TAX UPDATE

Tolley® CPD

January 2013

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Autumn Statement 2012 (Lectures P751 – 15.46 minutes; B751 – 15.52 minutes)

Introduction

The Chancellor delivered his Autumn Statement on 5 December 2012. Although the focus of the Statement was on the economy, it included a significant number of tax provisions and plans. This was of course in advance of the legislation which was issued in draft for consultation on 11 December. This article concentrates on the key points in the Chancellor's speech.

Personal tax

Tax rates and allowances

The Chancellor announced increases of 1% in the higher rate threshold for 2014/15 and 2015/16 after an effective decrease next year in 2013/14. He also announced the personal allowance will be increased next year to £9,440 (instead of £9,205 as originally announced in Budget 2012.)

What the personal allowance will be for 2014/15 is not known, but the Chancellor confirmed his intention to increase it to £10,000 ultimately. It may be beneficial to set out the annual thresholds that are known:

- in the current year 2012/13, the personal allowance is £8,105. The higher rate threshold (that is the personal allowance plus the basic rate band) is £42,475.
- in 2013/14, the personal allowance will be £9,440 and the higher rate threshold is expected to be £41,685.
- in 2014/15, the higher rate threshold is expected to be £41,865.
- in 2015/16, the higher rate threshold is expected to be £42,285.

Even after the successive increases in the higher rate threshold announced in the Autumn Statement, it will still be lower than it is currently.

As announced previously, the trust rate of income tax will reduce to 45% (37.5% for dividends) in April 2013, which is still significantly higher than the basic rate of income tax for individuals. With an increasing level of personal allowance, trustees need to maximise the benefit for beneficiaries by distributing income up to its level where they are able to.

ISAs

The stocks and shares ISA limit will be £11,520 in 2013/14. The Government intend to consult on expanding the list of qualifying investments to include shares traded on small and medium enterprises equity markets, eg AIM.

CGT

The annual exemption will increase to £11,000 in 2014/15, and to £11,100 in 2015/16, which means that the annual exemption for trusts will be £5,500 and £5,550 respectively in those years. No other CGT changes were announced.

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Inheritance tax

In 2015/16 the nil rate band will be £329,000 (assuming no other changes in the meantime).

Pensions taxation

Annual allowance

The annual allowance for pension contributions is to be reduced from £50,000 to £40,000 with effect from 2014/15.

It is assumed that the unused annual allowance carried forward for years up to 2014/15 will not be affected. You may wish to advise clients to consider maximising their pension contributions currently to avoid any problems later should the limitations on the carry forward be limited.

The Chancellor states that this change will only affect 1% of pension savers, This is likely to disproportionately impact on those in defined benefit pension schemes including those in the public sector and the reducing number of private sector employees who are still within a defined benefit pension scheme.

Any annual allowance charge must be reported via Self Assessment and employees outside of the Self Assessment regime will need to be aware of quite complex rules to notify chargeability by 5 October following the end of the tax year (to avoid a penalty).

Lifetime allowance

The lifetime allowance (the maximum amount that a member of a pension scheme can accumulate across all his/her pensions) is to be reduced from £1.5m to £1.25m with effect from 2014/15.

The Chancellor believes that this change will only affect 2% of pension savers, some of whom may have already protected their accumulated pension rights under previous reductions to the lifetime allowance.

There will be a 'fixed protection regime' which individuals with pension pots in excess of £1.25m (who do not already have lifetime allowance protection) will be able to use to protect their pension savings.

Pension drawdown

The capped drawdown limit is to increase from 100% to 120% of the value of an equivalent annuity.

State pension

The basic state pension will be increased by 2.5% from 6 April 2013 to take the payment to £110.15 per week.

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Benefits and tax credits

Tax credits

The couple, lone parent and child elements of the Child Tax Credit will be increased by 1% for the three years from April 2013. The basic and 30 hour elements remain frozen in 2013/14 but will increase by 1% in the following two years. All disability elements will continue to be increased in line with prices.

The Autumn Statement proposals will require claimants to provide evidence of childcare costs and confirmation that a child over 16 is in qualifying education or training.

Universal credit

The parameters for the universal credit will be published on 10 December 2012, which will include the income disregards.

Other state benefits

The vast majority of state benefits will be increased by 1% for the three years from April 2013. Disability benefits will continue to be increased in line with prices. Child benefit will be frozen in 2013/14 but will increase by 1% in the following two years.

Business taxation

Temporary increase in AIAs and Enterprise Zone Allowances

One of the most surprising announcements in the Chancellor's actual statement was that the Annual Investment Allowance (AIA) would be increased from £25,000 to £250,000 from 1 January 2013. This is intended to be a temporary measure that is withdrawn after two years, so should be available for expenditure until 31 December 2014.

This will be useful for certain businesses which have intermittently high capital expenditure. The two year window should be sufficient for smaller businesses to carefully plan to take advantage of this increase, whilst the introduction almost immediately means that there is less incentive to hold off investing in capital expenditure.

Clearly, if any businesses are looking to make significant amounts of capital expenditure in the next month (but not in 2013), they should consider whether there is any benefit in getting the costs to be treated as incurred after 31 December 2012.

This is normally based on when the obligation to pay becomes unconditional as stated in CAA 2001, s 5(1). In the absence of a contract, or specific terms in the contract, the obligation becomes unconditional on delivery. Therefore, simply requesting a delivery date in the new year might make capital purchases eligible for relief in full.

It is worth noting that most provisions relating to the timing of expenditure are anti-avoidance provisions and act to defer the point at which capital expenditure is incurred. This is most likely to be of interest to businesses with December year ends, where they might be looking to bring capital expenditure within the accounting period. Further aspects of the calculations involved are discussed separately later.

The Government were making enhanced capital allowances available at designated sites in the Ebbw Vale and Have Waterway Enterprise Zones in Wales.

Simplified taxation for small businesses

The Government will be adopting some of the Office of Tax Simplification's (OTS's) recommendations on small business taxation.

The OTS had recommended a simplified cash accounting basis for calculating the profits of unincorporated businesses with turnover under a threshold of £30,000. HMRC issued a consultation on small business taxation which showed that the Government favoured a higher threshold of £77,000, consolidating the level with the VAT threshold.

HM Treasury intend to make this available on a voluntary basis from 2013. Businesses which opt in will be able to stay within the regime until their turnover exceeds £154,000.

The Government also intend to allow unincorporated businesses to claim specified flat rates rather than having to calculate actual amounts. The intention in the consultation document from April 2012 was that this would be available to all unincorporated businesses and the following expenses would be affected:

Expense	Proposal
Business use of motor vehicle	The standard mileage rate will be used to simplify a claim. This is already available for businesses with turnover under the VAT threshold.
Business use of home	A flat rate of expenses will be introduced. A three-tier system is being considered.
Personal use of business premises	A three-tier disallowed percentage will be introduced for businesses such as guest houses, B&Bs etc
Telephone and internet services	Private use that is not significant or material will be ignored and the full amount will be eligible for relief
Subsistence	HMRC will introduce improved guidance
Stationery and related items	Estimates of unit costs will be allowed, such as on a per-letter basis

The Autumn Statement has not confirmed these proposals.

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Employee shares for employment rights

Proposals included in the Growth and Infrastructure Bill currently before Parliament create a new class of company employee labelled 'an employee owner'. Employee owners will have fewer rights under the Employment Rights Act 1996, but in exchange the employing company will issue shares to the employee worth between £2,000 and £50,000.

The Government intends to provide a capital gains tax exemption of up to £50,000 on shares acquired by employee owners as part of the agreement.

The Government is also considering ways to reduce tax liabilities arising as a result of the shares being awarded initially. Currently the first £2,000 worth of shares awarded under an employee owner agreement should be free from income tax and NIC. Any value of shares in excess of £2,000 will still be subject to income tax and NICs and this is likely to be a significant discouragement for the employee.

OTS review of termination payments and employee benefits

The OTS is to review the taxation of:

- employee benefits and expenses
- employee termination payments

Interim reports are likely to be published in 2013.

Reducing burdens on employers imposed by TUPE Regulations

Following on from the publication by the Department for Business Innovation and Skills "Call for evidence - Effectiveness of transfer of undertakings (protection of employment - TUPE) regulations 2006", the Chancellor announced today that the Government will consult on reducing unnecessary burdens imposed by the TUPE regulations.

Simplification of tax advantaged share schemes

HMRC's consultation into the OTS's report on tax advantaged employee share schemes closed on 18 September 2012. The Autumn Statement confirms that the Government intends to bring in a "package of simplifications" to its employee share schemes during 2013.

Corporate taxation

Corporation tax rate reduction

The Chancellor announced that the main rate of corporation tax would reduce to 21% from 1 April 2014. The Government hopes that this will encourage companies to invest in the UK and to establish their operations in the UK. The measures announced in the Autumn Statement will result in the UK having the lowest corporation tax rate in the G7 and the fourth lowest in the G20.

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It had already been announced that the corporation tax rate would reduce to 23% from 1 April 2013. The corporation tax rates for recent years are:

FY	2011	2012	2013	2014
Small profits rate	20%	20%	20%	20%
Main rate	26%	24%	23%	21%
Standard fraction	3/200	1/100	3/400	1/400
Marginal rate	27.5%	25%	23.75%	21.25%

Low salary / high dividend remuneration strategies will continue to prove most effective for owner-managed companies.

Targeted Corporation Tax anti-avoidance

Measures have been introduced with immediate effect which target specific corporation tax avoidance schemes involving financial products. The three schemes are:

- schemes which use a partnership to avoid the group mismatch legislation
- property return swaps
- manufactured payments and loan write-offs

The schemes are complex and the detailed operations of the schemes are not discussed. The provisions relating to the property return swaps legislation and the tax mismatch legislation will apply to accounting periods beginning on or after 5 December 2012. The provisions relating to manufactured payments apply to dividends or interest paid on or after 5 December 2012.

Further expected Corporation Tax changes

During the summer, the Government consulted on a number of proposed tax changes. Further announcements and draft legislation are expected on 11 December 2012. These will include consultation responses and draft legislation in relation to the following matters which are of relevance to companies (links to the consultation documents are provided below):

- an above the line credit for research and development
- corporation tax reliefs for the creative sector. The Chancellor's Autumn Statement confirmed that the relief available will be among the most generous in the world and that a payable tax credit of 25% of qualifying expenditure will be available, which is higher than the 20% rate referred to in the consultation document.
- changes to the taxation of real estate investment trusts (REITs).
- whether to introduce a rule allowing companies with a non-sterling functional currency to compute their capital gains and losses in their functional currency
- anti-avoidance measures relating to the general anti-abuse rule, and disclosure of tax avoidance schemes (DOTAS).

Taxation of multinational companies

The way in which multinational companies are taxed or not taxed in the UK has received a great deal of press coverage throughout recent months. Despite paying other taxes such as VAT, NIC, stamp taxes and business rates for example, certain multinational companies have been criticised for paying little or no corporation tax, despite generating huge sales in the UK.

The Government is therefore under pressure to tackle the issue. It is hoped that a detailed consultation process will be carried out to find a workable solution. However, the Chancellor did state that additional resources will be provided to the Organisation for Economic Co-operation and Development (OECD) to devise an international framework for dealing with profit shifting. In addition, further funding will be provided to HMRC to improve its risk assessment capability for large multinational companies.

Finally, as transfer pricing is key to the taxation of multinationals in the UK, HMRC's transfer pricing specialist resources will be increased to help identify and resolve transfer pricing issues.

Administration

HMRC digital services

Taxpayers will benefit from further investment into HMRC's digital services in the next three years. This will mean that:

- Self Assessment taxpayers can conduct all tax transactions online
- PAYE taxpayers will be able to transact with HMRC online for the first time
- small and medium enterprises will be able to access all relevant tax services from a personalised homepage with secure data messaging

Investment in risk tools

HMRC is already moving towards enquiries run via sophisticated risk analysis in the shape of the single compliance process. The HMRC campaigns and task force visits are also targeted using risk analysis. The Autumn Statement contains news of further investment in this technology.

Data-gathering powers

It is proposed that the existing data-gathering powers in FA 2011, Sch 23 be amended to allow HMRC to issue notices to merchant acquirers (ie those who process card payments). The aim is to identify those businesses evading tax by not declaring their full income.

Gift aid

The Gift Aid Small Donations Scheme is to be introduced in April 2013. The scheme will reduce the administration required for charities to reclaim tax on small amounts. Following consultation, the cash limit for donations has been increased to £20.

