Tolley®CPD

August 2013

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Personal Tax

Investment refunded as part of termination payment recognised

The taxpayer had worked at Morrison Construction from 1996. In 2005, Morrison acquired the assets of Richardson Ltd and the taxpayer was appointed sales director of that company where he remained until December 2007. As an incentive to move to Richardson, the taxpayer was invited to enter an enterprise management incentive (EMI) scheme. He invested £30,000 to join the scheme. It was understood that, should the taxpayer leave the company, the sum would be refunded to him.

The taxpayer decided to leave the company in December and, under a compromise agreement, received a £75,000 compensation payment. Of this sum, £30,000 was tax exempt under ITEPA 2003, s 401 to s 404A, but the taxpayer believed that a further £30,000 represented repayment of his investment in the company and should be free of tax.

HMRC disagreed, saying that there was nothing in the compromise agreement to suggest that £30,000 related to the taxpayer's EMI investment.

Decision:

The First-tier Tribunal accepted the taxpayer's contention that he would not have signed the agreement unless the £30,000 he invested in the company was included. On that basis, it ruled that the compromise agreement was a separate legal document which was unrelated to his employment contract, and any payments in relation to the loss of employment were free of tax under ITEPA 2003, s 401. HMRC were not obliged to consider the terms of the compromise agreement in isolation, but should also look at the surrounding circumstances relating to the agreement. The payment included the £30,000 invested in the company, a statutory redundancy of £930, with the remainder being a non-contractual compensation sum.

The taxpayer's appeal was allowed.

Comments – This decision contrasts with the First-tier Tribunal's ruling in G Reid (TC1877), an appeal by the managing director of Richardson Ltd. He had also appealed against HMRC's decision that his termination payment did not include a refund of his investment in the company. In that case, the tribunal disagreed with the taxpayer. It found that the compromise agreement, signed by the taxpayer, had not stated directly or indirectly that any termination payment would include a refund of the taxpayer's investment in the company and dismissed his appeal. This case demonstrates the care that needs to be taken with termination payments and also with compromise agreements in ascertaining exactly what is covered by the terms of the agreement.

I Johnson TC2656

Exercise of share option

A company (B) had allocated one of its employees (P) units in an option scheme known as a 'capital accumulation plan'. In 2004, P left his employment but retained his rights under the scheme. B subsequently issued shares to P under the scheme. P submitted a self-assessment return claiming a refund of the tax that B had deducted under PAYE. HMRC began an enquiry, rejected the repayment claim and issued a closure notice requiring P to pay further tax of £813,133.

Decision:

The First-tier Tribunal dismissed P's appeal. Judge McKenna held that the 'capital accumulation plan' units were employment-related securities options, within ITEPA 2003 s 471. The distribution of the shares to P was a chargeable event, within ITEPA 2003 s 477(3).

Comments: The First-tier Tribunal upheld HMRC's contention that the 'capital accumulation plan' units were employment-related securities options, and that the distribution of shares to the appellant was a chargeable event which gave rise to a liability to income tax. This case demonstrates the key issue that when an individual leaves an employment the relevant securities options do not cease to be employment related securities options.

M Phair v HMRC TC2752

Gain is subject to PAYE

The taxpayer saved into her employer's SAYE share option scheme from February 2005 to May 2007, when a management buyout of the company (E) took place. The employees who had been saving into the SAYE scheme were given a bonus by the new company, KN, to enable them to have enough savings to exercise their share options at the option price, as otherwise they would not have paid enough into the scheme to do so. Tax and National Insurance were correctly deducted from the bonus payments.

The taxpayer used her net bonus and her SAYE savings to exercise her share options. She immediately sold the shares to the company. As this happened within three years of the date of grant of her options, the gain realised on the sale of shares was subject to income tax.

In her 2007/08 self-assessment tax return, the taxpayer included the gain as a capital gain on which no tax was due. She later realised this was incorrect and accepted that income tax was due on the gain, but said that the company should have subjected the gain to PAYE. This was on the basis that the shares were purchased under a general offer made by KN to non-management shareholders to acquire the issued share capital of E. HMRC argued that the offer was not a “general offer”, therefore the company had not been required to operate PAYE on the gain made by the taxpayer.

Decision:

The First-tier Tribunal reviewed the evidence and concluded that the offer to the non-management shareholders was to acquire their shares only.

It excluded the shares held by the management team because special arrangements had been made for them. In the tribunal's view, for an offer to be a general offer, it was not necessary for it to be made to all the shareholders of the company. Under rule 9 of the Takeover Code, supervised by the Panel on Takeovers and Mergers, an offer made to non-bidder shareholders was considered a general offer.

The tribunal ruled that ITEPA 2003, s 701(2)(c) did not apply and E should have subjected the taxpayer's gain to PAYE. The judge said that since E should have deducted the tax, the taxpayer “could not be charged under the self-assessment regime”.

The taxpayer's appeal was allowed.

Comments – This case demonstrates the complexity of the rules relating to employment related securities and the interaction with PAYE and self-assessment. Particular care needs to be taken on the exceptions where this falls with these SAYE options.

Hema Tailor (TC2614)

NIC on car provided for company director

In April 2004, the director/shareholder of the taxpayer company bought a BMW X5 car which he used for business and private purposes. He sold a 90% share in the car to the company. He made a 10% contribution towards the running costs and paid 10% of the total fuel costs to the company. He was not charged to car or car fuel benefit.

HMRC ruled that the company should pay class 1A National Insurance in respect of car and car fuel benefit. The taxpayer appealed. The First-tier Tribunal dismissed his appeal, saying the fact that the director owned 10% of the car did not prevent the vehicle being made available to him by the employer.

Decision:

The Upper Tribunal agreed with the previous tribunal. The issue hinged on whether the car was made available to the director. The judge said that, in line with Mr Justice Pumfrey's comments in Christenson v Vasili [2004] STC 935, “the term 'made available' in ITEPA 2003, s 114 must be given its ordinary meaning”. The director bought the car and then transferred an interest to the company, but it was “immaterial how the co-ownership came about”. Under s 114, whenever an employee used a car that was co-owned, the employer made the car available to the employee.

The judge concluded that the director had use of the car during the period it was jointly owned, and so the company made the vehicle available to him. On that basis, class 1A National Insurance was payable.

The taxpayer's appeal was dismissed.

Comments - ITEPA 2003 s 114 provides that where a car is made available to an employee, the cash equivalent of the benefit of the car, and any fuel provided, is treated as earnings. Since 1991, class 1A NIC has also been charged.

The Upper Tribunal upheld the First-tier Tribunal's decision that the fact that the director had retained a 10% interest in the car did not avoid the charge to contributions. The decision here is in line with the High Court decision in Christensen v Vasili (where the employer had transferred a part interest to the director, whereas in this case the director had transferred a part interest to the employer).

GR Solutions Ltd v HMRC (Upper Tribunal)

Purpose of travel

The appellant was an MP who travelled from his Dundee constituency to Glasgow to attend a Labour party meeting. He then flew to Heathrow and completed his journey into London by train. The Independent Parliamentary Standards Authority (IPSA) disallowed his claim for the cost of whole journey.

Under chapter 9 of the IPSA scheme, MPs can claim for travel that is "necessarily incurred in the performance of the MP's parliamentary functions". This included the cost of "journeys between any point in the constituency … and a Westminster or London area home".

The MP appealed to the First-tier Tribunal. Before the hearing, the authority accepted that the expense relating to the second leg of the journey, ie Glasgow to London, should be allowable.

Decision:

The tribunal ruled that the travel from Dundee to Glasgow formed a separate journey in its own right. The MP had a specific reason for going to Glasgow. Furthermore, that purpose was not in connection with his parliamentary functions. The tribunal agreed that the journey between Glasgow and London should be allowed.

The taxpayer's appeal was allowed.

Comments – The decision is not really surprising in light of the authority accepting before the hearing. Travel expenses have a strict code for allowability for both employees and the self-employed. When the Chapter 9 extract is examined it is clear that the travel on the second leg qualifies.

McGovern v Compliance Officer for IPSA TC2621

Payer has UK tax presence

The defendant, a Greek citizen, was a director and the only shareholder of a company and its subsidiary, which carried on business in the UK. He lived in Kent and had UK earnings on which he paid tax. The claimant was a director of both companies and, until March 2011, he was an employee of the subsidiary. The defendant agreed that the claimant would have an interest in the company.

A deed was signed under which the defendant would make a series of payments to the claimant. The sums were to be paid in full without any deduction other than those legally required.

The defendant fell behind with the payment schedule and the deed was varied to give more time for payment. The claimant brought proceedings claiming a payment under the deed.

At issue was the nature of the payments and whether tax should be deducted from them. The defendant said the payments constituted employment income and that he was obliged by law to make a deduction from the payments. The claimant argued that no tax should be deducted.

Decision:

The court ruled that the payments were employment income and should be treated as such. The defendant owned a property in Kent, and had UK earnings on which he paid tax. It followed that he was an “other payer” under the Income Tax (PAYE) Regulations 2003, SI 2003/2682 and had a tax presence in the UK. He was therefore required to deduct tax from the payments made to the claimant. The claim failed.

Comments – The definition of income can be very important as the tax consequences that flow from the income can be very different. Naturally if income is likely to classified as employment income then tax is required to be deducted.

Telfer v Sakellarios, Queen's Bench Division

Scholarships to sons of company director

A company made payments to two sons of one of its directors (K) while they were at university. HMRC issued assessments on K, charging tax on the basis that the payments were taxable benefits.

Decision:

The FTT dismissed K's appeal, holding that the payments were taxable by virtue of ITEPA 2003 s 212. (The tribunal also upheld determinations charging NIC.)

Comments: ITEPA 2003 s 212 provides that 'a scholarship which is provided for a member of an employee's family or household is to be regarded ... as provided by reason of the employment' and as a taxable benefit. The FTT upheld HMRC's view that the effect of this provision was that the payments made to the director's sons were taxable benefits. This is a case that should not have made it to the Tribunal as there are detailed conditions for scholarships and the facts did not fall within them.

S Kutcha v HMRC (and related appeal) TC2769

Capital Taxes

What does “residence” really mean for PPR? (Lecture P786 – 11.09 minutes)

When you sell your home any resultant gain is subject to the principal private residence exemption. If you have occupied the property as your home for all the years that you have owned the property then the gain is fully covered by the principal private residence exemption. If you have only occupied the property for part of the time then a proportion of the gain will be covered by the exemption – on a time apportioned basis.

If a property has been your principal private residence at any point you are always deemed to occupy the property as your main residence for the last three years of ownership – irrespective of the fact that you may live somewhere else in those last three years.

Apart from the last three year rule above, a taxpayer can only ever have one principal private residence at any one time. So if you have a main home and a holiday home you may have two residences but you will only get principal private residence exemption on one of them at any one time. The facts will decide which of the properties is your main residence and consequently covered by the main residence relief.

The taxpayer can however override the facts and nominate which of his residences is his main residence for the principal private residence exemption.

