on the tables, help themselves to the food off the trays, and clear up afterwards
- the food was not consumed on Value's premises.

Again, on balance the Tribunal held that this was a supply in the course of catering.

The third type of supply was of picnics to attendees at the Harrogate Flower Show. The factors were similar to those listed above but in the round the Tribunal considered that this was also a supply of food in the course of catering. It was not a mere supply of food; it catered to the customer's requirement for a ready-to-eat picnic meal while attending the show. The Tribunal noted in particular that choice was limited and that customers had to collect their food but overall, taking into account that it was a pre-ordered meal ready to eat at the show with cutlery and drink, it was a supply in the course of catering.

The Tribunal took the opportunity to consider the CJEU cases collectively known Bog C-497/09, which hinged on the differing treatment in Germany of supplies of goods and of services. The Tribunal explained that in the UK there is not a distinct line between supplies of food (goods) and supplies of services (catering), because UK law standard-rates not just catering but also supplies "in the course of catering". Thus whilst distinct supplies of services are never zero-rated (because all the zero-rated Items are goods), supplies of goods (food) may still be standard-rated if they are in the course of catering. All three classes of supply considered by the Tribunal in this case fell into that category, because the service element was not sufficient to make them supplies of catering services.

The appeal was dismissed.

TC1189

New error penalties tested... (*Lecture B665 – 19.52 minutes*)

One of the first cases on the FA 2007 regime for penalties has come before the Tribunal. A trader submitted a VAT repayment claim for over £21,000. When HMRC queried it, the trader's accountant confirmed that the true repayment should have been just over £1,000. A penalty at 15% was imposed under the post-1 April 2009 rules.

The trader's plea of "reasonable excuse" was based on the attribution of the error to the work of a temporary employee. The Tribunal rejected this, holding that the trader had shown a "lack of reasonable care". The penalty was confirmed.

First Tier Tribunal (TC00728): NA Al-Faham (t/a Express Food Supplies)

A company deregistered for VAT in April 2009. In July 2005, it had opted to tax a building it owned, and had recovered input tax of £42,875. It failed to declare output tax on the deemed supply of the building under Sch.4 para.8 VATA 1994: this should have been accounted for on the final return to 2 May 2009. It seems that someone must have realised that this was a mistake, because the company tried to re-register in October 2009, and rang the Advice Line to discuss the possibility of reinstating the original registration. It was told that this would not be possible.

HMRC assessed the deregistration charge at £30,000 in January 2010, and imposed a 15% penalty for a careless error that had not been disclosed. The maximum penalty would be 30% of the potentially lost revenue, and HMRC contended that the maximum mitigation had been allowed.

The trader argued that it had disclosed the problem to HMRC when it tried to reinstate the registration in October 2009. The Tribunal examined the correspondence and representations from the taxpayer and disagreed: at no point had the error been explained by the trader. HMRC had identified it from information supplied, but it had not been voluntarily disclosed. The penalty was confirmed at 15%.

First Tier Tribunal (TC00828): Mollan & Co Ltd

A members' club in Southend claimed input tax of £28,287 in respect of a water bill which was in fact zero-rated. The club had taken 3/23 of the gross amount paid. HMRC levied a penalty at 15%.

The club had received a statement from the supplier but not an invoice. The accountant had tried to clarify whether the supply was VATable and had received conflicting advice; it had also paid VAT on other water supplies in relation to other premises. The invoice for this supply was only produced when HMRC investigated the input tax on the return, and it was discovered that it did not show any VAT.

HMRC said at the hearing that they had offered to suspend the penalty, but the club declined to accept the conditions which would have been imposed. The chairman noted that contradictory advice had been given on this as well, but that the reviewing officer had clearly stated that the penalty would not be suspended "because it is unlikely that it will happen again". That seemed to go against the policy underlying suspension of penalties.

The Tribunal was satisfied that the trader had exercised reasonable care and the penalty was therefore cancelled altogether.

First Tier Tribunal (TC00833): The Athenaeum Club

A partnership exchanged contracts for the purchase of a warehouse in May 2009, and opted to tax. Completion was in July 2009, but the partnership claimed the input tax on the purchase early, in its return for the period to June 2009. This was based on a misunderstanding of the tax point for a purchase of land. The return was picked up for verification in August 2009; HMRC later issued a penalty which was mitigated to 15% on account of a "prompted disclosure" under FA 2007 Sch.24. The partnership appealed, arguing that the penalty was too harsh.

The judge considered that the penalty regime required consideration of special circumstances in order to avoid the imposition of penalties that were disproportionate to the risk of tax loss and to the individual taxpayer's culpability. Although HMRC had granted the maximum mitigation allowed by the law for a prompted disclosure, the judge considered that the one-off nature of the transaction, and its unusually large value together with no real likelihood of tax loss constituted special circumstances for reducing the penalty. He further reduced it to 7.5%.

The decision includes a useful review of the rules for reducing a penalty and the taxpayer's rights of appeal. This review was mainly required because the taxpayer's grounds of appeal did not specify which appeal right was being exercised under para.15 Sch.24, and did not consider the "special circumstances" defence in para.17. The judge disagreed with HMRC's interpretation of the rules and set out in some detail his view of how they should be applied.

First Tier Tribunal (TC00983): GD & Mrs D Lewis (t/a Russell Francis Interiors)

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Change to HMRC's views on the delayed tax penalty provisions

Following the case of GD and Mrs D. Lewis HMRC issued R & C Brief 15/11 on 6 April 2011 to announce a change in the interpretation of the way self-correcting errors are interpreted for penalty purposes.

Under the 2007 Finance Act, new penalties were introduced for inaccuracies on returns or other documents. Under these penalties, if a return contains an inaccuracy that relates to a timing error which is automatically reversed in a subsequent tax period, the penalty is not calculated on the full amount of tax underpaid in the first period, but on a reduced amount to take account of the timing error.

For example, if someone reclaims £100,000 VAT on a purchase in period 1 when it should have been reclaimed in period 2, they claim £100,000 too much in the first period but £100,000 too little in the second. Any penalty for the overclaim in period 1 is not calculated on the £100,000 but on a reduced amount to take account of the automatic reversal of the inaccuracy in period 2.

HMRC's Current position
HMRC's approach to date has been that in order for the penalty to be calculated in this way, the customer had to have submitted both the return containing the initial inaccuracy, and the one containing the automatic reversal of the inaccuracy in a later period. This means that in some cases HMRC has charged a penalty on the full amount because they acted to correct the inaccuracy on the first return before the second return could be submitted, thereby preventing the inaccuracy from being reversed.

Revised position
HMRC is changing its approach for cases where HMRC intervened to correct the inaccuracy before the second return was received, preventing the inaccuracy from being reversed. When HMRC are satisfied that, but for their intervention, the inaccuracy would have been automatically corrected in a subsequent return, customers will receive the reduced penalty based on the rules for delayed tax. HMRC will shortly update our guidance to reflect this.

What you should do
If you have been charged a penalty for an inaccuracy on a return and you believe that, had HMRC not intervened before a subsequent return could be submitted, the inaccuracy would have been automatically reversed in a subsequent period, you should contact HMRC to request that the penalty is reviewed, mentioning the Brief in your request.

This only applies to timing inaccuracies, those that are automatically reversed in a subsequent period after they are made without you having to do anything more. It does not apply to the VAT Error Correction procedure nor to compensating but unrelated inaccuracies.

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