Forthcoming changes

Over the summer, the Government consulted on a number of proposed tax changes likely to be of interest:

- the introduction of a statutory residence test for individuals
- the abolition of ordinary residence and
- the codification of Statement of Practice 1/09
- tax advantaged employee share schemes - follow-up on the OTS recommendations
- the proposed cap on unlimited tax reliefs for individuals
- the proposed general anti-abuse rule and
- penalties for late payment and late filing under Real Time Information
- the reform of the rules on attribution of gains of non-resident close companies to UK resident shareholders and the transfer of assets abroad provisions following a challenge by the EU
- the annual charge on UK residential property held by non-natural persons
- the extension of the CGT regime to tax gains on UK residential property held by non-resident non-natural persons

Further announcements and draft legislation were published on 11 December 2012 on the above.

There is also expected to be a consultation on a range of options for employee, employer and self employed NICs as part of the Government's exploration of possible integration of income tax and NIC, although this is likely to be delayed pending further progress on planned changes to the way in which HMRC operates the tax system.

Not going ahead

In May 2012 HMRC and HM Treasury published a consultation document on the 'Taxation of Controlling Persons', concerning personal service companies within ITEPA 2003, Part 2, Ch 8. Those proposals would have required office holders / controlling persons integral to the running of an organisation to have PAYE and NICs deducted at source. The Government has decided not to proceed with these proposals, but instead will strengthen the existing intermediaries legislation in ITEPA 2003 Part 2, Ch 8, as well as keeping the area under review.

Anti-avoidance

The Chancellor was keen to demonstrate that progress has been made on tackling anti-avoidance. He mentioned the general anti-abuse rule, the UK-Switzerland agreement and the information sharing agreement with the US (ie legislating for the Foreign Account Tax Compliance Act (FATCA)).

In addition to the closing of several 'tax loop-holes', the Autumn Statement contains several further measures:

- an offshore evasion strategy to be published in Spring 2013 which will include a centre of excellence within HMRC

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- increased resources to tackle the avoidance of inheritance tax using offshore trusts, bank accounts and other entities
- a review of offshore employment intermediaries which are used to avoid (and in some cases evade) the collection of national insurance contributions by exploiting the condition that the employer must have a place of business in the UK in order to pay secondary Class 1 national insurance

Aggressive tax avoidance schemes

The use of 'aggressive' tax avoidance schemes is to be further discouraged by the introduction of:

- new information disclosure rules
- new penalty rules for promoters

Evasion and anti-avoidance

As a prelude to the Autumn Statement, HMRC published its document “Closing in on tax evasion” on 3 Decembe which set out a range of measures -- both recently employed and planned for the near future -- to combat tax evasion and artificial avoidance.

The Chancellor committed a further £77 million to HMRC to invest in raising revenues. They will approach the task on a number of fronts such as:

- using new technology to tie up information available from third parties such as banks and the Land Registry
- forging agreements with other jurisdictions to share information about taxpayers
- increasing the threat of penalties and criminal convictions
- focussing its attention on high risk affluent groups

Abusive partnerships

The Chancellor mentioned in his speech that HMRC would be pursuing abusive partnership arrangements. The policy costings says that some of the new funding for HMRC to tackle avoidance would go towards tackling partnerships which have entered into structures to avoid tax suffered by the partners on non-partnership income.

Indirect Taxes

VAT

The Chancellor did not announce any further VAT changes in the Autumn Statement and the statement reiterated the changes announced in the 2012 Budget. A brief summary of the significant changes are briefly outlined

- static holiday caravans -- the reduced rate of VAT will apply to supplies of static and large touring caravans with effect from 1 April 2013

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- hot takeaway food -- standard-rated VAT will be applied to hot takeaway food with effect from 1 October 2012. However if the food is heated and left to cool down naturally it will still be zero-rated.
- alterations to listed buildings -- approved alterations to protected buildings are now liable to VAT at the standard rate with effect from 1 October 2012.
- self-storage -- with effect from 1 October 2012 supplies of self-storage are now liable to VAT at the standard rate. The capital goods scheme for providers of self-storage has been amended to ensure that small firms are able to benefit from the scheme in the same way as larger competitors.

Other indirect taxes

The following changes were announced:

Fuel duty

the planned increase due to take place in January 2013 has been cancelled and, therefore, the cost of fuel will not be increased by 3.02 pence per litre in January. The Chancellor also announced that the 2013/14 planned increase will also be delayed until 1 September 2013, so there will only be one planned increase in 2013. Also all future increases will take place on 1 September each year going forward.

APD

APD rates will increase by the Retail Price Index increase for September 2012, with effect from 1 April 2013

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Personal Tax

Payments by EBTs were loans not emoluments

A company (MG) provided management services to a group of companies which included a major football club. In 2001 the group established an employees' remuneration trust for the benefit of employees and their families. Group companies paid money into the trust, with a direction to the trustees to establish and fund a sub-trust for the benefit of the family of a particular employee, and make a loan facility available to the employee. HMRC issued determinations under SI 2003/2682, reg 80 on the basis that the various payments were emoluments of the employees' employment, and were liable to PAYE and NIC. MG, and four associated companies, appealed.

Decision:

The First-tier Tribunal allowed the appeals in principle (by a 2:1 majority). Judge Mure held that, in the majority of the cases under appeal, 'the acceptance of loans in the circumstances of the present appeal' did not amount to payment of remuneration, since 'the employees benefiting did not obtain an absolute legal entitlement to the monies'. While there was 'a degree of orchestration in the arrangements made with employees', these did not amount to 'an absolute transfer of funds to the employee'. However, on the evidence, 'advances in favour of certain players are taxable and liable to NIC'. It followed that 'the assessments made fall to be reduced substantially'. Judge Mure expressed the hope that the parties could 'settle the sums due for the limited number of cases mentioned without further reference to the tribunal'.

Comments - There is a great deal of money at stake in this case, which has given rise to considerable publicity. The First-tier Tribunal allowed the majority of the appeals, albeit only by a 2:1 majority, holding that the appellant companies had not been required to account for PAYE or NIC on the majority of the disputed payments. (This is something of a pyrrhic victory for the football club involved: following the transactions which gave rise to this appeal, it suffered further financial problems which culminated in liquidation and relegation.) A key area of consideration for the tribunal was the application of the Ramsay principle. From a legal perspective, it is notable that the decision refers to the 2004 HL decision in Barclays Mercantile Business Finance Ltd v Mawson, but fails to refer to the more recent Supreme Court decision in HMRC v Tower Mcashback LLP ([2011] UKHL 19). The transactions under appeal predated the anti-avoidance provisions introduced by FA 2011 Sch 2.

Murray Group Holdings Ltd v HMRC (and related appeals) TC2372

NIC: failure to claim small earnings' exception

An individual (P) registered as self-employed and paid Class 2 national insurance contributions between 2005 and 2010, although he qualified for small earnings' exception under SSCBA 1992 s 11(4). In 2011 he claimed a refund of the contributions he had paid. HMRC agreed to repay the contributions which P had paid for 2009/10, but rejected his repayment claim for earlier years.

Decision:

The FTT dismissed P's appeal against this decision.

Comments - The lesson here is that all claims for small earnings' exception, and all repayment claims, should be lodged within the statutory time limits.

J Pugsley v HMRC TC2366

Company cars - advisory fuel rates from 1 December 2012

These rates apply to all journeys on or after 1 December 2012 until further notice. For one month from the date of change, employers may use either the previous or new current rates, as they choose. Employers may therefore make or require supplementary payments if they so wish, but are under no obligation to do either.

Engine size	Petrol	LPG
1400cc or less	15p	11p
1401cc to 2000cc	18p	13p
Over 2000cc	26p	18p

Engine size	Diesel
1600cc or less	12p
1601cc to 2000cc	15p
Over 2000cc	18p

Hybrid cars are treated as either petrol or diesel cars for this purpose.

Capital Taxes

Another entrepreneurs' relief case (Lecture P752 – 16.18 minutes)

The recent case of *Russell v HMRC (2012)* concerned a claim for entrepreneurs' relief in respect of a disposal of farmland in Scotland.

Three brothers carried on a farming business in partnership (although one of the brothers subsequently died and had been replaced by his widow) and, in 2008/09, nearly seven hectares of farmland were sold to a developer for a substantial profit. The taxpayer (R) was entitled to a one-third share of the disposal consideration. Following the sale, the partnership continued to farm the remaining land. It was agreed that the sale represented 35% of the land which was 'fit for purpose'.

The partnership profits either side of this disposal were modest:

	£
2006/07	2,796
2007/08	2,895
2008/09	2,175
2009/10	1,902
2010/11	1,740

An agricultural contractor worked the land on behalf of the partnership. The only source of business income was from the sale of barley. The only asset of the farming partnership was the land itself. R gave evidence that the primary reason why he and his brothers had retained the land was because of its potential for development. He had been trying for a number of years to obtain planning permission and had only recently succeeded. R was explicitly asked whether what the partnership did in connection with the farming business had changed after the sale of the land. He said that the sole difference was that they had lost a field and, since there was less barley to harvest, the profits went down.

At first sight, the claim for entrepreneurs' relief looks hopeless. There is no doubt that the land was used for farming, but entitlement to entrepreneurs' relief where there is an unincorporated business requires the disposal of all or part of a business – what we had here was simply the disposal of part of the land. *McGregor v Adcock (1977)* is good authority that the mere sale of some of the farmland is not a disposal of part of the farming business.

However, R felt that the application of this principle was inappropriate to his family's circumstances. The farm comprised approximately 22 hectares of barley. That was the business and his job as the farmer was to look after the business. The sale of seven hectares meant that 35% of the business had gone and so why should it not be said that the sale of the seven hectares was not a sale of part of the business?

The First-Tier Tribunal, taking their lead from *McGregor v Adcock (1977)*, looked at the nature and extent of the business activities before and after the transaction and concluded that R ran the business in exactly the same way either side of the disposal in early 2009. That does not seem to be in the least

surprising – indeed, it will often be inevitable if someone is selling part of their business. Why should they conduct the remaining part of the business any differently from the way in which they conducted the whole? The more important element should surely be the *extent* of the activities after the sale. In this case, the partnership's activities were clearly scaled down to reflect the fact that the business was rather smaller than it was before.

That sounds a good response, but, in the end, it was not good enough. R failed in his claim. In the High Court case of *Atkinson v Dancer (1988)*, it was held that, where a farmer sells some land which he has been using for a farming business, this will not, prima facie, amount to the sale of part of the farming business because it is not itself the sale of any part of the business, notwithstanding that the sale of the land on which the business has been conducted will reduce the activities of the farmer and probably his profits.

This is a powerful authority but possibly too broad an explanation to deal with R's family circumstances. It is clear that, in the context of, say, a dairy farm, the sale of a field or the sale of a barn would represent the mere sale of an asset without the disposal of any part of the business. This would also be in point where a manufacturing company sold a factory with the processes being transferred to other business premises. But R's business was cultivating barley on 22 hectares of farmland. That was the whole of the business and it might reasonably be enquired what would R have to do in order to sell part of his business. If the partnership had sold more than half the land, would that have made a difference?

Maybe the crop had been harvested and the land sold was just bare land, in which case the sale of part of it might then not represent part of the business. But what if R sold 35% of the land (including the growing barley) to another farmer who continued to farm it in the same way? Why should that not be the sale of part of the business? See the recent decision in *Gilbert v HMRC (2011)*. And what about the position where new barley has just been sown? Should it really make a difference whether the land is sold immediately before or after sowing or harvesting?

One might reasonably expect the legislation to be capable of applying to these reasonably straightforward circumstances and perhaps the judgments in *McGregor v Adcock (1977)* and *Atkinson v Dancer (1988)* were applied too literally for R's particular circumstances. Otherwise it would seem impossible for R to dispose of part of his business and that would be a harsh and possibly unreasonable interpretation of the legislation. Why should TCGA 1992 not be interpreted purposively so that some effect can be given to it rather than for purposive construction only ever to apply against the taxpayer (as all too often seems to be the case)?

Contributed by Robert Jamieson

Private Residence – CGT or Trading Income? (Lecture P753 – 9.45 minutes)

CGT exempt - or trading profit?

The sale of an individual's dwelling house is normally a capital gains tax (CGT) matter. This tax treatment generally provides an opportunity to claim private residence relief on the disposal (TCGA 1992, s 222(1)).

However, depending on the circumstances, HM Revenue & Customs (HMRC) may sometimes contend that the property disposal is a trading transaction. Income tax treatment takes precedence over CGT treatment (TCGA 1992, s 37(1)).

For the purposes of determining whether transactions constitute trading, HMRC will invariably seek to apply the 'badges of trade'

Badges of trade

The question of what constitutes a trading activity for tax purposes has resulted in extensive case law on the subject over the years. 'Trade' is defined as including 'any venture in the nature of trade' (*ITA 2007, s 989*). However, there is no further statutory guidance for income tax purposes.