This nomination must be made by written notice to an HMRC officer within two years of acquiring the second residence. If the taxpayer were to acquire a third residence the two year clock would start again.

The taxpayer has the right to vary a nomination notice by a further written notice to an HMRC officer – the variation can backdated up to two years.

In the case of a man and his wife living with him or of civil partners, there can only be one residence or main residence for both, so long as 'living together' and, where a notice specifying the main residence affects both spouses or civil partners, it must be given by both. If when a couple marry they each have a residence and they continue to use both, the two-year period for jointly nominating the main residence begins on the date of marriage (HMRC Capital Gains Manual CG 64525).

It is worth noting that the choice is not between two or more properties but between two or more *residences*. A property never occupied by the taxpayer as a residence cannot enter the equation. A nomination given more than two years after the *acquisition* of a property will not be late if made within two years after the property is first occupied as a residence.

<u>Meaning of residence</u>

The word residence is not defined in the legislation so it must be given its ordinary meaning. For an individual its ordinary meaning is the dwelling in which that person habitually lives: in other words, his or her home. There must be a degree of permanence to their occupation of the property for it to be regarded as a residence.

There are certain circumstances where the legislation deems a dwelling house to be the residence of an individual even though it is not occupied by that individual as their as a home. These circumstances are set out at CG64477 and include job related accommodation.

In all other circumstances a dwelling house must be occupied by the individual as a residence before it can qualify for relief (CG 64427).

Two recent cases focus on the definition of residence and these are considered below:

Mrs S Bradley v HMRC

A woman lived in a house (AR) which she owned jointly with her husband. She also owned a flat and a second house (ER), both of which had been let to tenants. In August 2007, she separated from her husband and moved into the flat. In March 2008, she advertised ER for sale. In April 2008, after her tenants had moved out, she moved into ER and began redecorating it. In November 2008, she moved back into AR with her husband. In January 2009, she sold ER. HMRC issued an assessment charging CGT on the gain. She appealed, contending that ER had been her principal private residence from April to November 2008.

The First-tier Tribunal rejected this contention and dismissed her appeal, observing that she had already advertised ER for sale before she began living there. Judge Aleksander found that 'she never intended to live permanently at (ER); it was always only ever going to be a temporary home, and therefore it was never her residence'.

D. Morgan v HMRC

The taxpayer bought a property with the intention of making it his marital home. He had owned a flat elsewhere but sold that to fund the new purchase. Before completing on the new house, the taxpayer's fiancée broke off the engagement. The taxpayer went ahead with the purchase and moved in his possessions. Three months later, he decided to let the property and live with his parents. It was let from 31 August 2001 to 15 March 2006, when the taxpayer moved in with a view to selling. The house was sold in July 2006.

HMRC assessed the taxpayer to capital gains tax on the gain, saying that the two periods that the taxpayer had stayed in the property had been temporary.

The taxpayer appealed.

Describing the case as “extremely finely balanced”, the First-tier Tribunal said that the taxpayer needed to show only that it had been his intention to make the house his permanent residence when he first moved in. It was not the quality of occupation that mattered so much as the occupier's intention. The tribunal accepted the taxpayer's assertion that he had hoped, when he occupied the house, that his fiancée might return. It was clear that, because of an “early repayment charge” clause in the mortgage, it would have been financially unviable for the taxpayer to sell the property straight away.

Further, it was understandable that he found the cost of living there on his own was too high and decided to let the property and move back with his parents.

The taxpayer was entitled to only or main residence relief; his appeal was allowed.

Practical implications

1. Selling a buy-to-let

Clients that claim to reside in a buy to let property shortly before they sell the property are highly unlikely to secure the last 3 years as PPR. Moving in shortly before sale would not normally be regarded as permanent occupation.
They would need to move into their buy to let with no intention of selling the property in the short term. There is no specific time limit as to what might secure permanent intent but I would plan on living in the property for at least a whole tax year and within that timeframe there was never any intention to sell.

2. Second homes

When clients own a second residence they may wish to nominate that second property for a short period of time – say one week. The nomination would then secure PPR relief for the last three years of ownership on the second residence. In the absence of a nomination PPR would be given to the property which is the main residence of the family. A nomination simply allows a taxpayer to choose the lesser occupied property as their PPR.

For the nomination to be valid the second property must be regarded as a residence of the taxpayer. The same degree of permanence must exist as with the main residence.

For second homes this would be more of a regular pattern of visits over a number of years. It should be furnished and equipped for the taxpayer's family and the taxpayer should retain a diary of their visits. This might comprise a few weekends, the odd week in the school half terms, a few weeks in the summer and maybe a week a Christmas. The key is that they hold the property with view to occupying it as their second residence.

When they nominate the second residence for a week (say) they do not need to reside in the second property for that particular week. They are effectively confirming we have two long term residences and we are now choosing to nominate the second residence for a random one week period.

Right to extract sand in existence at March 1982?

The taxpayer, a company in Northern Ireland, carried on business as sand merchants, extracting sand from Lough Neagh. When it was formed, the company took over a licence, originally granted in 1965, to extract the sand. A new licence was granted in 1993 and this was replaced by another in September 1998.

In November 1998, the taxpayer sold its business to another company. HMRC assessed the taxpayer to corporation tax.

The taxpayer appealed on the basis that the licence was part of its goodwill and that the chargeable gains computation should include credit for the value of the licence as at March 1982.

Decision:

The First-tier Tribunal rejected this argument, holding that "the asset disposed of by the appellant in 1998 was the right to extract sand pursuant to the 1998 licence".

The taxpayer's appeal was dismissed.

Comments – Normally cases involving the value of an asset at 31 March 1982 deal with the quantum of the value. This case however dealt with whether the asset itself existed at 31 March 1982. Unfortunately although clearly the firm had been operating for a very long time under various arrangements the asset which was being sold actually came into existence in 1998 (the licence) and clearly the Tribunal could not find that that licence actually existed at 31 March 1982 and therefore had a value on that date.

P & J McCann (Toomebridge) Ltd TC2619

Claim for attribution of consideration to goodwill

The taxpayer sold Mercedes cars under a dealer franchise agreement with Daimler-Chrysler (UK) Ltd.

In 2000, Daimler-Chrysler decided to terminate its dealer agreement with the taxpayer on 12 months' notice. After the taxpayer challenged the notice, a settlement was reached, under which it was agreed that the taxpayer's dealership would end on 30 June 2003. Under the agreement, the taxpayer would also be entitled to an enhanced territory release payment.

The taxpayer made a transfer agreement with another dealer (Leadley), which paid the taxpayer £1.7m, part of which included the territory release payment, the rest covering the assets of the business. HMRC said that part of the payment was for goodwill and the balance was to compensate the taxpayer for the early termination of its dealership. Only the part relating to goodwill, therefore, qualified for rollover relief under TCGA 1992, s 152.

The First-tier Tribunal allowed the taxpayer's appeal. The Revenue appealed to the Upper Tribunal (Tax and Chancery Chamber), which found for HMRC. The taxpayer appealed.

The taxpayer argued that the territory release payment had been intended to form part of the consideration for the disposal of the goodwill. HMRC's contentions was that the goodwill enjoyed by the dealership originated from the strength of the Mercedes brand, which was owned by DCUK and its German parent company and was not something that the taxpayer could pass on to Leadley.

Decision:

The CA unanimously dismissed M's appeal. Patten LJ observed that part of the payment (described as a 'territory release payment') 'became payable under a variation of the franchise agreement which reserves the right to control the use of the Mercedes mark'. On the evidence, he held that this could not 'have been the subject of a claim for compensation by (M) as a result of the termination of the franchise and, for that reason, the territory release payment cannot be treated as a payment derived from an asset belonging to (M)'. M could not 'assert an interest of its own in the goodwill which it was surrendering on the termination of the agreement. The compensation for both aspects of the dealership was, therefore, on the face of the agreement, calculated as the amount of lost profit attributable to the period in question.' Therefore, the territory release payment was 'compensation for the loss of the right to trade under the dealership agreement' and was taxable accordingly.

Comments: The CA unanimously held that part of the consideration which the company had received was compensation for the loss of a right to trade, and did not qualify for rollover relief. This confirmed the decision at the Upper Tribunal. As with many cases involving relief from taxation it is crucial that the correct asset or income is identified so that the correct provisions are applied to the asset or income. Identifying the correct asset in a complex transaction is often more difficult as demonstrated in this case where the First-tier Tribunal had erred in law in finding that the whole payment had been consideration for goodwill. This of course was extremely relevant as it was the goodwill which was the qualifying asset for rollover relief.

Mertrux Ltd v HMRC EWCA

Wrong kind of business

HMRC began an investigation into the capital gains tax treatment of the disposal of properties by the taxpayers for the year 2007/08. The Revenue believed that no business asset taper relief was due on the gain, because the taxpayers' property letting business was not a qualifying activity under TCGA 1992, Sch A1 para 5.

The taxpayers appealed, saying the properties had been purchased using profits generated from their car sales business and had been used to make a profit. They were therefore business assets and business asset taper relief should apply.

Decision:

The First-tier Tribunal noted that the properties had been bought with a view to holding them as long-term assets to be let out as private rented accommodation. One of taxpayers referred to the properties as being part of their future pension provision. On this basis, “it was quite clear” to the tribunal “that the properties were bought as investments and not as business assets”. The lettings income arising from the properties was Schedule A income and no business asset taper relief was due.

The taxpayers' appeal was dismissed.

Comments - Recent capital tax cases have focused on the nature of how a particular asset or set of assets are held. These have dealt with the issue of the trade for the purposes of incorporation relief in CGT and business property relief in IHT. Although BATR has been gone for some time now the question was equally relevant as the type and therefore the rate of taper relief depended upon the decision. Hence the comments in black and white by the Tribunal - "it was quite clear" to the tribunal "that the properties were bought as investments and not as business assets".

S and L McCaughern TC2700

IHT BPR: What is an Investment Business? (Lecture P788 – 10.07 minutes)

Background

For inheritance tax (IHT) purposes, business property relief (BPR) is clearly valuable, particularly at the 100% rate. The availability of BPR initially depends on the existence of an underlying business, which is not wholly or mainly investment in nature. On the face of it, establishing whether or not a business is wholly or mainly an investment one ought to be a straightforward task. However, in practice it can often prove difficult.

Legislation and HMRC guidance

'Business'

The first hurdle is that there must be a business. There is little statutory guidance on the meaning of 'business'. IHTA 1984, s 103(3) simply states:

> *"(3) In this Chapter "business" includes a business carried on in the exercise of a profession or vocation, but does not include a business carried on otherwise than for gain."*

HMRC's Inheritance Tax manual (at IHTM25051) states that the effect of s 103(3) is to exclude 'hobby businesses'.

The Shares and Assets Valuation manual (at SVM111110) cites some case law guidance on the definition of 'business', albeit that those cases are non-IHT cases.

The 'right' business

It should be noted that even if activities amount to a business, it must be the 'right' business from a BPR perspective.