Six 'badges of trade' were identified by the Royal Commission for the Taxation of Profits and Income in 1955, using previous case law about what constitutes a trade. Subsequently, in *Marson v Morton* [1986] STC 463, a total of nine badges were identified. HMRC guidance lists these badges of trade as follows (BIM20205):

1. Profit-seeking motive
2. The number of transactions
3. The nature of the asset
4. Existence of similar trading transactions or interests
5. Changes to the asset
6. The way the sale was carried out
7. The source of finance
8. Interval of time between purchase and sale
9. Method of acquisition

HMRC's interpretation of those badges and relevant case law is outlined in subsequent paragraphs of the Business Income Manual.

In *Marson v Morton*, it was pointed out that the badges "…are in no sense a comprehensive list of all relevant matters, nor is any one of them so far as I can see decisive in all cases. The most they can do is provide common sense guidance to the conclusion which is appropriate."

In *Salt v Chamberlain* [1979] STC 750, Oliver J commented: "…I doubt whether the question whether in any given case a person is or is not carrying on a trade is capable of solution by the application of a logical progression of propositions culled from decided cases. The question is, I think, one of overall impression."

Thus the badges of trade should not be used as a definitive checklist.

Regan & Anor v Revenue & Customs

In *Regan & Anor v Revenue & Customs* [2012] UKFTT 569 (TC), Mr and Mrs Regan's history of residences etc was as follows:

Property	Date	Note
91 Surrenden Road	Sold August 1999	Occupied as residence prior to disposal. Then stayed with friends until acquiring 95 Rowan Avenue
95 Rowan Avenue	Bought May 2000 Sold during 2003	Occupied May 2000 to June 2003
7 Woodland Drive	Bought Sept. 2002	Initially uninhabitable; work carried out to house for the next 2 years Occupied from April 2004
93 Rowan Avenue	Bought Feb. 2003 Sold August 2006	Occupied June 2003 to April 2004

The taxpayers' appeal concerned 93 Rowan Avenue. Mr & Mrs Regan claimed that the property was their home, and that no tax charge arose on disposal by reason of private residence relief. HMRC contended that the disposal of 93 Rowan Avenue was a trading transaction, and that the proceeds were therefore subject to income tax. Alternatively, HMRC claimed that if the disposal was not a trading transaction, it was liable to CGT because the property was not Mr & Mrs Regan's only or main residence.

The taxpayers and HMRC both made submissions to the tribunal about the nature of the disposal of 93 Rowan Avenue, based on the various badges of trade. The tribunal weighed up the badges, and concluded that the balance tipped towards the disposal of 93 Rowan Avenue *not* being a trading transaction or an adventure in the nature of a trade.

The tribunal then went on to consider whether 93 Rowan Avenue was Mr & Mrs Regan's only or main residence. HMRC contended that, on the evidence, the property never became a 'residence' of Mr & Mrs Regan, as it was a 'stop gap' until they could move into 7 Woodland Drive. However, the tribunal held that in the circumstances, and in view of the fact that Mr & Mrs Regan occupied 93 Rowan Avenue for 9-10 months, it was "more than a stop gap or temporary place of occupation but where they lived, i.e. their residence."

Mr & Mrs Regan moved out of 93 Rowan Avenue in April 2004 and sold it in August 2006. As the period from April 2004 fell within the last 36 months' ownership, the fact that they did not live there during that period did not affect the availability of CGT relief under s 222(1) (see s 223(1)). They were therefore entitled to CGT relief on the disposal of the property. The taxpayers' appeal in relation to 93 Rowan Avenue was therefore allowed.

Contributed by Mark McLaughlin

Deathbed planning – rights issues and BPR (Lecture P754 – 10.37 minutes)

The Special Commissioners' decision in *Vinton v HMRC (2008)* illustrates both the uses and the limitations of the replacement property provisions found in S107 IHTA 1984.

The deceased taxpayer (D) had owned 750,500 shares in Wilton Antiques Ltd which attracted 100% business property relief. D also had an outstanding loan of £300,000 due from the company on which there was no business property relief. A few days before her death:

- D took up a rights issue under which she was allocated 300,000 further shares in the company in satisfaction of her loan account. As a result of the share reorganisation rules, these shares were equated with her original holding and accordingly attracted full relief on her death, despite having been owned for less than a week.

- D acquired some further rights issue shares which had been renounced by one of the other shareholders.

- D subscribed for further shares in the company, paying £1,000,000 for them.

It was held that business property relief was not available in respect of the acquisitions. None of these shares had been owned for two years at the time of D's death (see S106 IHTA 1984) and a subscription for new shares is not within the let-out found in S107(4) IHTA 1984. The position would have been different had these two holdings been acquired via a rights issue to D.

It is also worth noting the tax-efficiency of converting D's debt into shares.

Contributed by Robert Jamieson

IHT: beneficial ownership

An elderly widow, who had inherited some money from her father, transferred £94,000 from a bank account in her name to a new account in the joint names of her and her son (M). She died eight years later. HMRC issued a notice of determination charging IHT on the whole amount held in the account.

Decision:

The FTT upheld the determination and dismissed M's appeal, applying the principles laid down in Sillars & Another v CIR, Sp C [2004] STC (SCD) 180.

Comments - The FTT upheld HMRC's contention that IHT was chargeable on the whole of the amount held in the relevant bank account at the time of the widow's death. The decision here is in line with the previous cases of Sillars & Another v CIR and Boland's Executrix v HMRC.

J Matthews v HMRC TC2329

IHT: money lent by shareholder

An individual (L) died in 1999. He was a shareholder in a company (T), and T's records showed that L had lent T £107,210. HMRC issued a notice of determination including this £107,210 as part of L's estate. L's personal representative appealed, contending that the £107,210 should have been treated as a gift to T rather than a loan.

Decision:

The FTT rejected this contention and dismissed the appeal.

Comments - The FTT upheld HMRC's contention that the amount which the deceased had lent to the company formed part of his estate for IHT purposes.

Mrs G Silber (MMM Lerner's Personal Representative) v HMRC TC2369

Administration

PAYE RTI: late filing and late payment penalties (Lecture P755 – 9.23 minutes)

The draft legislation for penalties for late filing and late payment once RTI commences was published slightly before the 11 December release of Finance Bill 2013 and other material. There are changes to the existing late payment penalties and the inaccuracy penalties to make them easier to use in relation to the new RTI scheme.

The new late filing penalties for RTI will apply from 6 April 2014. Most of the changes to the existing penalty regime in Sch 56 FA 2009 will apply from the same date.

Late filing penalties

No late filing penalties will apply to RTI returns in either 2012/13 or 2013/14. The existing penalty regime will apply if there are late returns at the year end – so the penalty will be £100 per 100 employees (or part) per month late (or part month).

To avoid late filing penalties, employers need to report their final payment to an employee for the year by 19 May following the relevant year end. If they report this by 19 April this will relate to the year just ended. If they report between 19 April and 19 May the report is in time to avoid a year end penalty, but must be made as an "Earlier year update".

From April 2014, the following late filing penalties will apply :

- The first month in a tax year which is filed late will not be subject to a penalty, although the Regulations may provide for circumstances when this provision does not apply;
- After this a penalty will apply which takes into account the number of employees and the number of defaults in the tax year. The penalty is triggered if the full payment submission is not made on or before the time of payment of the employee, but for employers with multiple paydays in a month, the legislation limits the number of penalties under this provision in respect of each tax month to one. Regulations will provide for the precise calculation of a penalty.
- The regime provides separately for penalties in the case of what it terms "extended failures". An extended failure is when the filing remains outstanding three months after the due date. HMRC has the choice to impose a penalty in respect of all extended failures in a tax year either individually or collectively. This provides some flexibility with the administrative issue of when penalty notices should be raised. The amount of the penalty is 5% of the liabilities that would be due in accordance with the return. HMRC must give notice that the penalty will be due – but this is likely to be given routinely so that the higher penalty can apply in every case if HMRC desire. It is clear that notwithstanding the exemption for the first late filed return in a tax year (see above) that this penalty is separate and thus would be imposed if the return were an extended failure.
- The new penalty process allows a penalty to be raised up to two years after the end of the tax month, or in the case of extended failures, two years after the due filing date.

Late payments

A general amendment to the late payment penalties in Sch 56 FA 2009 has been made, to ensure that the existing penalty regime operates in relation to a tax year rather than the payments falling due in a tax year. This means that late payment of tax due on 19 April will be aggregated with late payments in the preceding tax year rather than the following tax year. This amendment takes effect from the date of Royal Assent.

The existing penalty legislation is then amended as follows:

- The first late payment in a tax year continues to be regarded as "not a default" for the purposes of this legislation (as now)
- For the first, second and third defaults in respect of the tax year, the penalty is chargeable at the time of the default at a rate of 1% of the tax comprised in the default
- For the fourth, fifth and sixth defaults in respect of the tax the penalty is chargeable at the time of the default at 2% of the amounts comprised in the default
- For the seventh, eighth and ninth defaults in respect of a tax year the penalty is chargeable at the time of the default at 3% of the amounts comprised in the default, and
- For the tenth and subsequent defaults a penalty is chargeable at the time of the default at a rate of 4%.

This allows for the late payment penalties to be issued during the year, which will be much more effective in producing better compliance than the annual penalty notice currently issued. There is a by product in that lower penalties will apply:

Example – late payment penalties

X Limited has made a total of 10 late payments in relation to a tax year. Each payment was for £6,000.

Current penalty regime

The penalty is calculated based on nine defaults, as the first late payment does not count as a default for this purpose. In that case, the penalty is a total of 3% of all of the amounts paid late – a total of £54,000 (ignoring the first). The penalty is therefore £1,620.

Amended penalty regime

The penalty is levied for each default as follows :

Defaults 1, 2 and 3 (after the first which is ignored)	(1% x £6,000) x 3 = £ 180
Defaults 4, 5 and 6	(2% x £6,000) x 3 = £ 360
Defaults 7, 8 and 9	(3% x £6,000) x 3 = £ 540

Total penalty £1,080

Once again, these amendments apply from the date of Royal Assent. It is not quite clear how HMRC will apply the amended penalties in 2013/14 when in theory the old regime applies to payments due in May, June and probably July.

Inaccuracy penalty

The amendments to Sch 24 FA 2007 take effect in relation to penalties assessed on or after the date of Royal Assent. The amendment simply permits HMRC to issue an inaccuracy penalty in relation to one or more defaults in a tax year – the current regime aligns penalties to a return made for a tax year, but given that the returns will formally be made more frequently, the admin needs to recognise this fact, and also to allow for repeated inaccuracies to be penalised together.

This does mean that the existing regime, with "Careless/Deliberate" etc and the concept of disclosure (telling, helping and allowing) all apply to returns made under RTI. HMRC has undertaken not to charge penalties in-year in respect of inaccuracies on RTI returns during 2012-13, but this will apply only to employers taking part in the pilot. For 2013-14 penalties for inaccuracies may apply to in year returns. HMRC has stated that a risk based approach will be used.

Contributed by Rebecca Benneyworth

Excessive tax

An electrical contractor failed to deduct tax from payments he made to two subcontractors. After an enquiry, HMRC issued a determination under Income Tax (Construction Industry Scheme) Regulations 2005, reg 13. The taxpayer appealed, saying that the determination was excessive, and that he had believed that he was not required to deduct tax on the payments, although he now understood that some tax was due. He also asserted that the main contractor for whom he had worked was unreliable and had overstated the amounts he had received and which he used to make the payments to the subcontractors.

Decision:

The First-tier Tribunal accepted the taxpayer's version of events, and reduced the amount charged by the determination to reflect the lower payments.

The taxpayer's appeal was allowed in part.

Comments – This case demonstrated that resolution and evidence of the circumstances can persuade the Tribunal to determine the result in favour of the taxpayer.

R Winsor (trading as Winsor Electrical) TC2339

Successful appellant applying for indemnity costs

A company director (C) had been offered the opportunity to invest in a property development company (S). He borrowed £1m from a finance company (T) and subscribed for a £1m loan note in S. On 5 April 2002 C made a payment of £899,995 to T, which was described as a prepayment of interest due on the loan (which had been expressed as lasting for 30 years). On his 2001/02 tax return, he claimed tax relief on the basis that this was a payment of interest. HMRC rejected the claim on the basis that the payment was partly of capital rather than interest, and issued an amendment to C's return.

C appealed. In the meantime, C had entered into a similar transaction and made a similar payment, also described as a prepayment of interest, in March 2003. C claimed relief for this payment in his 2002/03 return, and HMRC began an enquiry. Following negotiations, a meeting took place between C, his professional advisers, and two HMRC officers in November 2005. One of the HMRC officers proposed a compromise agreement whereby relief should be given for 50% of the disputed payments in the tax years in which they were made, with relief for the remaining 50% being spread over the life of the loans. Later that month HMRC sent a draft agreement, on these lines, to C's solicitors. In December 2005 C sent a signed copy of the agreement to HMRC, and paid £404,258 to HMRC in accordance with the agreement. HMRC formally accepted C's offer in November 2007. Meanwhile, C had entered into similar transactions in 2006/07, and had made a payment of £2,594,028, again as a prepayment of interest due on a 30-year loan, on 4 April 2007. On his 2006/07 tax return, C claimed tax relief on the basis that this was a payment of interest. HMRC began a further enquiry into this return. They subsequently issued a closure notice rejecting the claim, and in January 2009 they issued discovery assessments for 2001/02 to 2005/06 under TMA 1970 s 36, resiling from the previous agreement on the grounds that there had been a 'material non-disclosure'. C appealed, contending firstly that the payments were genuine prepayments of interest, and alternatively that the effect of the agreement reached in December 2005 was that the discovery assessments were invalid.

Decision:

The First-tier Tribunal reviewed the evidence in detail, accepted both these contentions and allowed C's appeals (see decision TC02194). Following this decision, the appellant applied for costs to be awarded on the indemnity basis. The First-tier Tribunal rejected this application. Judge Berner held that this was 'not a case where it would be appropriate, or in the interests of justice, to award costs on an indemnity basis'. He directed that HMRC should make an interim payment of £650,000 towards the appellant's costs.

Comments - The First-tier Tribunal rejected the appellant's contention that he should be awarded costs on the indemnity basis. For a discussion of the substantive appeal, see 'Cases', Tax Journal, dated 14 September. For an example of a case where costs were awarded on the indemnity basis, see Carvill v Frost (No. 2) ([2005] STC (SCD) 422).

GP Curran v HMRC (No. 2) TC2327

Penalties for failure to make payments of PAYE

A firm of solicitors persistently paid its PAYE and NIC after the due dates, and HMRC imposed penalties under FA 2009 Sch 56. The firm appealed, contending that it had a reasonable excuse because it had not received money due from the Legal Services Commission, and that the penalties were excessive because payments which it had made should have been allocated to its liability for the current tax month, rather than to its liability for the previous tax month.

Decision:

Judge Radford allowed the appeal in part, finding that HMRC had failed to observe the practice laid down in HMRC's Debt Management and Banking Manual at DMBM210105, which instructs HMRC staff that 'where exceptionally you feel the customer's allocation would not be in their best interests, for example because a different debt is about to be enforced, you can suggest to the customer that it would be in their best interests to allocate differently'.

Comments - This case can be contrasted with the earlier decision in AJM Mansell Ltd v HMRC (TC02279) (reported in November 2011 notes). In that case, the tribunal had dismissed a similar appeal, applying the dicta of Lord Macnaghten in Cory Bros & Co Ltd v Turkish SS Mecca, HL [1897] AC 286, who held that 'when a debtor is making a payment to his creditor he may appropriate the money as he pleases, and the creditor must apply it accordingly. If the debtor does not make any appropriation at the time when he makes the payment, the right of application devolves on the creditor'. It appears from the decision that HMRC's representative in Kelcey & Hall did not draw Judge Radford's attention to either the Turkish SS Mecca case or the AJM Mansell case. Judge Radford's reference to DMBM210105 is worth noting and citing in similar subsequent cases. The other lesson to be drawn from these cases is that if an employer pays each month's PAYE a month late, it will incur a penalty for each month. Therefore, where an employer has fallen into arrears, it should try to avoid further penalties by ensuring that payments are allocated to its current liability, rather than allowing HMRC to set them against its oldest debts.

Kelcey & Hall Solicitors v HMRC TC2333

Surcharge: 'proportionality' in question

A company (T) paid its VAT liability for the period ending 30 June 2009 one day late. HMRC imposed a surcharge of £4,260. T appealed, contending that the surcharge was disproportionate.

Decision:

The Upper Tribunal rejected this contention and upheld the surcharge, holding that 'there is nothing in the VAT default surcharge which leads us to the conclusion that its architecture is fatally flawed'. The tribunal specifically distinguished the earlier decision in Enersys Holdings UK Ltd ([2010] SFTD 387), which involved a surcharge of £131,881, and held that the surcharge here did not give rise to any breach of the principle of proportionality.

Comments - The Upper Tribunal has allowed HMRC's appeal in HMRC v Total Technology (Engineering) Ltd (Upper Tribunal). This is an important victory for HMRC, as the Upper Tribunal, chaired by Warren J, has unanimously reversed a controversial decision by Judge Redston. The Upper Tribunal has held that the amount of a surcharge may in some cases breach the principle of proportionality, as it did in Enersys, where the surcharge was more than £130,000, but did not do so in this case, where the surcharge was less than £5,000.

HMRC v Total Technology (Engineering) Ltd (Upper Tribunal).

Penalties stood on evaded tax confirmed by UT

HMRC issued assessments for 1996/97 to 2003/04 and imposed penalties under TMA 1970 s 95, at the rate of 45% of the evaded tax, on an MC who had failed to maintain full records of his income.

Decision:

The First-tier Tribunal upheld the assessments and the penalties (but allowed appeals against estimated assessments for years before 1996/97). The MC appealed to the Upper Tribunal, which dismissed his appeal, holding that there was 'no basis to disturb the Tribunal's decision'.

Comments - The Upper Tribunal upheld the FTT decision with regard to both the amount of the assessments and the amount of the penalties.

C Reid v HMRC (Upper Tribunal)

What is admissible evidence in court for appeal on input tax claim?

A company had reclaimed input tax of more than £1,000,000 on the purchase of a large number of mobile telephones. HMRC rejected the claim on the basis that the transactions formed part of an MTIC fraud, and the company appealed. HMRC applied for several witness statements to be admitted in evidence. The company objected to some of the statements. The First-tier Tribunal directed that statements by two of HMRC's witnesses should be excluded. HMRC appealed to the Upper Tribunal.

Decision:

The Upper Tribunal upheld the First-tier decision in respect of one of the witnesses. Judge Bishopp observed that 'this was evidence HMRC wished to put in after the expiry of the time limit imposed by tribunal directions, already extended several times, and when they knew that an application for permission would be necessary. A litigant wishing to put in late evidence has a duty to make the application promptly and, in a case such as this where the evidence is being compiled, to forewarn his opponent: it is not a case in which doing so would undermine the purpose of the evidence. HMRC did not forewarn, and took an unexplained amount of time to produce the evidence.' However Judge Bishopp allowed HMRC's appeal in respect of their other witness, whose statement related to the

conviction of one of the people involved in the transactions on two counts of conspiracy to cheat the revenue. Applying the principles laid down by Lightman J in Mobile Export 365 Ltd v HMRC ([2007] STC 1794), 'the presumption must be that all relevant evidence should be admitted unless there is a compelling reason to the contrary'.

Comments - The Upper Tribunal allowed HMRC's appeal in part only, accepting that evidence relating to the conviction of one of the company's suppliers should be admitted, but rejecting an application for a late witness statement where there was no reasonable explanation for the delay.

Atlantic Electronics Ltd v HMRC (No. 4) (Upper Tribunal)

Lack of communication by HMRC meant TTP arrangement still applied

The taxpayer appealed against a surcharge in respect of late paid tax for 2008/09. He said it was not applicable because he had made a time-to-pay arrangement with HMRC in January 2009.

In September 2011, HMRC wrote to the taxpayer informing him that this arrangement had ended in April 2010. The taxpayer said this was the first time he had been made aware of its cancellation. HMRC claimed he had been told of this "on numerous occasions" but were unable to provide details of any such communications.

Decision:

For that reason, the First-tier Tribunal decided that HMRC had "unilaterally cancelled the time-to-pay arrangement but failed to inform the appellant". This seemed "remarkable" to the judge who said that "fair dealing and good practice would suggest that HMRC should at least inform a taxpayer" if they planned to terminate an arrangement.

The judge said that the taxpayer was justified in assuming the arrangement was still in place when the surcharge was issued and this constituted a reasonable excuse for non-payment of the 2008/09 tax due. However, given that HMRC clearly regarded the time-to-pay arrangement had ceased, the taxpayer was liable to pay the outstanding tax without "reasonable delay", although it was the judge's hope that the parties could reach a "sensible compromise".

It is worth noting that, at the beginning of his decision, the judge expressed concerns about the accuracy of HMRC's case history within their statement of case. It contained errors in relation to the timing of events as well as unsupported statements. The taxpayer's appeal was allowed.

Comments – Time to pay arrangements can be vital to taxpayers in the current economic environment. Without them the delays will cause interest and penalties. The tribunal judge quite rightly highlighted the duty of HMRC to act properly. To advocate information has been passed "on numerous occasions without evidence is simply not credible.

Philip Procter TC2206

Allow more time before deadline!

HMRC issued a trust and estate tax return to the trustees of a settlement in April 2011. The completed return was received by HMRC on 1 November 2011, one day after the deadline for paper returns. HMRC imposed a late filing penalty of £100.

The trustees appealed, saying that they had posted the return on Friday 28 October in time for it to arrive with HMRC on 31 October.

Decision:

The First-tier Tribunal judge said it did not seem "to be the action of a reasonable and prudent taxpayer to post a return on the very last day before a deadline, especially with an intervening weekend" and dismissed the taxpayer's appeal.

Comments – The case demonstrates that different judges will take different views on when sufficient time has been given for submitting forms by the deadline. We have had a number of cases where judges have determined in favour of the taxpayer where the relevant documents were posted first class before the deadline but have allegedly arrived with HMRC after the deadline. The judge did not regard the taxpayer as taking the appropriate action in this case.

Derek Evans Settlement (TC2230)

Penalty imposed at 15%

An employee (M) changed jobs at the end of September 2009. On his 2009/10 tax return, he only declared his income from the second employer, and only declared his benefits from his first employer. When HMRC discovered this, it imposed a penalty under FA 2007 Sch 24, at the rate of 15% of the potential lost revenue.

Decision:

The FTT upheld the penalty and dismissed M's appeal.

Comments - The First-tier Tribunal held that there was no reasonable excuse for the errors in the appellant's return, and upheld the penalty which HMRC had imposed under FA 2007 Sch 24.

S McHale v HMRC TC2329

Penalties imposed on solicitor for failure to comply with notice

A solicitor failed to comply with a notice under TMA 1970 s 19A. HMRC imposed penalties under TMA 1970 s 97AA.

Decision:

The FTT upheld the penalties and dismissed the solicitor's appeal.

Comments - TMA 1970 s 97AA provides statutory penalties for failure to comply with a notice under TMA 1970 s 19A. The FTT upheld the penalties which HMRC had imposed in this case, and also upheld discovery assessments issued on the basis that the solicitor appeared to have overstated his expenditure. Judge Coverdale's decision is worth reading in full, as an illustration of the difficulties which HMRC sometimes encounter in attempting to administer the tax system.

MJ Rayner v HMRC TC2363

Time limit for assessment

An individual (G) submitted two returns in which he overclaimed foreign tax credits. When HMRC discovered this, they issued assessments to recover the tax due. G appealed, contending that the assessments had been issued outside the statutory time limit.

Decision:

The FTT rejected this contention and dismissed the appeals. Judge Coverdale held that the conditions of TMA 1970 s 29(5) were satisfied.

Comments - TMA 1970 s 29(5) provides that HMRC may issue an assessment outside the normal time limits where 'the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation …'. The FTT upheld HMRC's contention that this condition was satisfied here, as HMRC had not previously been aware that the appellant's return overstated his entitlement to foreign tax credits.

K Gobie v HMRC TC2364

Notice of appeal and late appeal

In March 2012 the appellant partnership applied—under TMA 1970, s 49 (as amended)—to the tribunal for permission to extend the time for appealing against amendments made by HMRC in closure notices issued on 15 December 2008. The appellant contended that, during the course of a telephone conversation with an officer ("B"), they had orally requested HMRC to agree that they should be permitted to give notices of appeal; and that had been refused. The appellants' case was they had never received the closure notices or any other letters sent by B. HMRC argued that before

the lateness of an appeal could be considered, a notice of appeal had to be given pursuant to TMA 1970 s 31A. The issue arose as to: (i) whether a notice of appeal had to be given; and (ii) the approach the tribunal should take in exercising its discretion to give permission for a late appeal.

There was no requirement that before the lateness of an appeal could be considered a notice of appeal had to be given. TMA 1970 s 49 applied because no notice of appeal had been given to HMRC within the 30-day time limit specified in TMA 1970 s 31A. TMA 1970 s 49(2) made provision for the giving of a notice of appeal after the relevant time limit; it did not state that the request to give a late notice of appeal had to be in writing. HMRC were, however, directed to agree to a notice of appeal being given after the 30-day time limit where Conditions A–C were met. Condition A made it clear in terms that making a request for HMRC to agree that a late notice of appeal could be given was a separate step to the giving of a notice of appeal. If HMRC did not agree, for whatever reason, the jurisdiction of the tribunal was engaged. The jurisdiction of the tribunal to give permission under s 49(2)(b) only arose where HMRC did not agree. The tribunal's discretion to give permission for a late appeal was wider than HMRC's jurisdiction pursuant to s 49(3). Therefore the tribunal could extend time for giving a notice of appeal where Condition A was not satisfied. It followed that the absence of a written request was a matter the tribunal could take into account in exercising its discretion whether to give permission for a late appeal; it was not a pre-condition to the jurisdiction of the tribunal. Although in the present case there had been no written request, there had been an oral request.