Section 105(3) contains the general rule (subject to certain limited exceptions in s 105(4), (4A)):

> *"(3) A business or interest in a business, or shares in or securities of a company, are not relevant business property if the business or, as the case may be, the business carried on by the company*

consists wholly or mainly of one or more of the following, that is to say, dealing in securities, stocks or shares, land or buildings or making or holding investments."

There have been a number of cases in particular on whether a business was mainly investment in nature. In some of those cases, BPR was held to be due, including:

- Farm and let property - *Farmer and anor (executors of Farmer, decd) v IRC* [1999] STC (SCD) 321;
- Caravan park - *IRC v George and another* [2004] STC 147; and
- Landed estate – *HMRC v Brander* [2010] UKUT 300 (TCC).

However, in other cases, BPR was denied, including:

- Industrial units – *Martin and Horsfall (Moore's Executors) v CIR* [1995] STC (SCD) 5;
- Flats let on assured shorthold tenancies – *Burkinyoung v IRC* [1995] STC (SCD) 29
- Caravan park – *Hall (deceased) v IRC* [1997] STC (SCD) 126

The Trustees of David Zetland Settlement v Revenue & Customs

In *The Trustees of David Zetland Settlement v Revenue & Customs* [2013] UKFTT 284, the settlement trustees appealed against HMRC's refusal to allow BPR on the ten year anniversary of the trust in September 2007 on the grounds that the trustees were carrying on a business of 'making or holding investments', which is excluded from BPR under IHTA 1984, s 105(3) (see above). The main issue was whether the trustees' activities from being 'mainly' one of dealing in land or making or holding investments. The settlement assets included:

(a) The leasehold interest in 'Zetland House' – A commercial building divided (by September 2007) into 53 units;

(b) 100% of the shares in Avidpride Ltd (A Ltd) – The company's principal asset was the leasehold interest in a property divided into 20 commercial units and a car park;

(c) 50% of the shares in Mainlegion Ltd (M Ltd) – The company owned the freehold to Zetland House.

(d) A 'property portfolio' – Comprising eleven residential properties, and one non- business asset (ie a residential property occupied rent-free by a trust beneficiary).

BPR was claimed on the basis that all the assets and activities of the trustees comprised one composite business.

However, the tribunal pointed out that each of the different strands of the business must be considered separately, ie the core business carried on by the settlement (Zetland House) must be viewed separately from the holding of shares in A Ltd and M Ltd. The relevant test for the shares was whether the business carried on by each company qualified for BPR. The tribunal considered that it was necessary to examine the nature and purpose of the various activities.

Zetland House

The tribunal acknowledged that certain services and activities were provided. The question was whether those services and activities elevated the business from mere ownership or investment into a business which was relevant for BPR purposes. The tribunal also had to decide whether the business consisted of sufficient non-investment activity to qualify for BPR. The trustees argued that it provided sufficient additional services and facilities to make the business a non-investment activity, and that the following services and facilities should be regarded as additional:

A. Conference rooms

B. Mail room, reception and porters

C. Staff

D. Café

E. Communal events

F. Internet services

G. Bicycle stands

H. Project management

I. Cleaning services

J. 24 hour security

K. Gym and hair salon

The tribunal examined the various services provided, and concluded that they were "…mainly of a standard nature aimed at maximizing income through the use of short-term tenancies". It was acknowledged that some services were provided over and above what was required. These included: cleaning of the common parts of the building, post sorting and delivery, reception, free food and drink at socials and gift vouchers. However, the services which were not investment business related were not sufficient to tip the balance in favour of obtaining BPR.

Company shares

A Ltd – the tribunal noted that fewer services were provided to the tenants of the commercial units owned by the company than were provided to the tenants of Zetland House. On that basis, the shares could not be considered relevant business property. The ownership of the shares by the settlement would therefore constitute an investment activity. BPR was excluded by s 105(3).

M Ltd – Similarly, the holding of the shares in M Ltd was an investment for the settlement, and BPR was also precluded.

The trustees' appeal was therefore dismissed.

General points

- *Office accommodation* - As mentioned, there have been a number of cases concerning whether a business is mainly one of making or holding investments for BPR purposes. However, the *Zetland* case appears to be the first one concerning serviced office accommodation.
- *Serviced holiday accommodation* - BPR was denied in respect of serviced holiday accommodation in *HMRC v Personal Representatives of Nicolette Pawson* [2013] UKUT 50 (TCC) (see Dean Wootten's TSO lecture, March 2013). The Upper Tribunal broadly decided that the nature and extent of the services provided in that case were not sufficient to prevent the business from being mainly one of holding the property as an investment. The services provided were all of a relatively standard nature, and aimed at maximising the income obtainable from the short term holiday letting of the property.
- *'Business' for CGT purposes* - There is no definition of 'business' for CGT purposes. In *Elisabeth Moyne Ramsay v HMRC* [2013] UKUT 226 (TCC), the Upper Tribunal held that the taxpayer's activities in relation to a single building divided into ten residential apartments were sufficient to constitute a 'business' (for the purposes of incorporation relief under TCGA 1992, s 162). However, note that the test in this case was different, as the issue was whether a business existed; for IHT purposes, the hurdle is whether there is a business which consists wholly or mainly of making or holding investments.
- For HMRC guidance on investment business, see the Inheritance Tax manual at IHTM25261-IHTM25264; in the context of caravan sites and furnished lettings, see IHTM25271-IHTM25280. In relation to the letting of commercial premises, see SVM111160.

Contributed by Mark McLaughlin

An important amendment to new S162B IHTA 1984 (Lecture P789 – 16.50 minutes)

In a surprising announcement which appears to be an attack on what has hitherto been regarded as relatively unaggressive and sensible tax planning, the Treasury have confirmed in the Finance Bill that the rules governing deductible liabilities for IHT purposes are to be tightened.

The anti-avoidance legislation covers several aspects of the IHT code, but this chapter focuses on new S162B IHTA 1984 which deals with liabilities incurred to finance (directly or indirectly) what is referred to as 'relievable property', ie. property qualifying for any of the following reliefs:

(i) business property relief;

(ii) agricultural property relief; or

(iii) woodlands relief.

If the liability has been incurred to acquire, maintain or enhance property which is eligible for business property relief under S104 IHTA 1984, S162B(2) IHTA 1984 provides that this liability reduces the value of the relevant business property (rather than any other property on which the loan may be specifically secured) so that only the net value of the property will attract business property relief.

This puts a stop to the widespread practice of borrowing against the collateral of (typically) a valuable main residence and using the loan to acquire an AIM portfolio which, in two years' time, should attract 100% relief.

If the liability has been incurred to acquire, maintain or enhance property which is eligible for agricultural property relief under S116 IHTA 1984, S162B(4) IHTA 1984 provides that this liability reduces the agricultural value of the farmland and farm buildings so that only the net agricultural value of the property will attract agricultural property relief.

If the liability has been incurred to acquire, maintain or enhance woodlands or to plant trees and an election has been made under S125 IHTA 1984 to exclude the value of trees and underwood on a person's death, the liability is deemed to reduce the value of the trees and underwood before the resulting net value is left out of account (S162B(7) IHTA 1984).

It was originally intended that this measure would apply to transfers made on or after the date of Royal Assent. In practice, this would normally catch deaths occurring on or after the commencement date, even though the deceased might have implemented his borrowing arrangement several years earlier. In some cases, the taxpayer might have found that his business needed further working capital in order to survive the recession but his bank would often have been unwilling to make him an appropriate business loan. As a result, he offered the bank his house as collateral for, say, the £250,000 loan, which of course they accepted. This arrangement would be caught in exactly the same way as the AIM investment referred to in (c) above. As a result, the Exchequer Secretary to the Treasury made the following announcement during the Committee Stage debates:

'The Government recognise that some lenders may require security in the form of personal assets before they are willing to lend and that individuals may not be able to restructure the loan or unwind the arrangements for some time. An amendment will, therefore be tabled to change the commencement date so that the new rules dealing with liabilities incurred to acquire a relievable property will apply only to new loans taken out on or after 6 April 2013. That will mean that the new provisions will not affect someone who took out a business loan in the past secured against their other assets.'

This is a very welcome amendment.

Contributed by Robert Jamieson

Minimising 10-year anniversary and exit charges (Lecture P787 – 13.36 minutes)

One possible planning step which can be taken before a 10-year anniversary charge is to reinvest the trust funds in assets qualifying for 100% business or agricultural property relief. This is not always a straightforward solution, given that it may involve realising gains on existing assets, and the qualifying period of ownership for the relevant relief must of course be observed.

The alternative strategy of borrowing against the trust property and investing the borrowed funds in suitable exempt assets such as AIM shares has been stymied by the provisions in the current Finance Bill.

Where exit charges are concerned, it is instructive to compare the tax position of an exit charge *before* the first 10-year anniversary and an exit charge *after* a 10-year anniversary. With the former, let us suppose that a settlor puts relevant business property worth £2,000,000 into a discretionary settlement. There will be no entry charge because of the availability of 100% business property relief. However, if, after seven years, the shares are sold for, say, £3,500,000 and the cash (net of any CGT liability) is then distributed to one or more of the trust beneficiaries, it should be noted that there will be a tax charge based on the trust's 'initial value', ie. £2,000,000. The fact that the original settled property qualified for 100% relief is neither here nor there.

Contrast the position if the property remained in the trust and was worth, say, £5,000,000 at the time of the first 10-year anniversary. The IHT payable on that occasion would be nil because the trustees will be entitled to 100% business property relief. If the company was sold two years later for, say, £7,200,000 and the sale proceeds (net of CGT) were distributed in cash, the rate of tax on that capital appointment would be 0% because, under S69 IHTA 1984, the tax charge in these circumstances always looks back to the rate paid on the last 10-year anniversary.

Contributed by Robert Jamieson

Administration

Finance Act 2013

The Finance Act 2013 received Royal Assent on 17th July 2013

It is comprised of 236 sections and 51 Schedules and runs to 648 pages.

Illness is a partial excuse

D and his wife were directors of the appellant. They began the company in 2003. After having a baby, the wife stopped working, leaving D as the only person managing the company. In May 2006, D was diagnosed with a life-threatening cancer. He had an operation, after which he tried to return to work but was unable to cope. He became depressed and totally obsessed with his health. A manager was appointed to look after the company. D subsequently was rediagnosed with cancer and had to have a further operation, this time to remove his leg. Afterwards, he was less able to cope than before and relied on the manager to deal with company matters. He spent some time in Florida trying to recover.

The company fell behind with its PAYE obligations and HMRC imposed penalties. The company appealed.

Decision:

The First-tier Tribunal noted that, despite his illness, D was aware that PAYE had to be dealt with every month because payments were made, even if they were late. There was a reasonable excuse initially for the late payments, but it was the responsibility of the directors to ensure that payments were made on time. D should have made alternative arrangements sooner to ensure tax matters were dealt with properly. Further, his wife was still a director and so also had responsibility for the company. The tribunal cancelled the penalties for the first three months that payments were late, but confirmed those for the remaining six months.

The taxpayer's appeal was allowed in part.