In exercising its discretion to give permission for a late appeal, the tribunal would give effect to the overriding objective in r 2(1) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, SI 2009/273 to deal with cases fairly and justly, and also consideration to some or all of the criteria (a) to (i) set out in CPR 3.9(1). It would also assume that if the appeal was allowed to proceed, the appellants had to have at least a reasonable prospect of success. On the facts, the three-year period counted significantly against the appellants. However, they had not received notifications of the decisions, and the amounts involved were relatively modest. Furthermore, they had a reasonable prospect of success on appeal and would suffer prejudice if permission was not granted. It was finely balanced and an exceptional case. Taking all the circumstances into account, it would be unfair to shut the appellants out from pursuing their appeals. The applications would be allowed.

Applications allowed.

Comments – This represents an interesting case examining certain key aspects of the appeals procedure. It looks at both the role of HMRC and the role of the Tribunal as part of the process.

Advance Consulting (Partnership) and ors v Revenue and Customs Comrs TC 2245

Business Taxation

Watch the AIA transitional rules!

As mentioned earlier, Chancellor George Osborne increased the AIA from £25,000 to £250,000, for a period of two years starting on 1 January 2013.

However draft legislation published on 11 December could cause problems for businesses and advisers because of potential clashes between two different sets of transitional rules for the reduction of the AIA to £25,000 in April 2012, and the latest increase, which operates ahead of the 2013-14 tax year.

Finance Bill 2013 clauses introduce the concept of a “straddling period” that starts before 1 January 2013 and ends on or after that date. It is advisable to keep this concept separate from the “transitional period” in the rules that operated in April 2012, and that will come into play again when the temporary increase in the AIA is reversed in January 2015.

Initially, it seems slightly strange to see April 2012 as a relevant date in the context of transitional provisions for the changes applying from the start of 2013. A company that draws accounts up for 12 months to 31 January 2013 will find that the computations are affected by the transitional provisions that applied when the AIA cap was reduced in April 2012 but also by those now applying to increase the AIA.

Businesses and companies with accounting periods spanning the date of change will need to follow the transitional rules carefully to ensure that the timing of their expenditure makes best use of the available relief. Only the ingoing transitional rules are relevant here – the closing transitionals will be relevant in a year or so.

Example 1 – period spanning 1 January 2013

Company with accounting period end 31 March

Year ended 31 March 2013

Period 1 April 2012 to 31 December 2012 275 days x £25,000 = £18,836

Period 1 January 2013 to 31 March 2013 90 days x £250,000 = £61,644

Total £80,480. Note that if the apportionment is calculated on a monthly basis (as in the HMRC TIIN) the allowance is £81,250.

However, the allowance available on expenditure before 1 January 2013 is restricted to £18,836, as in previous years when the allowance has been increased. If all of the expenditure occurred after 31 December 2012, the allowance would be £80,480.

Example 2 – period spanning both 1 April 2012 and 1 January 2013

Income tax business with accounting period end of 31 January.

Year ended 31 January 2013

Period 1 February 2012 to 5 April 2012 65 days x £100,000 = £17,760

Period 6 April 2012 to 31 December 2012 270 days x £25,000 = £18,443

Period 1 January 2013 to 31 January 2013 31 days x £250,000 = £21,175

Total £57,378

Here, the expenditure is restricted as follows :

Between 6 April 2012 and 31 December 2012, no more than £20,560. This is arrived at by ignoring the increase to £250,000, and applying the transitional rules for the reduction to £25,000, i.e the period 6 April to 31 January 2013 would previously have been subject to a maximum of £20,560 (for 301 days/366).

Before 6 April 2012 and from 1 January 2013, no restriction.

Yet another complication in the field of capital allowances which has been changing every year since 2008!

Revenue & Customs Brief - 32/12 – P&M Allowances: polytunnels

Previous view of HMRC

Section 22 of the Capital Allowances Act 2001 (CAA) specifically prohibits expenditure on the provision of a ‘fixed structure’ from qualifying as expenditure on plant or machinery (unless one or other of the exceptions in section 22 or 23 apply). HM Revenue & Customs (HMRC) previously considered that most polytunnels should aptly be viewed as fixed structures, and/or that, in some other cases, they might aptly be viewed as premises or setting, rather than as plant or machinery. However, this view was not entirely shared by businesses, tax practitioners or representative bodies, such as the National Farmers Union (NFU), NFU Scotland and British Summer Fruits.

Current view of HMRC

HMRC accept that the use of polytunnels, as a modern farming technology, has developed over time. Following discussions with the NFU, NFU Scotland and British Summer Fruits, HMRC also accept that some polytunnels are not most aptly classified as ‘fixed structures’ and that neither is it appropriate to regard some polytunnels as simply providing the premises or setting for the fruit growing activity. Given this, HMRC agree that polytunnels that are neither ‘fixed structures’ nor premises/setting should qualify for plant and machinery capital allowances under Part 2 of CAA.

HMRC have, however, been unable to accept the proposal by representative bodies that all polytunnels should be regarded as plant, because the uses to which polytunnels may be put by businesses are extremely varied, and farming techniques involving polytunnels may, of course, continue to evolve over time.

Which polytunnels may or may not qualify for plant and machinery allowances will depend on the facts of each case, including the exact use of the polytunnel in any particular business. However, HMRC consider that certain types of use will qualify for plant and machinery allowances, and will now issue revised guidance to its staff setting out the type of use that does not mean that allowances are prohibited, assuming that the other conditions for relief are met.

Revised guidance

CA 22090 is to be revised with immediate effect in accordance with the text below.

Open and settled cases

For all open claims HMRC will now consider those claims in line with the revised guidance below. Where information is held that enables the enquiry to be settled without further action, letters will be issued confirming that the matter is now settled in accordance with the updated version of CA 22090. In open claims where insufficient information is held, fact finding letters will shortly be issued and the cases will be considered in light of the updated guidance, once the further information has been received.

HMRC are aware that a small number of cases may have been settled where the business made a claim to plant and machinery allowances and the claim was refused in accordance with HMRC's view of the law at that time, although the claim would probably have been admitted, based on HMRC's updated view. Where a business has had a claim refused based on HMRC's previous view they should contact the office that dealt with the claim to ask for the matter to be reconsidered in light of this Revenue & Customs Brief.

CA 22090

CA22090 - Plant & Machinery Allowances (PMA): Buildings & structures: Glasshouses and Polytunnels

Glasshouses

Most glasshouses are not plant or machinery. They are buildings or structures and so are excluded from plant or machinery allowances CA22010 and CA22020. In the case of Grays v Seymours Garden Centre (Horticulture) 67TC401 a planteria, which was effectively an unheated glasshouse, was held not to be plant.

Accept that a glasshouse and its attendant machinery are inter-dependent and form a single entity which functions as plant in a grower's business if the following conditions are satisfied:

A. The structure and the equipment were designed as one unit to operate as a single entity.

B. It incorporates extensive computer controlled equipment, without which the structure cannot operate to achieve the optimum artificial growing environment for the particular crops involved.

C. The equipment was permanently installed during the construction of the glasshouse.

D. The equipment includes computer systems which control:

- boiler and piped heating systems,
- temperature and humidity controls,
- automatic ventilation equipment,
- automatic thermal screens or shade screens.

Depending on the crops grown, the equipment may include:

- equipment for carbon dioxide enrichment of the glasshouse atmosphere (for example for tomatoes or cucumbers),
- hydroponic culture (for tomatoes and capsicums),
- mobile benching or transport tables (for pot plant production),
- lighting to control day length or to supplement natural light (for pot and cut chrysanthemums and plant propagators).

A glasshouse that qualifies as plant is likely to be used for year round growing of high value crops. Without the benefit of a closely controlled environment there would be a limited growing season around the summer season.

Polytunnels

A polytunnel is usually a metal framed semicircular tunnel covered in polythene that is used predominantly by the farming and horticulture industry. If a polytunnel is a fixed structure it is excluded from plant or machinery allowances CA22020.

The exact use of the polytunnel can vary. As well as its use for growing plants, it may also be used to provide shelter for livestock, machinery or stores. In these cases it does not really matter whether the polytunnel is a fixed structure or not (although it is very likely to be fixed) because its primary, if not only, use is the provision of shelter and it will therefore comprise part of the premises or setting in which the qualifying activity is carried on CA21110.

However where the polytunnel is used for growing plants, whether or not it is a fixed structure will be crucial, because it is only possible to consider the function of a polytunnel in a qualifying activity where it is not a proscribed fixed structure CA22020.

Absent the prohibition in respect of fixed structures, it is accepted that in relation to the growing of plants a polytunnel does far more than just provide shelter from the elements. It can provide an enhanced growing environment for plants, not only increasing air and soil temperature and humidity, but also extending the crop growing season and protecting plants from insect infestations.

Neither 'fixed' nor 'fixed structure' is defined in the Capital Allowances Act. Anchor Intl (at [2005] STC 411 at 421) took the approach of applying the ordinary meaning to the term. Quite what the ordinary meaning of being 'fixed' amounts to is not entirely clear. There is a spectrum of potential definitions of 'fixed'. At one end of the spectrum 'fixed' could mean simply that the structure is set in place so that it does not move. At the other extreme it could mean that it is attached permanently in a certain place on the land such that it can never be moved intact.

Accordingly, it is necessary to look carefully at the facts of each case, including exactly how the polytunnel is to be used in the business.

In relation to strawberry and raspberry crops a key determinant will be the exact method of cultivation of the crops. Where strawberries and raspberries are grown in the ground then, as a matter of fact, the same ground cannot be continually reused. The maximum growing period for strawberries cannot usually be more than 4 years. For raspberries it can be slightly longer at 7 years. After the relevant period of time the crops must be planted elsewhere and the polytunnels will, therefore, be moved to the new location. HMRC will accept that, in such circumstances, the better view is that the polytunnels are not fixed structures, but are rather apparatus or plant, used in the qualifying activity.

However, where in relation to strawberries in particular, the crops are grown in raised beds (grow bags on trestle tables, for example) then there is no need or expectation that the crops will ever need to be grown elsewhere. In such situations it is far more likely that the polytunnels should properly be regarded as fixed structures and, as such, they will be unable to qualify for plant and machinery allowances.

In relation to other crops, similar careful consideration of the facts will be needed to determine whether or not the polytunnel is a fixed structure. For example, blackberries, gooseberries and black/redcurrants can be grown in the same location for ten years or more and in relation to such crops it is far more likely that the polytunnel will be a fixed structure.

Machine Games Duty (Lecture B754 – 11.29 minutes)

Machine Games Duty (MGD) begins on 1 February 2013. It will replace Amusement Machine Licence Duty (AMLD).

This guide tells you what MGD is, how it will work and what you need to do if it affects you.

What is Machine Games Duty

MGD replaces AMLD, and where MGD is payable you don't have to pay VAT.

MGD is charged on the playing of dutiable machine games where customers pay to play the games in the hope they will win a cash prize that's more than the cost to play the machine. MGD is not payable on machine games that only offer non-cash prizes or only cash prizes that are less than the cost to play.

A machine game is dutiable if both the following apply:

- the prize - or at least one of the prizes that can be won - is cash, or includes cash
- at least one of the cash prizes is bigger than the smallest amount that's paid to play the game

MGD is not generally payable on the takings from machines where the play is:

- at a not-for-profit event, for example an event that's held for charity
- on lottery machines which meet the rules for Category B3A lottery machines and takings from these machines will be exempt from VAT
- in a tournament, for example where players play against each other instead of playing against a machine and the winner gets a prize - this could be the person scoring 3 lemons in the shortest time, or similar

Rates of MGD

There will be two rates of duty for MGD:

- standard rate at 20 per cent - the standard rate applies to any machine games subject to MGD, that aren't covered by the lower rate

- lower rate at 5 per cent - the lower rate is for machines where the maximum cost per game on that machine (the 'maximum stake') is 10 pence, and the cash prize is £8.00 or less

If a machine offers several dutiable machine games, and one or more is subject to the standard rate, then all the dutiable machine games on that machine are subject to the standard rate. This applies whether or not some of them would otherwise be charged at the lower rate and regardless of whether anyone actually plays the standard rated games.

Who needs to register and pay Machine Games Duty

You'll need to register with HM Revenue & Customs (HMRC) for MGD and pay the duty if you hold the relevant licence or permit.

In Great Britain the relevant licences or permits are:

- premises licence for gambling activities under the Gambling Act 2005
- family entertainment centre gaming machine permit
- club gaming permit
- club machine permit
- prize gaming permit

- Licensing Act (England and Wales) 2003 premises licence for sales of alcohol, and the equivalent under the Licensing (Scotland) Act 2005 - however in the case of a tenanted pub, where the licence is held by someone other than the tenant, the tenant will nevertheless be a person liable to register for MGD (club premises certificate granted under Part 3 of the Licensing Act 2003)

In Northern Ireland:

- registration certificate including a club registration certificate
- bookmaking office licence
- bingo club licence
- amusement permit
- licence allowing the serving of alcohol

You'll also have to register if you represent someone who holds one of these licences or permits, for example if you are a personal representative or a trustee in bankruptcy.

If you don't have a licence or permit

If you don't hold a licence or permit, you may still have to register and pay MGD if you are:

- required to hold a relevant licence or permit but you haven't got one
- the owner, lessee or occupier of premises
- responsible for the management of premises
- responsible for controlling the use of machine games
- responsible for controlling admission to the premises, or providing goods and services to people who are let in

If no one registers, then all those listed above may be responsible for paying MGD.

If no one registers and HMRC are unable to establish who should be registered, then everyone who is entitled to a share in the profits from the machines may have to pay the duty on their share.

If the dutiable machine games are on a stall at a travelling fair then either the stallholder or the person in charge of the fair must register for and pay MGD. If neither of them registers then both may be responsible for paying MGD due.

Registering for Machine Games Duty

If you have dutiable machine games you'll need to register for MGD with HMRC. As a general rule, you'll need to do this at least 14 days before any machines are available to be played.

If you know you will be making machines available for play on 1 February 2013 you must register before 11 January 2013. If a person applies for registration after 11 January, HMRC will process the application as quickly as possible. However, applications received after 11 January cannot be guaranteed to be

processed by 1 February when the tax becomes payable. If people apply for registration after 11 January, then they may be liable to a penalty.

You will be able to register from 1 November when the MGD online registration service will be available.

The MGD online registration service is now available to enable you to register.

There may be times when HMRC will ask for security for payment of duty before they'll accept your application to register. If you're located outside of the UK, HMRC might not accept your registration unless you have a tax representative in the UK.

HMRC can issue a registration notice when they have evidence to suggest there is failure to register for MGD. If you don't agree with this, you can ask HMRC to reconsider their decision. You have the right to appeal within 30 days of the registration notice. If you can't prove to HMRC that you don't need to register, or you don't appeal within the time limit, HMRC can register you from the date of the registration notice.

Group registration

Two or more corporate bodies (that is companies or partnerships incorporated through Companies House), can ask to be registered as a group. This is usually allowed so long as all the members:

- wanting to be in the group are corporate bodies
- have a controller in common - for example, a holding company for the other businesses or group members
- are in the UK or have a place of business in the UK
- have agreed to be part of the group and one group member agrees to take on the role of group representative

All members of the group will be 'jointly and severally liable' for MGD payable to HMRC. This means that HMRC can ask any one member of the group to pay MGD due, although HMRC are only likely to do this if the group representative doesn't pay.

How to register for Machine Games Duty

HMRC's MGD Online Registration Service will be available on 1 November 2012.

Using the online system will be:

- secure
- quick - forms take less time to fill in and there are no postal delays
- easy - due to the on-screen help that guides you through the process
- more certain, because you get an immediate on-screen acknowledgement that HMRC has received your application

Information you'll need to hand before you register:

- the type of business you run
- the number of machines you have
- business address (including correspondence address)
- other references, for example National Insurance Number (NINO), Unique Trader Reference (UTR) or VAT Registration Number (VRN) where appropriate

If you don't have a licence or permit, HMRC will need details of all the premises that you want to register for.

Once HMRC has accepted and processed your application, you'll be placed on the MGD register, and receive your MGD registration number. You'll be able to view it online and a copy will be sent to you in the post.

If you prefer not to use an online system, you'll be able to download the registration form from the HMRC website and send it to HMRC by post.

Changes to your MGD registration

You must tell HMRC if any of the following details change:

- change of premises
- address
- group members
- you stop trading, turn off or sell your machines

You can go to the MGD online service and amend your registration details or write to HMRC.

Agents

You can appoint an agent to deal with your MGD affairs. The MGD for agents service will enable agents to:

- set up client authorisations online
- make changes to clients' MGD registrations (change of premises and address)
- view clients' accounts
- submit returns on their clients' behalf

HMRC will not discuss your personal or financial information with an agent if they haven't been authorised.

The MGD register

When your registration application is accepted, HMRC will add your name to the MGD Register. The register will be publically available as a free online 'look up' facility where people wanting information about who is registered for MGD can put in a postcode and find all the registered addresses at that postcode. This means that anyone who has concerns about MGD liability if no one is registered, or is a profit sharer, can check whether someone they are considering entering into a business arrangement with is registered for MGD.

The register is available as a free online 'look up' facility.

Newspaper companies: payments to holding company not deductible

A group of companies published several regional newspapers. Several subsidiary companies assigned unregistered trade mastheads to their parent company, and then paid a lump sum to the parent company to license the trade marks for a fixed term. The purpose of these transactions was described as being 'to reduce reported profits in the newspaper subsidiaries, since the levels of profit become common knowledge and could lead to union claims'. The subsidiaries claimed a deduction for the payments they had made to the parent company, although the parent company treated the payments it received as outside the scope of corporation tax. HMRC rejected the subsidiaries' claims.

Decision:

The First-tier Tribunal dismissed the companies' appeals. Judge Walters held that it was a principle of common law that unregistered trade marks 'were not assignable in gross, but only assignable in connection with the goodwill of the business concerned in the goods to which the mark was referable'. Applying the principles laid down by Fry LJ in Pinto v Badman, CA, (1891) 7 TLR 317, an unregistered trade mark 'cannot be assigned independently of the business to which it relates because such an assignment would enable the transferee to represent that it was part of the goodwill of the business, which it could not be if it were independently assigned out of the ownership of the owner of the business'. On the facts here, the purported assignments 'were assignments in gross and were void for mistake as to the assignability of the subject matter of the purported assignments'.

Comments - There was a great deal of money at stake in this case. In a press release dated 14 November 2012, HMRC stated that 'this is an important ruling against a marketed avoidance scheme and the latest in a series of successful HMRC challenges to such schemes. We will continue to challenge artificial arrangements such as this in the interests of the vast majority of businesses and people who choose to play by the rules.'

Iliffe News & Media Ltd v HMRC (and related appeals) TC2365

Inter-company debt: whether a 'loan relationship' depends on evidence

The taxpayer company, MJP, was a wholly-owned subsidiary of Carat International, which was itself wholly-owned by Aegis plc. Between 2001 and 2004, some inter-company transactions took place between MJP and Aegis with the result that, by 1 January 2004, Aegis owed MJP more than £6.8m.

The companies made an agreement to the effect that MJP had loaned Aegis that sum and, by 26 March 2004, Aegis owed the taxpayer a further £78,611 in respect of interest. On 26 March 2004, the two companies signed a deed of waiver under which MJP surrendered £6.7m.

MJP claimed a deduction in its 2004 corporation tax computation for £6.6m, this being the waived amount less a foreign exchange difference of £14,000. HMRC refused the claim on the ground that no loan relationship existed between MJP and Aegis under FA 1996, s 81 (now CTA 2009, s 302). The taxpayer company appealed.

The First-tier Tribunal found for HMRC, as did the Upper Tribunal (Tax and Chancery Chamber). The taxpayer appealed, saying the Upper Tribunal had made errors of law in respect of the evidence needed to deny a loan relationship.

Decision:

The Court of Appeal said the Upper Tribunal had been entirely right to support the First-tier Tribunal's decision. It had been reasonable for the First-tier Tribunal to conclude that there had been an assignment to MJP of the indebtedness of Aegis. Furthermore, it had found as a fact that the relevant transactions had not been transactions for the lending of money and decided that the subsequent loan agreement could not have retrospective effect to alter the nature of the transactions that had already taken place.

The taxpayer company's appeal was dismissed.

Etherton LJ observed that 'no-one gave evidence for (M) who had any direct knowledge of the transactions. Nor did anyone give evidence who had actually drawn up the entries in the books and records of (M) and other group companies on which (M) relies. Nor did anyone give evidence about the way the group carried on business at the time of the transactions, with particular reference to the commercial relations and dealings between the companies within the group.'

Comments - It is important to present adequate evidence in support of any appeal. The FTT had not been impressed by the company's presentation of its case, and the Upper Tribunal and the CA unanimously upheld the First-tier decision as one of fact. Etherton LJ's comments are self-explanatory.

Because of the figures involved a hopeless case continues to be appealed – again without success!

MJP Media Services Ltd v HMRC EWCA

Property developer not trading

An individual (JO) submitted four tax returns declaring income from property development. HMRC began an enquiry into the returns and formed the opinion that JO 'could provide no credible evidence to substantiate the figures for either turnover or expenditure'. They subsequently issued amendments to JO's returns, accepting his declared turnover figures but disallowing some of the claimed expenditure. JO appealed, contending that he had submitted false returns and accounts in the hope of obtaining a bank loan.

Decision:

The Upper Tribunal accepted JO's evidence and allowed his appeal (reversing the First-tier decision). Arnold J held that 'there is simply no credible evidence that (JO) carried on any business or trade as either a property developer or a builder during the four years in question' and that 'in the absence of any challenge to (JO's) evidence to the tribunal that he had not developed, refurbished or redecorated any properties other than his own residence, it was not open to the tribunal to disbelieve that evidence'.

Comments - This is an interesting and unusual case, because normally one might assume that the First-tier Tribunal's decision that the appellant had been a property developer was a finding of fact. However the Upper Tribunal reversed the First-tier decision. Arnold J accepted the appellant's contention that he had submitted false accounts in the hope of obtaining a bank loan, and that he had not in fact made the profits declared in those accounts.

J Okolo v HMRC Upper Tribunal

Relief for shortfall

The appellant was a director of a property trading company ("E"). A bank made loans to E, which were guaranteed by the appellant, in order for E to acquire two flats with a view to selling them on at a profit. E sold one flat and rented out the other. Interest was paid on the loans which exceeded the rent received and so the appellant made up the shortfall by making payments directly to the bank and credits were made to his director's account with E. The bank subsequently demanded payment of the outstanding loans. The remaining flat was sold at a loss and E was subsequently dissolved.

The appellant claimed, inter alia, loss relief for loans to traders under TCGA 1992 s 253(4) and that loss to be set off against his general income under TA 1988 s 574. HMRC wrote to the appellant pointing out that a claim to relief could only be made after the loan had been irrecoverable, and he replied that "the true situation was that the loan was in effect irrecoverable as soon as the payments were made". HMRC disallowed the appellant's claim and he appealed.

The following issues arose for consideration, whether: (i) the outstanding amounts were irrecoverable from the outset and did not "become irrecoverable" for the purposes of TCGA 1992 s 253(4)(a); (ii) payments were made "under the guarantee" within the meaning of TCGA 1992 s 253(4)(b), and could be inferred from the mere fact that the appellant was guarantor; and (iii) relief was available under TCGA 1992 s 253(3) for the outstanding amount of principal on the irrecoverable loan.

Decision:

In determining whether, for the purposes of TCGA 1992 s 253(4), interest on the loan was recoverable to begin with but then became irrecoverable, the issue was a matter of objective fact. The statements made by the appellant were of limited weight and not conclusive of the loans being irrecoverable from the outset. The documentary evidence was that a commercial lender had been prepared to lend money to a company; that did not indicate that the loans were irrecoverable as a matter of objective fact at the outset.

For the purposes of TCGA 1992 s 253(4)(b), the absence of evidence that a guarantor had made a payment pursuant to a call from the creditor to do so was not necessarily conclusive. Mere lack of evidence of a demand was not in and of itself a solid foundation for refusing a s 253(4) claim. Even though it was possible that a payment might be made under a guarantee (depending on its terms and how they were construed) even if the creditor had not issued a demand, it did not follow that any payment made by a guarantor would fall within the term “made under the guarantee”. That had to be determined according to the particular circumstances of the payment in question. On the facts there was inadequate evidence that the payments were made under the guarantee.

The money lent was used by the borrower “wholly for the purposes of trade carried on by him” within the meaning of TCGA 1992 s 253(3) as the money paid by the appellant was wholly used to pay for interest on a loan which was itself for the purposes of E's trade. The appellant should therefore be entitled to claim under s 253(3) for outstanding amounts of principal of the loans he made to E, which was the shortfall between the rent received and the interest payments made.

Although TA 1988 s 574 did enable relief from income tax, it only applied to losses on the disposal of shares the individual had subscribed for. There was no such evidence in the present, or any indication that there had been a claim, refusal or appeal to give the tribunal jurisdiction to consider the issue. The appellant's appeal against HMRC's refusal to allow relief against his general income would be dismissed.