Comments – Cases such as these demonstrate that Tribunals will take certain matters into account for a period of time. A set of conditions may provide a reasonable excuse for a limited period of time but of course the onus of directors is to ensure that appropriate procedures are put into place even in difficult circumstances such as those described in the case.

All Day Recruitment Services Ltd (TC2699)

Reasonable excuse

The taxpayer submitted its 2010/11 end-of-year employer return P35 on 4 April 2011 and said it had received an acknowledgement from HMRC confirming receipt of the form. In August, the parent company of the taxpayer called the HMRC employer helpline and was informed that the return had not been received.

The taxpayer claimed HMRC had said that, when the return had been sent (4 April), their systems were being updated so there may have been a fault on their interface. The taxpayer submitted the return successfully on 4 August, but HMRC imposed a penalty for late filing.

Decision:

The First-tier Tribunal found as a fact that HMRC's computer system could only accept an employer return on a single occasion, and that the taxpayer's form was not received before 4 August. The tribunal also found that the cause of the taxpayer's failure to file on 4 April was because of HMRC's computer upgrade.

On this basis, the tribunal said it was possible that the taxpayer had received an acknowledgement that the return had been filed on 4 April. This was a "genuine, honest and reasonable belief" that provided a long-accepted defence in common law. Although the tribunal had no jurisdiction to discharge the penalty for late submission of the form on the grounds that it believed it to be unfair, it could if the taxpayer had reasonable excuse which, in this instance, it did.

The taxpayer's appeal was allowed.

Comments – This is yet another case involving the penalties raised in respect on the 2010/11 end of year employer returns. However the circumstances are slightly more unusual. The "genuine, honest and reasonable belief" that provided a long-accepted defence in common law was very appropriate in these circumstances. The evidence was clearly in favour of the reasonable excuse and thus a fair outcome arose.

Eclipse Generic Ltd TC2662

Prudent employer

The taxpayer was late submitting its employer's annual return for 2011/12. As a result of this HMRC imposed a penalty of £100.

On 30 April 2012, the taxpayer's agent submitted the return online and received an email from HMRC confirming the submission had been successfully received. This email acknowledged that a receipt of return was generic for both test and live submissions. Although this acknowledgement gave the warning that it was necessary to send the actual annual return by the due date if this was a test submission, the taxpayer's agent was not put on notice that the return was defective.

In this instance, HMRC did not send a reminder to the agent to file the return on time. After receiving the penalty notice, the agent contacted HMRC and discovered the return filed on 30 April 2012 was a test submission. He immediately filed a new return.

Decision:

The tribunal held that the taxpayer had a reasonable excuse for its default, because its actions were “those of a prudent employer conscious of its responsibilities under the taxes acts”.

The taxpayer's appeal was allowed and the penalty cancelled.

Comments – This case is another example of the confusion that can arise from unclear messages from the HMRC computer system when returns are submitted. In any system of self-assessment where the filing is dependent upon the operation of the computer it is essential that taxpayers know exactly whether or nopt they have successfully filed.

Comprehensive Management Consultants Ltd (TC2652)

Validity of discovery assessment

The appellant (S) had, in 2000/01, entered into an avoidance scheme which was broadly similar to that which was subsequently held to be ineffective in Drummond v HMRC [2009] STC 2206. HMRC issued a discovery assessment. S appealed, contending that the effect of the decision in HMRC v Dr M Charlton (and related appeals) [2012] UKUT 770 (TCC) was that the assessment was invalid.

Decision:

The First-tier Tribunal rejected this contention, specifically distinguishing the decision in Charlton. Judge Kempster observed that 'in Charlton, the taxpayers' returns included the scheme reference number that had been allocated by HMRC when the tax avoidance scheme had been registered by the scheme promoters'. Furthermore, in the Charlton case, the Ch D decision in Drummond had been issued before the closure of the relevant enquiry window. In the present case, however, the decision in Drummond 'was still several years away when the enquiry window closed in January 2003', and 'the relevant law relating to the scheme adopted by (S) was of a degree of complexity such as to make it unreasonable for the officer to be aware of an insufficiency on the basis of the information contained in (S's) tax return'.

Comments: This decision is worth noting because the FTT specifically distinguished the earlier decision in Charlton and held that the information on the appellant's return was not adequate to have alerted an HMRC officer to the fact that the appellant had entered into an artificial avoidance scheme which should be the subject of an enquiry. As Judge Kempster observed, a crucial distinction between the cases was that in Charlton the appellant had included the relevant DOTAS reference number on his return.

R Smith v HMRC TC2768

No power

The taxpayer appealed against HMRC's decision not to write off underpaid tax under extra-statutory concession A19. The taxpayer had underpaid tax of £2,615 for 2009/10 and 2010/11 as a result, the taxpayer asserted, of a mistake made by HMRC. He said it was unreasonable to expect him to pay the outstanding sum when it had been caused by the department's error.

HMRC said that the First-tier Tribunal had no jurisdiction to give a ruling about the correct application of the concession.

Decision:

The First-tier Tribunal sympathised with the taxpayer, saying that when an individual has more than one employment, the operation of the PAYE system was “by no means straightforward”. However, the tribunal had no authority to consider the application of extra-statutory concession A19.

As a result, the taxpayer's appeal was dismissed.

Comments – It is understandable that the taxpayer thought that a result of a mistake by HMRC that the tax ought to be written off under ESC A19. However the tribunal highlighted that they had no authority to consider the application of the ESC.

C Flood TC2665

Error or mistake relief: salesman claiming to have been employee

An individual (T) began working as a salesman for a Danish company (D) in 1994. T's contract stated that he was an employee. However, D did not deduct tax from the payments which it made to him. In 2002, on the advice of an accountant, T submitted tax returns for 1996/97 to 2001/02 on the basis that he was self-employed. In 2003, T engaged a different accountant who considered that he should have been treated as an employee, and submitted a claim to error or mistake relief under TMA 1970 s 33. HMRC rejected the claim.

Decision:

The FTT dismissed T's appeal. Judge Powell observed that T had 'failed to deal with his tax affairs at all for years after he started work for the company'. It was likely that 'the PAYE liability would have exceeded the tax paid on the self-assessment returns'. Therefore, it was 'just and reasonable to deny relief altogether'.

Comments: The FTT upheld HMRC's view that it appeared that the appellant had paid less tax through being accepted as self-employed than he would have done if he had been treated as an employee, so that there were no grounds for granting error or mistake relief.

PG Tindale v HMRC TC2749

Notice requiring production of bank statements

HMRC issued notices under TMA 1970 s 19A to a married couple who operated a property lettings business. The notices required the production of bank statements and statements of money market transactions.

Decision:

The FTT upheld the requirement to produce bank statements. Judge Kempster observed that the couple's business was 'run through a bank account that also includes items of personal expenditure', and held that 'details of the transactions in that bank account are reasonably required by HMRC, as they relate at least in part to transactions of the letting business'. However, he allowed the appeal against the requirement to produce money market statements, finding that 'it would be unduly onerous to require the appellants to provide those other documents'.

Comments: The FTT held that HMRC was entitled to require the production of bank statements relating to an account which had been used for business transactions as well as private transactions. However, the tribunal held that the appellants should not also be required to provide statements of money market transactions.

I & P Phillips v HMRC TC2756

Delay by HMRC in processing application for deregistration

A woman (L) purchased a retail shop in 2000 and traded from it until December 2008, when she closed the shop because she had been suffering from ill health. She sent a form VAT7 to HMRC with a covering letter. HMRC did not acknowledge receipt. Subsequently, HMRC issued estimated assessments and surcharges. L wrote to HMRC in February 2012, repeating her request for the cancellation of her registration. HMRC agreed to cancel her registration from February 2012, but refused to backdate the cancellation to December 2008. L appealed.

Decision:

The FTT allowed her appeal. Judge Walters found that, on the balance of probabilities, the letter and form VAT7 which L had sent in December 2008 'were received by HMRC and, presumably, mislaid by them'.

Comments: The FTT accepted the appellant's evidence that she had submitted a letter and form VAT7 to HMRC in December 2008, and should be deregistered from that date. (In similar circumstances, several tribunal judges have found on the balance of probabilities that such a letter has been lost in the post. However, Judge Walters expressed the view that the most likely explanation was that the letter had been lost by HMRC.)

DL La Roche v HMRC TC2758

Assessment on pension scheme administrator

A pension scheme made an unauthorised payment of £100,000 to one of its members in 2006. HMRC issued an assessment on the scheme administrator (W) under FA 2004 s 255.

Decision:

The First-tier Tribunal dismissed W's appeal against the assessment. Judge Cannan noted that W was a chartered accountant and a chartered tax adviser. W had failed to observe the statutory reporting requirements and 'had delegated day-to-day control of the schemes for which he was the scheme administrator to another individual'. Judge Cannan observed that 'one of the reasons for the tax charges which arise where a pension scheme makes unauthorised payments is to safeguard the tax-relieved funds in the scheme for the provision of retirement benefits. In relation to loans, the provisions seek to ensure that funds are not loaned in circumstances where there is a risk they might not be repaid.' FA 2004 s 268(7) provided relief for a scheme administrator in certain circumstances where he 'reasonably believed that the unauthorised payment was not a scheme chargeable payment'. However, it was implicit in s 268(7) 'that the scheme administrator should have systems in place whereby he is aware that payments are going to be made by the trustees'. W 'had no systems in place to identify whether unauthorised payments were being made', and 'had no systems to identify in advance any payments being made'. Judge Cannan also held that the charge was not disproportionate and did not contravene the European Convention on Human Rights.

Comments: The First-tier Tribunal upheld an assessment on the administrator of a pension scheme which had made an unauthorised payment to one of its members. Judge Cannan's comments are self-explanatory.

SC Willey v HMRC TC2731

Negotiated settlement: further investigation by HMRC

The Revenue began an investigation into a company (S). This investigation was settled by a contract settlement in early 2004, under which S paid tax of £525,000. Later in 2004 HMRC began an enquiry into S's returns for 2002 and 2003 (in which S claimed relief for amortisation of goodwill). In 2006, HMRC also began an enquiry into S's returns for 2004 and 2005 (in respect of which S had submitted a covering letter claiming terminal loss relief). In 2011, HMRC issued closure notices rejecting S's claims. S appealed, contending firstly that its claim to terminal loss relief had become final and conclusive, and additionally that its tax liability for 2002 and 2003 had already been included as part of the 2004 contract settlement.

Decision:

Judge Mosedale rejected S's contention regarding its claim to loss relief, finding that HMRC had issued a closure notice rejecting that claim. She held that the tribunal had 'jurisdiction to consider as a general matter the appellant's claim that it had already paid its tax liabilities for the 2002 and 2003 year ends'.

She directed that either party could apply for this to be considered at a further preliminary hearing, failing which there should be a further hearing to consider the substantive appeals.

Comments: This is the latest instalment in what has become a long-running saga, in which HMRC and the company disagreed as to the precise scope of a negotiated contract settlement. The First-tier Tribunal upheld HMRC's view that it was not required to accept the company's claim to terminal loss relief.