Appeal allowed in part

Comments – It is important in situations such as these that the conditions for the relief are properly adhered to. As seen in the issues identified the importance of the rules must not be underestimated. You should look at the facts and consider the issues.

Goldsmith v HMRC TC2197

Parallel company and partnership structures (Lecture P752 – 13.06 minutes)

The recent decision by the First-Tier Tribunal in *Cooper v HMRC (2012)* deserves serious consideration by the advisers of those who are running parallel company and partnership structures.

In this case, cars and car fuel were made available by a partnership to its partners. The partners were also directors of a company (or the family members of such directors) to which the partnership provided administrative services. The Tribunal decided that, despite being supplied by the partnership, the cars and car fuel were made available by reason of the directors' employment. Accordingly, they were taxable as benefits in kind and were also subject to Class 1A NICs.

The partnership carried on a business of providing administrative services to the company in return for a management fee. The partnership had several employees who worked in this business, but the roles of the partners were minimal.

The Tribunal concluded that the business of the partnership did not require the provision of cars for the partners. Although the capital and any other financing costs relating to the acquisition of the cars (together with the cost of fuel) were met by the partnership, all these expenses were recharged and recouped from the company through the management fee. Thus the costs were ultimately borne by the company.

In addition, the terms of business between the partnership and the company did not, said the Tribunal, reflect those of independent parties acting at arm's length.

The Tribunal also pointed out that the partnership would not have existed but for the presence of the company which was its only customer. The benefit of the cars and car fuel would not have been provided were the partners not directors of the company (or the family members of such directors).

While this decision is only at First-Tier Tribunal level, it is likely that HMRC will try and take advantage of the ruling going forward. Attention should therefore be given to the rationale and commerciality of all existing and proposed parallel structures, especially where cars are provided by a partnership to the partners. It is safe to assume that HMRC will start to take a greater interest in such arrangements. Those who have historically used partnership and company structures may well be subject to a review by HMRC into the position for earlier years, perhaps going back to 2009 when the capital allowances rules for cars were changed.

Contributed by Robert Jamieson

Close company loans written off (Lecture B753 – 20.37 minutes)

It is well known that, where a shareholder director of a family business has had a loan from his company which is subsequently written off, a tax charge arises under S416 ITTOIA 2005 on the amount released, grossed up at the dividend ordinary rate of 10%. If relevant, further tax is payable by the individual at the difference between 32.5% (or 42.5%) and 10%. In other words, the loan waiver is treated in much the same way as dividend income.

It should be emphasised that the charge under S416 ITTOIA 2005 takes precedence over the benefit in kind rules for a loan waiver in S188 ITEPA 2003 (S189 ITEPA 2003). This means that the maximum effective rate of income tax is 36.11%.

However, the problem with these arrangements is often NICs. HMRC take the view that writing off the loan is the equivalent of paying 'earnings' to the director concerned. There are arguments against this point of view, but HMRC appear to be adamant that it applies and so, if this contention is to be resisted, a long and costly battle is likely to ensue.

A recent decision by the First-Tier Tribunal may go some way to assisting taxpayers in this regard. In *Stewart Fraser Ltd v HMRC (2011)*, the taxpayer (F) was the controlling shareholder and a director of a close company. Following the waiver of loans by the company to him, F had paid income tax under S416 ITTOIA 2005. HMRC argued that Class 1 NICs were also in point, given that the waivers constituted earnings in respect of F's employment as a director. The taxpayer, however, declared that the waivers had been granted to him as a shareholder in order to compensate him for the lack of dividends (which was due to an ongoing dispute with a minority shareholder).

HMRC gave particular weight to the fact that shareholder meetings had been silent on the matter of the waivers, which had in fact been decided at an ordinary directors' board meeting. The Tribunal noted that F had not produced any evidence to support his contention that the waivers had been made as a payment to him qua shareholder. Thus their conclusion was that the waivers must be an emolument of his employment.

Although the company lost the case, the decision is helpful to taxpayers such as F since it points to an argument against the imposition of an NIC charge. When presenting their case, HMRC's view was summarised by the Tribunal as follows:

> 'Had (the loans) been waived for him in his capacity as a shareholder, then HMRC would have expected to see this discussed and approved at a shareholders' meeting involving all the shareholders.'

What this indicates is that, if a company wants to avoid an NIC charge on loans written off, it is essential to approve the write-off at a general meeting of the shareholders (or, alternatively, to pass a written resolution circulated by the shareholders – not the directors – under Ss292 and 293 Companies Act 2006).

However, there is a further matter which needs to be considered: if HMRC treat the loan write-off as 'earnings', surely the company can then claim an allowable deduction for corporation tax purposes under the 'wholly and exclusively' rules of S54 CTA 2009? It should be borne in mind that the alternative route of using the non-trading loan relationship deficit relief in S459 CTA 2009 was outlawed for sums released or written off on or after 24 March 2010. Given that it will be difficult nowadays to make a good case for corporation tax relief where the loan write-off does *not* constitute earnings (ie. where the waiver is properly ratified by the shareholders), the company may well prefer to pay the relevant Class 1 NICs if that entails tax relief at a higher rate – corporation tax rates being higher than those for Class 1 NICs. It is not known what happened with Stewart Fraser Ltd.

It is understood that HMRC have recently selected a number of loan waiver cases for determination by the First-Tier Tribunal. One new argument which the authorities are advancing is that a loan write-off can constitute employment income under S62 ITEPA 2003 – they will be citing the ruling in *Clayton v Gothorp (1971)* in support of this contention. They intend to take this line where overdrawn loan account balances are released by deed as a reward for services following a decision by the board of directors. While S189 ITEPA 2003 enables the charge under S416 ITTOIA 2005 to take priority over S188 ITEPA 2003 (as mentioned in (b) above), HMRC maintain that a charge to tax on employment income has priority over both provisions. If HMRC succeed in substantiating that a charge under S62 ITEPA 2003 can apply, it does not necessarily follow that this section prevails over S416 ITTOIA 2005 (although the employment income provision does take precedence over S188 ITEPA 2003). And, even if S62 ITEPA 2003 is in point, does that not give added comfort to the tax-deductibility of the loan write-off?

Contributed by Robert Jamieson

VAT

Sales of vehicles under HP agreements

The taxpayer company, Volkswagen Financial Services (UK) was a wholly owned subsidiary of Volkswagen Financial Services AG, which was ultimately owned by Volkswagen AG. VFS (UK) made taxable and exempt supplies, making it a partially exempt trader for VAT. It incurred residual input tax which related to ordinary overhead expenditure.

The company's business covered various areas, including hire purchase. The treatment of the residual input tax on overheads attributable to these transactions was in dispute. VFS (UK) took each deal as one taxable transaction — the sale of the vehicle at cost price — and one exempt transaction — the finance element — and split the residual input tax equally between the two.

HMRC argued that the residual input tax in respect of hire purchase transactions was largely not deductible and apportioned the residual input tax between the value of the taxable and exempt outputs of each transaction, without taking into account the sale of the vehicle.

The First-tier Tribunal found that the company's method was the correct one. HMRC appealed to the Upper Tribunal.

Decision:

The Upper Tribunal decided that VFS (UK) was the finance arm of Volkswagen AG. It provided finance to enable customers to buy a car from a Volkswagen dealer, and was only involved with a sale if a customer needed such finance. It was true that VFS (UK) sold the vehicle, but only at the price agreed with the dealer. Indeed, the judge said that price was irrelevant to VFS (UK), having “no economic impact” on its business. All profits were made from finance transactions, which are predominantly exempt. On that basis, the residual cost inputs had no direct and immediate link with VFS (UK)'s business, apart from the small taxable elements of its finance business. The company's preferred method of attributing 50% of the residual input costs to taxable outputs was therefore not a fair and reasonable apportionment.

HMRC's appeal was allowed.

Comments - This is a significant win for HMRC, because the First-tier Tribunal had appeared to disagree with HMRC's policy as laid down in Revenue & Customs Brief 82/09. The Upper Tribunal reversed the First-tier decision and held that the company's attribution of input tax did not produce a fair and reasonable apportionment.

HMRC v Volkswagen Financial Services (UK) Ltd Upper Tribunal

Two are not one

A father had a business selling ice creams. In 1997, his son joined him in the business. They entered into a partnership and shared the profits equally between them. In 2005, they began a business selling hot food, again in partnership. In 2010 the ice cream business was transferred to a company in which both taxpayers and the son's wife had shares.

Neither business was VAT registered because their sales figures were less than the VAT threshold. HMRC decided that the two entities were in effect a single partnership between the father and son and, since the aggregate turnover exceeded the VAT threshold, the taxpayers should register for VAT.

The taxpayers appealed, saying the businesses were separate. The evidence for this was that the son's wife injected £24,000 into the ice cream business in 2005 and later began working in the business "to protect her investment". As a result she became, according to the taxpayers' adviser, a sleeping partner in that business, although there was no written evidence to this effect.

Decision:

The First-tier Tribunal noted that the Partnership Act 1890 does not require a formal partnership agreement to be in place between the partners; all that is required is for a business to be carried on by more than one person with a view to common profit.

The tribunal concluded that the wife was a partner in the ice cream business following her £24,000 investment, and this created two separate, differently constituted partnerships trading below the VAT threshold. The judges decided that the wife would not have made the investment without "some form of protection".

The taxpayers' appeal was allowed.

Comments - The taxpayers were "very fortunate that the tribunal accepted there was a second partnership in the absence of any clear written partnership agreement or accounts/tax returns that showed the wife as a partner", said Neil Warren, independent VAT consultant. He warned that "paperwork and contracts must be clear about the legal entity that is relevant to any business and that accounts and tax returns must then be consistent with the entity in question".

Colin Summers; Christopher Summers TC2267

TOMS applies

The taxpayer operated a website through which it marketed holiday accommodation in resorts in the Mediterranean and the Caribbean.

HMRC assessed the company to VAT which it said was due under the tour operators margin scheme (TOMS). Under this, where a travel agent supplies accommodation services as an agent for a principal,

VAT is payable in the member state where the accommodation is situated. But, where the travel agent supplies accommodation services as principal, the tax is payable in the member state where it is located.

The taxpayer appealed to the First-tier Tribunal which found in favour of HMRC. The Upper Tribunal (Tax and Chancery Chamber) allowed the taxpayer's subsequent appeal. HMRC appealed.

Decision:

The Court of Appeal said that it was necessary to look at the whole package provided by the taxpayer rather than concentrate on particular elements.

In this instance, the First-tier Tribunal had taken into account various considerations in reaching its conclusion. For example:

- the taxpayer dealt with holidaymakers in its own name in respect of the use of its website and in the services of its local handling agents;
- it dealt with complaints and compensation in its own name and without reference to the hotel operator;
- it used the services of hotel operators in the provision of the travel facilities marketed through its website;
- in relation to VAT, the taxpayer dealt with hotel operators in other member states in a manner inconsistent with the relationship of principal and agent; and
- it did not account to hotel operators for deposits etc received from holidaymakers and their agents.

The taxpayer company's appeal was dismissed.

Comments - Nick Garside, VAT specialist at Grant Thornton UK LLP, said the Court of Appeal's decision had gone further than that of the First-tier Tribunal in assessing the factors relevant to determining whether the taxpayer acted as an agent or principal and that it was “likely to result in HMRC reviewing the arrangements of other travel providers in the industry, particularly those that dynamically package online in order to determine whether TOMS should apply”.

He added: “Given the impact of the TOMS on already tight margins in the industry, any further widening of the circumstances in which travel providers act as principal rather than agent is bad news and businesses should consider taking advice where appropriate.”

Secret Hotels2 Ltd v CRC, Court of Appeal

New VAT rules for 'storage' supplies **(Lecture B755 – 15.26 minutes)**

From 1 October 2012, the standard rated list within VATA1994, Schedule 9, Group 1 – Land – has been amended to insert an extra sentence to item 1(k) – 'the grant of facilities for the self storage of goods,'

Note – items 1(a) to (n) covers the situations when a 'land' supply is not exempt from VAT i.e. exceptions to the exemption. So the amendment to 1(k) is bringing in another specific situation when a land supply is standard rated i.e. in relation to the self storage of goods.

Until 30 September 2012, the supply of self-storage was usually exempt from VAT if it provided the customer with a discrete area of land to which he had access for the purposes of storing his goods. However, other types of storage which do not provide the customer with a discrete area (for example storage provided by traditional removal companies) have always been standard rated. The new procedures level the playing field between different types of storage.

The aim of the legislation is to tax the provision of storage facilities to the end user – i.e. to a person for the storage of their goods. The change is not intended to tax the supply of premises used for some other purposes or to tax the sale or lease of a self storage facility or warehouse to a self storage supplier, which will continue to be VAT exempt (unless the supplier of the building opts to tax the supply).