Spring Salmon & Seafood Ltd v HMRC (No. 2) TC2723

Partnership applying for information to be omitted for judgment

A limited liability partnership (G) had applied to the QB for judicial review of HMRC's proposal to alter the tax treatment of certain supplies. Following the hearing, it applied for certain information to be omitted from the published judgment, on the grounds that it was commercially sensitive.

Decision:

The QB rejected the application. Leggatt J observed that the information had been 'contained in witness statements which were in evidence at the hearing', and that 'the entire hearing took place in open court'. He held that there was 'no good reason to restrict publication of any information contained in [G's] unaudited accounts'. On the evidence, it appeared that G 'would prefer competitors and customers not to know that, if the proposed tax treatment of its supplies is implemented, [G] will be unable to continue to trade for long unless its business is restructured in a way that will itself have certain detrimental consequences'. However, it was 'important in the interests of open justice to explain the facts which justify the conclusion'.

Comments: The QB rejected the partnership's application to exclude certain information from the published judgment. The decision here is in line with previous decisions such as Treharne v Guinness Exports Ltd, Ch D (1967) 44 TC 161. Leggatt J's comments are self-explanatory.

R (oao GSTS Pathology LLP) v HMRC (and related applications) (QB)

Consultation season is upon us

HMRC consultation: reform of close company loans to participators rules

HMRC have published a consultation document on whether to reform the rules governing the taxation of close company loans to their participators (and other related arrangements) and on options for such reform, for comment by 2 October 2013.

Close companies are those controlled, directly or indirectly, by five or fewer participators or by any number of directors who are participators. Participators are individuals who have shares or an interest in the company.

A tax charge applies where value is extracted from close companies by participators, other than by way of salary or dividend. The consultation covers options for reforming the rules which govern extractions of value, usually as loans or advances, from close companies by participators.

The main purpose of rules governing the taxation of close company loans to their participators is to deter close companies from transferring value to their participators in ways which are not chargeable to income tax or National Insurance contributions as remuneration or dividends, for example, as loans. The Government is interested in the scope and need for updating the legislation in line with its objectives for a fairer and simpler corporate tax regime, more robust against avoidance.

The four broad options identified by the Government for reforming the close company rules are: maintaining the current regime; increasing the tax rate but retaining the structure and operation of the regime; replacing the current repayable charging system with a lower rated but permanent charge which arises annually on amounts outstanding at the end of each accounting period until the extraction is repaid to the close company; and replacing the current repayable charging system with a lower rated but permanent charge which arises annually on average amounts outstanding during the accounting period.

This consultation applies to all close companies, including most small companies which, by the nature of their ownership, are close companies, and their participators. The Government intends that any reform to the regime would apply to relevant extractions in value which occur from April 2014.

HMRC consultation: withdrawing relief for interest on loans to purchase life annuities

HMRC have published a consultation document on the impact of withdrawing the relief for interest on loans taken out by individuals aged 65 or above before 1999 to purchase life annuities, for comment by 30 September 2013.

Relief for interest paid on loans other than those to purchase an annuity was withdrawn by April 2000. Although interest relief for those aged 65 and over taking out new loans to buy a life annuity was withdrawn from 9 March 1999, existing loans continue to qualify for the remainder of the loan period. In early 2013, the Office of Tax Simplification (OTS) recommended the withdrawal of this relief to enable the repeal of a considerable amount of legislation relating to interest relief itself and to the mortgage interest relief at source scheme (MIRAS), under which the borrower pays the lender the interest less the tax relief.

The Government proposes to withdraw MIRAS from April 2019 to enable this simplification. Withdrawing the relief will remove an administrative burden for lending institutions as they will no longer need to claim back from HMRC the amounts of relief deducted by borrowers from interest payments.

This consultation seeks to gather information about the extent to which individuals continue to benefit from the relief and to ask when might be an appropriate time to withdraw it.

HMRC consultation: how to improve HMRC's collection of debt: coding out

HMRC have published a consultation document on the proposed legislative changes to the collection of debt using the tax code, announced at Budget 2013, for comment by 5 September 2013.

HMRC aim to improve their collection of debts due to them through the PAYE system (known as coding out) by increasing the use of coding out, collecting more from higher earners while protecting lower earners, and extending the focus of coding out from just small debts to larger ones. Coding out is one of HMRC's most effective debt collection methods. It involves HMRC assigning a new tax code to a debtor, which means that the normal deductions made from a taxpayer's earnings by their employer will be increased to include an amount that will pay off the sum they owe to HMRC over the year.

The coding out limit is currently £3,000 for anyone with a primary source of PAYE income of less than £30,000 a year. HMRC are proposing to replace this current single scale by a graduated scale of limits, intended to come into effect in 2015 by secondary legislation. This would protect those on lower incomes, with no change to the maximum that could be coded out for those earning less than £30,000; and introduce a graduated, income related scale for earnings of £30,000 or more so that a maximum of £17,000 could be coded out for a person with earnings of over £90,000. To ensure a consistent approach, HMRC also propose to extend the legislative 50 per cent overriding limit, currently only available to K-codes, to all tax codes so that employers and pension providers do not make tax deductions in excess of 50 per cent of an individual's relevant pay. HMRC will also explore the potential to recover debts over more than one year, where appropriate, to make best use of the increased limits.

This consultation seeks views on the proposed legislative changes and applies to people who have a PAYE underpayment, a self-assessment (SA) balancing payment or an unpaid debt to HMRC or who represent them.

HMRC consultation: VAT: retail export scheme

HMRC have published a consultation document on possible options for redesigning the VAT retail export scheme (also known as tax-free shopping), for comment by 30 September 2013.

The scheme allows non-European Union visitors to claim a refund of VAT on goods they buy and export from the European Union (EU) in their personal luggage. HMRC aim to make the scheme easier to use and understand, and to limit opportunities for error and fraud.

This consultation applies to retailers and refund companies using the VAT retail export scheme, as well as overseas visitors and individuals who make claims for VAT refunds under the scheme. It seeks views on the main options for improving the scheme in the UK, which include: customer experience improvement measures such as removing the need for foreign visitors to carry their passports/identification documents around busy shopping centres; revenue protection measures such as tightening the rules on retailers issuing blank or duplicate claim forms; introducing a digital tax free shopping scheme to replace the current paper-based system; and introducing a minimum threshold for the retail export scheme. Implementation of certain options – in particular, the potential for introducing

a digital tax-free shopping scheme – will depend upon there being a sufficiently good case for any investment and views will be sought about how this might be achieved.

Reform of an anti-avoidance provision- Transfer of Assets abroad

HMRC have published a document summarising responses received in their 2012 consultation and seeking further views on the matching rules for the benefits charge and on draft guidance, for comment by 10 October 2013.

At Budget 2012 the Government announced a consultation on the transfer of assets abroad legislation. The consultation sought views on whether proposed amendments would ensure that the legislation remained compatible with European Union law, on certain clarification changes, and on whether any other changes were required. A new exemption and other changes were legislated in Finance Act 2013 although the proposed changes to the rules for calculating the amount to be charged in certain situations (the matching rules) were deferred to allow for further consultation

Simplifying the National Insurance processes for the self-employed

HMRC have published a consultation document to consider whether collecting Class 2 NICs alongside income tax and Class 4 NICs would be simpler and reduce the administrative burden on the self-employed community, for comment by 9 October 2013.

Update on discovery **(Lecture P790 – 8.27 minutes)**

An important development in this area comes from the Upper Tribunal dismissing HMRC's appeal against the decision of the First Tier Tribunal in the *Michael Charlton* case.

Basic position

If HMRC do not issue a notice of enquiry within the normal deadline of 12 months after the filing date, you and the client will want to be certain that there is no possibility of HMRC being able to enquire into that year's tax position (unless of course the client has deliberately concealed income).

There is now more guidance on this issue from case law which gives more hope than before, especially following the *Michael Charlton* case.. As far as the legislation is concerned it states that discovery assessments can be made in the following circumstances where HMRC can show that there has not been full disclosure:

- The loss of tax is the result of fraudulent or negligent conduct by the taxpayer or agent – Section 29 (4) TMA1970; or
- The officer of the Board could not have been reasonably expected to have identified the circumstances giving rise to the loss of tax before (a) the end of the normal enquiry deadline, or (b) before the conclusion of any enquiry, on the basis of the information that had then been made available to him – Section 29(5)

It has long been thought that this loads the dice very much in favour of HMRC, especially when looking at the definition in Section 29(6) of information being made available to an officer as under:

a) it is contained in the taxpayer's return for the year, or in any accounts, statements or documents accompanying the return
b) it is contained in any claim made for the year, or in any accounts, statements or documents accompanying the claim
c) it is contained in any documents, accounts or particulars which, for the purposes of any enquiries into the return or any such claim by an officer of the Board, are produced or furnished by the taxpayer to the officer whether in pursuance of a Section 19A notice or otherwise; or
d) it is information the existence of which, and the relevance of which as regards a loss of tax, could reasonably be expected to be inferred by an officer of the Board from information falling within (a) to (c) above or notified in writing by the taxpayer to an officer.

HMRC v Dr Michael Charlton UKUT770

Several clients of an accountancy firm had participated in a tax avoidance scheme. Whilst HMRC commenced an enquiry in most cases, in three cases they had failed to do so within the window and unsuccessfully argued that they could make a discovery.

The main factors were:

1. All three of the individuals had made detailed disclosures in their tax returns about the scheme and had stated the DOTAS scheme reference number.

2. HMRC argued that whilst the returns included factual details of the scheme they did not flag up that there was an actual insufficiency in the return, and following the ***Veltema*** case that was necessary to prevent a discovery.

3. The reason HMRC failed to start an enquiry within the normal deadline was not because an Inspector looked at the returns and missed the relevant points, but instead it was down to admitted administrative slip-ups such that nobody of the appropriate seniority looked at the three tax returns.

4. The FTT held that in the simple case the notional average officer should take his own decision on whether to assess. In a manifestly obvious tax avoidance scheme that has already been disclosed to HMRC and reviewed by them, one just considers what the notional average officer should and would have done in the relevant circumstances. This approach deals with matters in the appropriate way and it avoids the consequences of HMRC's contention that the test in Section 29(5) is crafted essentially for the simple scheme and does not apply where a tax avoidance scheme is involved.

5. The FTT added that whether the test they came up with by reference to Section 29(5) creates the right balance of fairness between HMRC and taxpayer is entirely secondary. However they also said that if they had adopted the contentions and conclusions advanced by HMRC *"we*

cannot resist observing that a quite extraordinary imbalance would have been achieved between the taxpayer and HMRC".

6. The UKUT agreed with HMRC that an assessment can be made where their original officer changes their mind or takes a different view, rather than anything completely new being discovered. However they disagreed with HMRC on the main issue of whether they had sufficient information to enable a hypothetical officer to have been aware of the under-assessment.

7. In particular the UKUT said:

   "*We are in no doubt that the existence of the AAG1 form could reasonably have been expected to have been inferred by the hypothetical officer and that the physical separation of the SRN number from other relevant entries on the tax return would not have prevented an officer from making the necessary link between them so as reasonable to infer the relevance of the form AAG1 to the insufficiency".*

Contributed by Gerry Hart

Business Taxation

Entitlement to claim P&M allowances on acquisitions (Lecture B786 – 17.34 minutes)

The rules giving entitlement to claim plant and machinery (P&M) allowances are contained in the Capital Allowances Act 2001 (CAA 2001). The main rule is in CAA 2001 s 11. To claim P&M allowances a person must have a 'qualifying activity' and incur 'qualifying expenditure'.

Qualifying activity

A 'qualifying activity' is capital allowances shorthand for a business. Qualifying activities are defined by CAA 2001 s 15. Various business activities qualify, but the most commonly encountered include: a trade; an ordinary or overseas property business; a UK or EEA furnished holiday letting, and professions.

Qualifying expenditure

'Qualifying expenditure' is capital expenditure on the provision of P&M wholly or partly for the purposes of the qualifying activity, and the person owns the expenditure as a result of incurring it.

Machinery and plant

Machinery and plant are discrete categories of assets (although an item can be both).

Machinery takes its ordinary meaning.

Plant is sometimes defined by statute. A good example, is 'integral features' defined by CAA 2001 s 33A. These include electrical systems; hot and cold water systems; heating, ventilating and air conditioning systems; lifts, escalators and moving walkways; and external solar shading. Otherwise, plant is defined by case law. The most important case is *Yarmouth v France* (1887) LR 19 QBD 647. The key point is that plant is business *apparatus*. This includes many standard fixtures in buildings, such as sanitary appliances and fire warning equipment.

Provision

It was held in *Ben-Odeco v Powlson* [1978] 52 TC 67 that 'provision' focuses attention on the plant and expenditure on the plant. This means not just the bare purchase price but also associated costs such as transport and installation (but not those that are too remote).

Ownership of fixtures

Satisfying the s 11 ownership requirement can be complicated for fixtures in buildings. A fixture is defined by s 173 by reference to the law of real property. Real property law contains a general rule that whatever is attached to the soil (ie, a fixture) becomes part of it.

Therefore, all fixtures belong to the freeholder, irrespective of whether another person (eg, a tenant) incurred the expenditure and installed them. This even applies to trade fixtures attached by a tenant for business purposes (for which the tenant would normally have the right to remove the asset during its tenancy).

Chapter 14 of CAA 2001 contains special rules that clarify ownership of fixtures for capital allowances purposes. They sometimes deem capital allowances ownership to differ from true ownership in real property law by creating a fictional ownership that, for capital allowances purposes only, overrides real property law.

There are three scenarios relevant to the ownership of fixtures for capital allowances purposes.

Additions

All P&M fixtures have to be installed, or attached, to the land or building at some time in the first place. Either when the property is built, extended or refurbished. Or as a piecemeal addition during the building's life.

Ownership for capital allowances purposes is dealt with by CAA 2001 s176. This says that a person is treated as the owner of a fixture for capital allowances purposes if they have an 'interest' in the 'relevant land' at the time the P&M becomes a fixture. The relevant land is the building or land that the fixture is attached to. An interest is defined in CAA 2001 s 175 as one of a number of legal interests. These include a freehold and leasehold (and their Scottish equivalents), an easement or servitude (or agreement to acquire any of these), or a licence to occupy land.

As long as the person incurring the expenditure has one of the appropriate interests at the time the P&M is installed it is treated as belonging to them for capital allowances purposes.

New interests in land

Where a new interest (eg, a lease) is granted for a capital sum there are two scenarios to consider.

If the lessor is *not* entitled to an allowance, CAA 2001 s 184 treats the fixture as belonging to the lessee. As long as before the lease is granted the fixture has not been used for business purposes by the lessor or anyone connected with it. And as long as no other person has a 'prior right'. A 'prior right' means that someone else (eg, a tenant) has previously incurred capital expenditure on the fixture, is entitled to claim (by virtue of having pooled that expenditure) and makes or has made a claim for allowances in respect of it.

However, if the lessor *is* entitled to an allowance then the lessor and lessee must make a joint election under CAA 2001 s 183 to transfer ownership of the fixture for capital allowances purposes from the lessor to the lessee. The deadline for making the election is two years after the date when the lease takes effect.

Existing interests in land

Where an existing interest (eg, a freehold) changes hands the fixture is treated as belonging to the buyer unless immediately after the transaction someone else has a 'prior right' (see above) in respect of it.

Freehold interests

So, the buyer of a freehold interest (or its Scottish equivalent) is generally treated as owning fixtures for capital allowances purposes, except those installed and paid for by a tenant (for which the tenant would probably have a 'prior right'). Where an investment property has been fitted out with tenant's trade fixtures it is, therefore, usually the case that the landlord's capital allowances claim is based on ownership of only a landlord's shell.

Leasehold interests

The buyer of a leasehold interest for a capital sum, only inherits ownership for capital allowances purposes if:

a) The lease being acquired is the same lease that was held by the person who had the fixtures installed. The installer would be treated as the owner by s 176. Capital allowances ownership, in effect, is associated with that interest and the new lessee inherits ownership upon acquiring that same interest.

b) The lessor was not entitled to an allowance and the fixture had not previously been used for business purposes by it, or anyone connected to it. The lessee is treated as the owner by s 184.

c) There had previously been a s 183 election transferring capital allowances ownership to the lease and that same lease is assigned.

Contributed by Steven Bone

Simplified expenses (Lecture B787 – 15.20 minutes)

HMRC have recently issued guidance highlighting

- the withdrawal of non-statutory 'business mileage' deductions and agreements for 'board and lodging' private use adjustments, now superseded by the 'simplified expenses' rules as part of 'simpler income tax for small businesses' legislation.
- transitional arrangements for the withdrawal of 'board and lodging' agreements.
- how businesses can use the 'simplified expenses' rules for business mileage, 'board and lodging' private use adjustments and flat rate adjustment for use of home.

'Business mileage' deductions

A non-statutory mileage rate scheme was previously available to small businesses, which allowed a deduction for business mileage to be computed using the 'Approved Mileage Allowance Payments (AMAP)' rates applicable under employment income rules.

For the tax year 2013/14 and onwards, this non-statutory scheme is replaced as the simplified expenses rules now provide a statutory basis to allow deductions for expenditure on motor vehicles. The new rules apply to all sole traders and business partnerships and provide relief for the costs of buying, maintaining and running the vehicles.

Simplified expenses: expenditure on motor vehicles

Under the 'simplified expenses' rules, businesses can calculate allowable expenditure on vehicles using a flat rate based on mileage. This means that actual costs incurred do not need to be recorded, nor do capital allowances need to be calculated.

Businesses can choose to use the flat rates. However, once the flat rate has been used in relation to a particular vehicle, this method of calculation must continue to be used for as long as the vehicle remains in the business. If capital allowances have already been claimed in respect of a particular vehicle, then the flat rate cannot be claimed in respect of that vehicle.

Where the 'simplified expenses' rules are not used, allowable expenses and capital allowances are calculated in the normal way unless the business has opted to use the cash basis, in which case capital allowances are only used for cars.

The rates per mile that can be claimed under the flat rate scheme are shown in the table below.

Vehicle	Flat rate per mile with simplified expenses
Cars and goods vehicles first 10,000 miles	45p
Cars and goods vehicles after 10,000 miles	25p
Motorcycles	24p

'Board and Lodging' private use adjustments

Historically, some HMRC offices have entered into 'board and lodging' agreements with small hotel and guest house businesses.

These provided a practical basis for agreeing private use adjustments in respect of use of the premises by the proprietor(s) and their family. HMRC are withdrawing these agreements.

Simplified expenses: premises used both for business and private purposes

Where business premises are used partly for private purposes as a home, under the 'simplified expenses' rules, businesses can choose to make a private use adjustment based on a flat rate amount . This amount is subtracted from actual expenses incurred to arrive at the amount deductible as a business expense.

Only premises used mainly for the purposes of carrying on a trade will qualify.

The flat rate amount is based on how many people (including children) use the business premises each month or part of a month as a private home. The flat rate includes all household goods and services, food and non-alcoholic drinks and utilities. It does not include mortgage interest, rent of the premises, council tax or rates. A reasonable apportionment of these expenses should be made based on the extent of the private occupation of the premises.

The flat rates are as follows:

Number of people	Flat rate per month
1	£350
2	£500
3 or more	£650

The use of the 'simplified expenses' method for private use of business premises is entirely optional. If the 'simplified expenses' rules are not used, the private use adjustment should be made under the normal statutory basis in which case records will need to be kept in order to make accurate adjustments.

Transitional arrangements for withdrawal of 'Board and Lodging' Agreements

All 'board and lodging' agreements are withdrawn with effect from the 2013/14 tax year and no business can use them for the first time for the 2013/14 tax year.

Some businesses currently using these agreements may need more time to prepare for the change, particularly in cases where the business opts not to use the 'simplified expenses' method and needs to maintain full records.

As such, **for the 2013/2014 tax year only,** any business which has used a previous agreement with HMRC for the 2012/13 tax year can also use it for the 2013/14 tax year, as an alternative to either the 'simplified expenses' method or the normal statutory basis.

'Use of home for business' deductions

Simplified expenses: use of home for business

The 'simplified expenses' rules also allow sole traders and business partnerships to claim a flat rate deduction in respect of 'use of home for business' as an alternative method to recording actual expenditure and apportioning the business element.

The monthly flat rate includes all household running costs, such as heat, light, power, telephone and broadband/internet costs.

The rates are as follows:

Number of hours worked	Flat rate per month
25 or more	£10
51 or more	£18
101 or more	£26

Businesses can choose whether or not to use the 'simplified expenses rules' applying to 'use of home for business'. If these rules are not used, businesses will need to use the normal statutory method instead.

If a business does not wish to use the simplified expenses for business use of home, then where private use of telephone/internet costs does not form a significant proportion of the service use, we will accept that the full amount of expenditure can be claimed.

Work on industrial estate

A company (H) traded from a site on an industrial estate. It claimed deductions for expenditure on relaying and resurfacing a carriageway, resiting its car park, reinstating a footpath and diverting telecommunications cables. HMRC rejected the claims on the basis that the expenditure was capital

Decision:

The First-tier Tribunal allowed H's appeal, holding that the expenditure was revenue expenditure.

Comments: The First-tier Tribunal accepted the company's contention that the disputed expenditure was revenue rather than capital. This is another case recently where expenditure has been undertaken on a drive or the like where the Revenue have come from the position that the expenditure was capital rather than revenue. Again the case has gone against them. HMRC issued general guidance and capital v revenue expenditure recently and due to issue detailed guidance for professionals in the autumn. It will be fascinating to see whether they build these recent defeats in the Courts into their guidance so the guidance reflects all recent judgements.