Examples of supplies affected by the change include – self storage in purpose built facilities; movable containers; garages; railway arches; lock-ups; spare rooms used for self storage; warehouses and distribution centres etc, renting space for the purpose of storing someone else's goods.

Examples of supplies not affected by the change - the sale or lease of a whole building to a self storage business (unless the vendor/lessor opts to tax); the rent of a property (where there are some storage facilities which are not a separate supply but ancillary to an overall supply of land); storage space rented by charities for a non-business purpose (e.g. for storage of goods for famine or disaster relief.)

Comment:

- A new Note 15(A) defines 'facilities for the self storage of goods' as being 'the use of a relevant structure for the storage of goods by the person (or persons) to whom the grant of facilities is made, and ''goods' does not include live animals.'
- A new Note 15(C) confirms that exemption will still be available to a charity that stores goods for its non-business purposes. The Note also recognises that if a building is rented out where only part will be used for storage, the arrangement could still qualify as a land arrangement (and VAT exempt) if the storage element is 'ancillary' to other building use.

Practical point........VAT on storage is wider than you think!

Let's consider a farmer who owns a farm and rents out two barns to local businesses. He has not opted to tax the land on his farm, so the rental income has always been VAT exempt. He might have read back in March the intention of HMRC to tax storage facilities that involve a 'land' supply with effect from 1 October 2012 (containers, caged areas, units, bays etc) – they were previously exempt unless the

building owner had opted to tax his property. However, if he had read page 38 of HMRC's original consultation document issued after the Budget, he would have been reassured by the sentence that the proposed change would have an impact on: "a) An estimated 250 VAT registered self-storage businesses that do not opt to tax their supplies". In other words, the new rules are only relevant to specialist self-storage businesses, not farmers or other property owners who rent out a couple of barns or units for general purposes.

So here's the surprise:

VAT Information Sheet 14/12 was issued by HMRC on 5 September, to clarify their interpretation of the legislation. I have directly quoted the relevant bits in Box 1.

Box 1 - VAT and storage – extracts from HMRC's VAT Information Sheet 14/12

2.2 What are the new rules (from 1 October 2012)?
The new rules are based on use of space for the self storage of goods. The changes ensure that the provision of space used for the self storage of goods (by the customer of the provider of the self storage space) in structures ('relevant structures') such as containers, units or buildings is standard-rated.

2.4 What if the storage provider doesn't know how the space he is letting out is used?
The use of the space will normally be clear from the nature of the facilities, the way they are advertised and the agreements entered into. However, in some instances, facilities may be suitable for a variety of uses and agreements may not specify a particular use by the licensee (i.e. the licensee is free to use the space for any purpose). In such cases it will be necessary for the grantor to obtain confirmation from his customer of the use to be made of the space. Suppliers are advised to obtain such confirmation in writing and retain it with their VAT records.
2.5 What if the space is used for the self storage of goods and another purpose? Where space is used by the customer for both the self storage of goods and another purpose, the VAT liability will follow that of the principal element of the supply in accordance with normal rules.

2.8 What if the storage provider doesn't know of changes in how the space he is letting out is used?
Suppliers should ensure that customers are aware that they should notify the supplier of any permanent changes of use in the future and that this may result in a different VAT treatment. Provided this is done there is no requirement for suppliers to actively monitor, on a regular basis the use being made of the space.

2.10 Is the supply of a warehouse or similar building used for storage now automatically standard-rated?
Standard-rating applies when space is supplied and used for the self storage of goods by the customer. Therefore, the lease of a warehouse or storage facility, such as a lock-up, to be used for the self storage of goods by the customer, will be subject to VAT.

So what does this mean for our farmer?

- He has a general rental agreement with his tenants that they can use the barns for any legal purpose: however......
- He doesn't know what the barns are being used for so from 1 October he needs to ask the tenants – para 2.4 in Box 1 suggests this should be done in writing and the written reply from the tenants should be kept as part his records
- Any storage use by the tenant is therefore standard rated (unless minor)....so much for the new rules only affecting 250 specialist self-storage businesses!

To extend the story, I telephoned HMRC's helpline service for a steer on the situation which exists in relation to a unit owned by one of my private clients that is used by the tenant for storage of goods for two weeks a month (approximately) and meetings and other purposes for the other two weeks. The HMRC officer's opinion (in my view correct according to the Information Sheet) is that the VAT charge should be calculated as in 'Storage Example 1' below. See also 'Storage Example 2'.

Storage Example 1

John is a decorator who rented a barn from Farmer Giles to store his paint and tools for 15 days in November 2012 and for the other 15 days he used it for non-storage purposes. Farmer Giles is VAT registered but has not opted to tax the barn. The monthly rental for the barn is £500 excluding VAT. The VAT is calculated as follows:

£500 x 15 days/30 days x 20% = £50 i.e. apportioned according to the use for 'storage' – it is a mixed supply because there are two clear purposes for the property i.e. no predominant supply is evident which could mean the secondary supply can be ignored as incidental.

Storage Example 2

John is a sole trader accountant who is not VAT registered (£70,000 a year sales i.e. below £77,000 VAT registration limit). He also owns a small warehouse unit that is rented out to a local business for rental income of £10,000 a year. If the user of the building utilises the building for storage after 1 October, then John's annual taxable income will be £80,000 instead of £70,000 and he may need to register for VAT at some point in the future. John may not be aware that his rental income (if storage is involved) could affect his liability to register for VAT on or after 1 October 2012.

Capital goods scheme

What is the situation for a business that invested, say, £100,000 plus VAT in buying a freehold commercial unit for the purpose of renting out 'land' space for storage purposes and never opted to tax his interest in the unit? In other words, he was prepared to sacrifice recovery of input tax on the purchase of the unit, to avoid having to charge 20% VAT on all of his rental income. His strategy has effectively backfired because the storage income is now standard rated by statute (from 1 October 2012), irrespective of the fact that he has not opted to tax his interest in the building.

The good news is that the legislation from 1 October 2012 allows him to bring the asset into the capital goods scheme, allowing input tax recovery to be considered over a ten year period with annual calculations. In normal circumstances, the capital goods scheme is only relevant to building purchases (or building works such as improvements, refurbishment programmes etc) if the cost of the asset (or works) exceeds £250,000 excluding VAT. If a building (or building works project) has a cost of less than £250,000, then all of the input tax claims are determined within the partial exemption tax year when the expenditure was incurred i.e. to 31 March, 30 April or 31 May, depending on when the VAT quarters of the business end (and 31 March for a business on monthly VAT returns).

HMRC VAT Information Sheet 14/12 – section 3

To put smaller businesses in the same position, self storage provides will be able to 'opt in' to the CGS for capital goods items with values below the £250,000 threshold where such items are owned by taxpayers affected by the change in the VAT treatment of supplies of self storage and will, after 1 October 2012, be used to make taxable supplies.

3.3 What are the conditions for opting into the CGS?

An owner of self storage premises can opt to apply the CGS to an item if:

the item is land, a building or civil engineering work (or part of a building or civil engineering work)

the businesses has incurred VAT-bearing capital expenditure on the acquisition of that item or on its construction, refurbishment, fitting out, alteration or extension

<u>that VAT-bearing capital expenditure amounts to less than £250,000</u>

<u>the item is to be used for making taxable supplies of self storage</u>

<u>must opt to apply the CGS by 31 March 2013</u>

3.4 How do businesses opt to use the CGS for items of less than £250,000 in value?

They can decide anytime after 1 October 2012 but no later than 31 March 2013 to opt items into the CGS and must make a written record of that decision.

3.5 Does the written record have to be sent to HMRC?

No. Self storage providers should retain the written record as part of their normal business records and make it available to HMRC should they request to see it at a future date.

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Storage Example 3

John is VAT registered and purchased the freehold of a commercial unit in April 2009 for £100,000 plus VAT. He did not claim input tax on the purchase of the unit because he is making storage supplies from the building (land related) and his tenants cannot reclaim input tax – so he decided not to make an option to tax election. John completes VAT returns on a calendar quarter basis.

For partial exemption year ended 31 March 2013, John can elect to bring the item into the capital goods scheme and claim some input tax on his September 2013 return (the second return after the end of the partial exemption year) because the item is now being used for both 'taxable' and 'exempt' purposes in the year (i.e. exempt use until 30 September 2012 and taxable use from 1 October 2012). For years ending 31 March 2014 to 31 March 2019, the recovery percentage through the annual scheme adjustments will further improve if his building is only used for storage purposes because the entire income generated by the building in these years will be 'taxable'.

Business is a hobby

The taxpayer company was incorporated and registered for VAT in May 2008. It described its business as show jumping and trading in horses. In its VAT return for the period to August 2008, the company claimed input tax of £73,167 in respect of the purchase of a horse called "For Fun", from which taxable income from various activities would be generated. HMRC disallowed the claim on the basis that the company was not a business for the purposes of VAT. The company appealed.

Decision:

The key question before the First-tier Tribunal was whether the company met the business tests in CCE v Lord Fisher [1981] STC 238.

Decision:

The tribunal judge was not satisfied that the business was a serious undertaking when the business tests were considered. The company traded at a loss and relied on the financial support of its sole director. No horses had been sold, despite good offers having been received and there seemed to be no continuous business activity. Rather than making taxable supplies, the predominant activity of the company appeared to relate to the "pleasure and social enjoyment of equestrian activities" by the director.

The taxpayer's appeal was dismissed.

Comments - The absence of profit does not necessarily mean that a venture is not a business arrangement but, in this case, a key factor was that offers to sell the horse were not seriously considered, said independent VAT consultant Neil Warren. He warned: "Taxpayers need to be very careful trying to gain an input tax advantage when a personal interest is involved, be it the purchase of boats, aeroplanes, racing cars or horses."

Goodman Equine Ltd (TC2243)

Competitive disadvantage

The claimant, TNT, was part of the TNT Group which provided postal distribution services for business mail. The interested party was Royal Mail Group Ltd, the sole universal postal service provider in the UK.

The claim related to "access services", ie access by other postal operators or users of postal services to Royal Mail's postal network. Supplies of postal services are exempt from VAT under EU law. In the UK, this exemption was granted to the Royal Mail only.

TNT wished to apply for judicial review as to whether this was consistent with EU law. It argued that, according to the ruling of the European Court of Justice in R (on the application of TNT Post UK Ltd) v CRC (Case C-357/07) [2009] STC 1438, the exemption was confined to services that fell strictly within the description of universal postal services, of which access services were not part.

The High Court accepted TNT's argument that, on reading the ECJ judgment as a whole, it was arguable that the court had intended to limit the VAT exemption to services that fell within the description of universal postal services only. It was also true that VAT exemptions had to be strictly and narrowly interpreted and that, in this context, the public interest was on direct and immediate consumers of universal postal services. The judge agreed that, with regard to fiscal neutrality and competition, it was arguable that extending Royal Mail's VAT exemption to access services might discourage operators such as TNT from seeking to establish their own delivery facilities and place them at a disadvantage to Royal Mail.

TNT was given leave to apply for judicial review.

R (on the application of TNT Post UK Ltd) v CRC, QBD

Wrong test

In June 2008, the Association of European Tour Operators submitted a voluntary disclosure of VAT overpaid in respect of membership subscriptions. It claimed that they should be exempt from VAT under VATA 1994, Sch 9 group 9 item 1(d). HMRC rejected the claim. The First-tier Tribunal allowed the association's appeal, and HMRC appealed to the Upper Tribunal.

Decision:

The Upper Tribunal judge was concerned at the “apparent logical gap in the reasoning of the First-tier Tribunal”. He said the “primary purpose” test as to the aims of the association was an objective one, rather than a subjective one, and the First-tier Tribunal “erred in law when it directed itself that the primary purpose of the association was 'what its directors and members consider to be the most important matter it is seeking to achieve or doing in return for membership subscriptions'”. It was the stated objects and the actual activities of the association that were relevant. The subjective views of the officers may help, but should not be taken as conclusive.

The case was remitted to the First-tier Tribunal to reconsider its findings about the purposes of the association.

HMRC's appeal was allowed.

Comments – This case demonstrates how important the purpose can be in determining how the relevant income will be treated for VAT purposes. As stated the case has been remitted back to the First Tier to determine the purposes of the association.

CRC v European Tour Operators' Association, Upper Tribunal

Fraudulent use of credit/debit cards

A group of companies, which traded as retailers, formed the opinion that it need not have accounted for VAT in cases where the purchasers had fraudulently used credit or debit cards to obtain goods. The company, which was the representative member of the group (D), claimed a VAT repayment of £1.9m. HMRC rejected the claim and D appealed.

Decision:

The First-tier Tribunal directed that the case should be referred to the CJEU for rulings on the interpretation of article 14(1) of Directive 2006/112/EC.

Comments - There is a great deal of money at stake in this case, and the CJEU decision will be keenly awaited.

Dixons Retail PLC v HMRC TC2337