Hopegar Properties Ltd v HMRC TC2734

Loan relationship: continuity of treatment on transfers within groups or reorganisations

The parent company of a group subscribed for zero coupon loan notes in several group companies. Those loan notes were then transferred to an associated company (V) for shares issued with a nominal value equal to the then value of the loan notes, but at a premium, on terms that the premium would be paid up by capitalising profits arising on the loan notes and appropriating those sums to V's share premium account. V claimed that the effect of FA 1996 s 84(2)(a) was that the credit that would otherwise be brought into account for corporation tax purposes on the accrual of profits on the loan notes under the 'loan relationships' rules did not fall to be brought into account. HMRC issued an amendment to V's return, increasing its taxable profit by bringing the disputed credit into account. V appealed. The First-tier Tribunal dismissed its appeal.

Decision:

The Upper Tribunal upheld this decision, holding that 'the realisation of the profit on the loan notes and the crediting to the profit and loss account of that profit' completed 'the steps whereby profit arises to the appellant as creditor in its loan relationship'. The capitalisation of that profit, and the transfer of that capitalised amount to a share premium account, was 'undertaken pursuant to a different relationship which in itself gave rise to no profit for the appellant'. Accordingly, s 84(2)(a) 'does not have the effect of excepting the realised profits arising on the loan notes from those profits and gains which give rise to a credit to be brought into account for corporation tax under the loan relationship provisions'.

Comments: There was a considerable amount of money at stake in this case, which was treated as a lead case. However it is largely of historical interest, as the relevant legislation was subsequently repealed by FA 2004 Sch 10. The Upper Tribunal upheld the First-tier decision in favour of HMRC.

Vocalspruce Ltd v HMRC (Upper Tribunal)

Management of golfers: whether trading

A pharmacist (M) had two sons, who were both professional golfers. He submitted tax returns claiming loss relief on the basis that he was carrying on a trade of managing professional golfers. HMRC rejected the claim.

Decision:

The FTT dismissed M's appeal, finding that his activities were aimed at fostering his sons' careers, and did not constitute 'a trading venture'.

PI Murtagh v HMRC TC2754

Remediation of contaminated land

A company constructed a marina at Portland in Dorset. It incurred expenditure on the construction of a sea wall, the construction of a plinth to enable buildings to be constructed, and the construction of floodwater drainage systems. It claimed relief under FA 2001 Sch 22 on the basis that this constituted 'qualifying land remediation expenditure'. HMRC rejected the claim on the grounds that 'the land in respect of which the expenditure was incurred was not in a contaminated state within the terms of the relief'. The company appealed.

Decision:

The First-tier Tribunal (FTT) allowed the appeal in part, holding that the company was entitled to relief for work carried out on the foreshore. However, the construction of a breakwater on the seabed, and work carried out on land above the tidal high-water mark, failed to qualify for relief. (Judge Sadler observed that the law relating to land remediation relief was amended with effect from 1 April 2009 to provide that 'land is now in a contaminated state only if the contaminating substance is present as a result of industrial activity, and not by reason of natural processes'. The company would not now be entitled to relief, since its claim was based on land having been contaminated by seawater.)

Comments: This is an interesting case on the provisions introduced in 2001 to grant tax relief for the remediation of contaminated land. However, the case is largely of historical interest, as the scope of the relief was significantly narrowed in 2009. As Judge Sadler observed, the company's expenditure would no longer qualify for relief, as the relief is now only available where land has been contaminated by 'industrial activity', and is no longer available where land has been contaminated by seawater, as was the case here.

Dean & Reddyhoff Ltd v HMRC TC2767

The £2,000 employment allowance (Lecture B788 – 12.23 minutes)

The government announced In the Budget on 20 March 2013 that it will introduce an ‘employment allowance’ (EA) of £2,000 a year for all eligible businesses, charities and community amateur sports clubs, to be offset against their Class 1 secondary National Insurance contributions (NICs) liabilities.

The EA will be available from April 2014, as part of the government’s strategy to encourage business growth.

HM Treasury's 'red book' Budget Report 2013 heralded the EA as follows:

'**A new Employment Allowance for every business and charity**

From April 2014, all businesses and charities will be eligible for a new £2,000 Employment Allowance. This will reduce their employer NICs bill. Up to 1.25 million employers will benefit, with over 90 per cent of the benefit going to small businesses. The scale of the allowance means that 450,000 of the UK's small businesses will no longer pay any employer NICs. On average, employers with fewer than 10 employees over the course of the year will see their employer NICs bill reduced by 80 per cent.

The Employment Allowance will reduce the cost of taking on new staff for small businesses; supporting those with an ambition to grow by hiring their first employee or expanding their workforce. Every business will be able to employ one worker on a salary of £22,400, or four employees working full time on the adult National Minimum Wage, without paying any employer NICs at all.

The Employment Allowance will be introduced from April 2014, delivered through standard payroll software and HMRC's Real Time Information system. To ensure maximum take-up, it will be simple to administer: employers will only need to confirm their eligibility through their regular payroll processes. This confirmation will ensure that up to £2,000 will be deducted from their employer NICs liability over the course of the year's PAYE payments.

The Government will engage with business representative bodies on the details of the design and operation of the new allowance, in order to ensure the system is as simple and effective as possible.'

The government is apparently keen to get the "extra help" of the EA to employers quickly. HMRC has indicated that, given the timescales, it is not running a formal consultation on the EA. Instead, HMRC is currently discussing the design and operation of the allowance with business representatives. HMRC is happy to receive further comments.

As indicated above, the EA will be delivered through standard payroll software and the real time information (RTI) system. Employers will signal in their RTI employer payment summary (EPS) that they are applying for the allowance. HMRC is planning for its 'Basic PAYE Tools – RTI' to have an EPS facility to help those employers who do not have such a facility on their software.

Employers will offset the allowance of £2,000 against their Class 1 secondary NICs liability as part of their regular payroll processes. No such contributions will therefore be payable until they exceed £2,000 for the relevant tax year.

For example, if in a tax year an employer is required to pay over to HMRC £3,500 in Class 1 secondary NICs, the allowance of £2,000 will be deducted from that liability, leaving a balance of £1,500 to pay.

"Every" employer?

Full details of the EA were not available at the time of writing. However, HMRC has indicated that the following restrictions will apply to the EA:

- Employers will only be able to claim EA once, against a single PAYE scheme – the allowance cannot be split across PAYE schemes. Employers with multiple PAYE schemes will need to decide which scheme should receive the allowance.

- The EA will not be available for domestic employers (e.g. persons who employ a nanny, au pair, gardener or care support worker).

In addition, HMRC has (informally) indicated that anti-avoidance rules will be introduced to prevent the claims to the employment allowance other than by "genuine businesses". Further details are presently awaited.

Article by Mark McLaughlin

VAT

Insufficient business connection

The taxpayer bought ten acres of land which included a lake. He dredged, improved and enhanced the lake and opened it to anglers on a day-permit basis. There were no buildings on the land, apart from a storage container at the entrance. Four years later, he applied for planning permission to build a house on the site. Building works began in July 2009 and he occupied the house from August 2010. The planning permission included a condition that the house had to be occupied by a person employed at the angling business.

The taxpayer claimed to have the VAT refunded under the DIY scheme under VATA 1994, s 35. HMRC refused the claim, saying the house was built in the course of the fishing business and therefore ineligible for the DIY scheme. The taxpayer appealed.

Decision:

The First-tier Tribunal did not agree with HMRC. The condition in the planning permission that the occupant of the house had to be connected with the fishing business was “not sufficient to establish that the house was constructed in the course or furtherance” of the business. The judge accepted the taxpayer's argument that, although it was easier to operate the business from the new house, it was also possible to run it from offsite, which the taxpayer had done for several years. The tribunal concluded that the house had been built as a family home.

The taxpayer's appeal was allowed.

Comments - Neil Warren, independent VAT consultant, said: “This outcome is good news for DIY self-build projects where there is a link to a business and conditions are imposed that are relevant to that business but they are not crucial as far as the arrangement is concerned. The key factor here was that the property was the main residence of the Burton family and it fulfilled all of the conditions of a dwelling specified in the legislation.”

R Burton (TC2522)

Conversion of public house into two semi-detached houses

A company converted a public house into two semi-detached houses. It reclaimed input tax on the work. HMRC rejected the claim on the basis that, before the work, part of the public house had been used as a flat for a manager, so that the work failed to qualify for zero-rating.

Decision:

The FTT allowed the company's appeal against this decision, applying the CA decision in C&E Commrs v I Jacobs, [2005] STC 1518, and declining to follow the VAT Tribunal decision in Calam Vale Ltd (VTD 16869). Judge Kempster held that 'the fact that an additional dwelling has been created means that Note 9 does not prevent the conversion coming within Item 1(b)'. He also held that there was no justification for distinguishing between claims under s 35 (such as Jacobs) and claims under s 30 (such as Calam Vale).

Comments -This is an interesting decision, because Judge Kempster specifically declined to follow the earlier VAT Tribunal decision in Calam Vale Ltd, which HMRC had cited as an authority. In Calam Vale Ltd, the appellant company had converted a public house into two semi-detached dwellings, and the VAT Tribunal had upheld Customs' contention that the public house was not a 'non-residential building' as defined by VATA 1994 Sch 8 Group 5 Note 7, and that Group 5 Note 9 did not apply to the conversion. However, in the subsequent case of Jacobs, the CA upheld a VAT Tribunal decision that the conversion of a building previously used as a boarding school qualified for zero-rating. Ward LJ held that the work was within Group 5 Note 9, holding that Note 9 should be 'construed so that the result of the conversion is to create in the building an additional dwelling or dwellings. One counts the number of dwellings in the building before conversion and again after conversion. If there are more on the recount, Note 9 is satisfied.' HMRC responded to this decision by issuing Business Brief 22/2005 on 1 December 2005, in which they stated that they 'now accept that, for the purposes of the DIY refund scheme, the conversion of a building that contains both a residential part and a non-residential part comes within the scope of the scheme so long as the conversion results in an additional dwelling being created. It is no longer necessary for the additional dwelling to be created exclusively from the nonresidential part. However, VAT recovery is restricted to the conversion of the nonresidential part.' The significant feature of this statement is that HMRC confined its concession to cases involving the DIY refund scheme under VATA 1994 s 35, and declined to accept that the same principles should apply to claims for zero-rating under VATA 1994 s 30. Judge Kempster has upheld the view, held by many VAT practitioners, that there is no justification for this distinction. It is not yet known whether HMRC intends to appeal against this decision.

Alexandra Countryside Investments Ltd v HMRC TC2751

Use of Jersey company: whether an 'abuse'

A financial adviser (N), who was registered for VAT, was the controlling shareholder of a Jersey company (AC), which provided loan broking services in the UK. HMRC issued an assessment on N, charging VAT of more than £10,000,000, on the basis that he should be treated as supplying the loan broking services and was liable to a 'reverse charge' under VATA 1994 s 8(1) in respect of advertising services supplied by another Jersey company (W). N appealed. The First-tier Tribunal allowed his appeal, but the Upper Tribunal directed that the case should be referred to the CJEU for a ruling on whether the national court should depart from a strict contractual analysis.

Decision:

The CJEU held that 'contractual terms, even though they constitute a factor to be taken into consideration, are not decisive for the purposes of identifying the supplier and the recipient of a "supply of services"'. The contractual terms could be disregarded 'if it becomes apparent that they do not reflect economic and commercial reality, but constitute a wholly artificial arrangement which does not reflect economic reality and was set up with the sole aim of obtaining a tax advantage, which it is for the national court to determine.'

Comments: The CJEU has referred the case back to the Upper Tribunal, but this decision appears to represent a victory for HMRC. The CJEU decision indicates that, if the Upper Tribunal considers that the arrangements were an 'abusive practice', it can disregard the arrangements under which a Jersey company was interposed into the supply chain in the hope of avoiding a charge to VAT.

HMRC v P Newey (t/a Ocean Finance) CJEU Case C-653/11

Conversion of barn into living accommodation

A council had granted planning permission for the conversion of four derelict barns into holiday accommodation. The work did not proceed, and the barns remained derelict. Subsequently, a woman (S) purchased one of the barns and converted it into a house. The planning permission provided that the occupation of the building 'shall be limited to a manager or proprietor of the holiday accommodation business'. S reclaimed VAT on the conversion. HMRC rejected the claim on the grounds that the effect of VATA 1994 Sch 8 Group 5 Note 2(c) was that the converted building was not 'designed as a dwelling'.

Decision:

The First-tier Tribunal dismissed S's appeal. Judge Poole specifically declined to follow Judge Kempster's decision in Burton v HMRC (TC02522). He observed that the effect of the Town and Country Planning Act 1990 was that 'any development carried out in breach of planning permission (and any non-compliance with a condition in a planning permission) are to be regarded as "prohibited" under planning law'. (Judge Poole noted that HMRC had appealed to the Upper Tribunal against Judge Kempster's decision in Burton, and expressed the hope 'that the Upper Tribunal will take this opportunity to bring some clarity and certainty to the law in this area'.)

Comments - As Judge Poole observed, there have been conflicting decisions on the interpretation of VATA 1994 Sch 8 Group 5 Note 2(c), which provides that a building can only qualify as a dwelling if its 'separate use or disposal' is not 'prohibited by the term of any covenant, statutory planning consent or similar provision'. HMRC was successful in the Upper Tribunal case of HMRC v Lunn [2010] STC 493, which was followed in the subsequent case of Brims Construction Ltd v HMRC (TC02455). However, HMRC was surprised to lose the case of Burton v HMRC (TC02522), where the planning permission provided that 'the occupation of the dwelling shall be limited to a person solely or mainly employed or last employed in' the appellant's fishery business.

L Swain v HMRC TC2719

Conversion of barn into residential unit: effect of planning permission

A woman (P) obtained planning permission for the conversion of two adjacent derelict barns into 'a live-work unit', and claimed a refund of VAT under VATA 1994 s 35. HMRC rejected the claim on the basis that the work failed to meet the requirements of VATA 1994 Sch 8 Group 5 Note 2(c).

Decision:

The FTT allowed P's appeal. Judge Bishopp expressed the view that 'it is not the province of HMRC or this tribunal to police the planning rules' and held that 'there has been compliance with the spirit, even if not the strict letter, of the consent'.

Comments - There have been conflicting decisions on the interpretation of VATA 1994 Sch 8 Group 5 Note 2(c), which provides that a building can only qualify as a dwelling if its 'separate use or disposal' is not 'prohibited by the term of any covenant, statutory planning consent or similar provision'. HMRC was successful in the Upper Tribunal case of HMRC v Lunn [2010] STC 493, which was followed in the subsequent cases of Brims Construction Ltd v HMRC (TC02455) and Swain v HMRC (TC02719). However, HMRC was surprised to lose the case of Burton v HMRC (TC02522), where the planning permission provided that 'the occupation of the dwelling shall be limited to a person solely or mainly employed or last employed in' the appellant's fishery business. HMRC has appealed to the Upper Tribunal against the First-tier decision in Burton, and the Upper Tribunal decision will be keenly awaited. It is understood that HMRC also intend to appeal to the Upper Tribunal against Judge Bishopp's decision in Lady Henrietta Pearson, and will suggest that the appeal should be stood over pending the decision in Burton.

Lady Henrietta Pearson v HMRC TC2735

Application for retrospective operation of flat rate scheme

A management consultant (S) voluntarily registered for VAT in 2007. However, his turnover never reached the registration threshold, and he deregistered from December 2011. In applying for deregistration, he requested that his VAT liability from 2007 to 2011 should be recomputed retrospectively, adopting the flat rate scheme. HMRC rejected this request.

Decision:

The FTT allowed S's appeal. Judge Staker observed that S 'need never have registered for VAT at all', and found that 'in the present case there are exceptional circumstances justifying retrospectivity'.

Comments: In most cases where an appellant has requested that the flat rate scheme should be operated retrospectively, the FTT has rejected the request. However, this case was unusual because it was clear that the appellant need never have registered for VAT in the first place. Judge Staker held that this constituted 'exceptional circumstances justifying retrospectivity', and allowed the appeal.

G Seeff (t/a TPL Associates) v HMRC TC2738

Reduced rate applies

The taxpayer, Colaingrove, had a contract with News International under which it provided discounted accommodation to readers of the Sun who took part in promotions. The customer paid the newspaper for the accommodation, and paid the taxpayer directly for power, usually about £6 a day.

Colaingrove claimed that the supply of power should be taxed at the reduced rate of VAT on the basis that it was domestic use. HMRC said the VAT was due at the standard rate because the charge for the caravan or chalet and power formed a single supply of holiday accommodation.

Decision:

The First-tier Tribunal accepted the taxpayer's argument that, had the holidaymakers been permitted to make their own arrangements regarding power supplier, they would have been subject to VAT at the lower rate. It went against fiscal neutrality for the standard rate to be applied, just because the holidaymakers were required to pay the fl at amount to the taxpayer.

The taxpayer's appeal was allowed.

Comments - Neil Warren, independent VAT consultant, suggested that this decision is likely to be appealed by HMRC because “it seems to be contrary to many similar cases that have been heard in the courts” and indeed contrasts with the Upper Tribunal's decision in Honourable Society of the Middle Temple (reported on page 6). He said: “applying the general principles of mixed supplies, a single payment in this type of situation would be wholly standard rated as a supply of holiday accommodation. However, the tribunal recognised that there were two distinct supplies taking place in this instance, involving different suppliers, and that the reduced VAT rate could apply to the charge of fuel.”

Colaingrove Ltd TC2534

Sale of spectacles via the internet

A company (P) began selling prescription spectacles via the internet in 2004. Initially, it accounted for VAT on the full amount of its supplies, but it subsequently submitted a repayment claim on the basis that 13.4% of the consideration should be attributed to supplies of medical care, which were exempt from VAT under art 132(1)(c) of Directive 2006/112/EC. HMRC rejected the claim, accepting that part of P's supplies would have qualified for exemption if the spectacles had been personally dispensed by an optician in a shop, but considering that P was not making any exempt supplies.

Decision:

The FTT allowed P's appeal. Judge Herrington held that all P's sales were 'effected under the supervision of a registered optician or medical practitioner'. He held that the services provided by P's opticians 'amount to medical care within the terms of the exemption'.

Comments: In Leightons Ltd v C&E Commrs (No. 2) [2001] VATDR 468 (VTD 17498), the VAT Tribunal held that where a company made supplies of corrective spectacles, it was making an exempt supply of medical care as well as a taxable supply of goods, and specifically rejected Customs' contention that it was making a single standard-rated supply. Following this decision, HMRC has accepted that opticians making such supplies from retail shops in the UK are entitled to apportion the consideration accordingly (although Business Brief 3/2002 indicated that they would 'challenge the apportionment' where they considered 'that there has been manipulation'). However, HMRC has declined to apply the same principle where customers have purchased corrective spectacles via the internet, rather than from a high street retailer. Judge Herrington accepted the company's contention that a company which sold spectacles via the internet was also entitled to treat a percentage of its consideration as exempt. It is understood that HMRC intends to appeal to the Upper Tribunal against this decision.

Prescription Eyewear Ltd v HMRC TC2759

Nursing home incorporating redundant church

A company constructed a nursing home on the site of a redundant church, incorporating most of the church as a reception area. HMRC issued a ruling that the work constituted the conversion of the church, and was chargeable to VAT at the reduced rate of 5%. The company appealed, contending that the work qualified for zero-rating.

Decision:

The FTT accepted this contention and allowed the appeal, observing that 'viewed structurally and as a whole the church can only be described as being dwarfed by the new build'.

Comments - HMRC formed the opinion that the work here constituted the conversion of the church into a nursing home. However, the FTT accepted the company's contention that, since the nursing home was substantially larger than the church had been, the work should be treated as the construction of a new building and as qualifying for zero-rating.

Astral Construction Ltd v HMRC TC2773

Self-billing problem

The taxpayer, a scrap metal business, had used a self-billing system with suppliers for many years. HMRC were aware of the arrangements, although had not formally sanctioned them, having carried sundry VAT inspections at the business. The company would ask for a copy of the supplier's VAT registration certificate and, having obtained it, call the local VAT office to check the document was correct. Having done that, the taxpayer made no further checks on the supplier.

It transpired that four of the suppliers had subsequently deregistered, which led HMRC to refuse to allow input tax claimed by the company in respect of suppliers from those traders.

The taxpayer appealed, saying that HMRC should use their discretion permitted under VAT Regulations 1995, reg 29 to consider the claim. HMRC refused because the conditions for self-billing arrangements had not been met by the taxpayer.

Decision:

The First-tier Tribunal said that HMRC were "fully aware" that the taxpayer was using self-billing arrangements. The tribunal judge did not accept HMRC's contention that the taxpayer could have known that the suppliers were deregistered. He was satisfied that the managing director of the company had spoken to the VAT office which had confirmed the suppliers were registered. The invoices that were subject of the appeal were correctly completed and complied with reg 14 and the VAT legislation. The tribunal concluded that HMRC had acted unreasonably in not exercising their discretion.

The taxpayer's appeal was allowed.

Comments - Neil Warren, independent VAT consultant, said: "Self-billing is very common in many trades, but the conditions specified in the legislation and HMRC's policy guidance need to be closely followed. If the taxpayer had ensured a self-billing agreement was in place with each supplier, the assessment considered in this case would have been unlikely to have been raised. The agreement would have specified that the supplier must notify the company if it deregistered for VAT purposes, which would, it is hoped, have avoided this problem."

GB Housley TC2548

Late registration penalty

The taxpayer, a solicitor, set up a practice specialising as a criminal legal aid advocate. Following a Law Society routine audit in June 2011, he realised that he should have registered for VAT in the previous November.

Having obtained the amount of outstanding VAT, £25,000, from his accountant, the taxpayer applied to the Legal Services Commission for it to meet the output tax liability on his invoices. After some delay, it agreed to pay £18,000. The taxpayer registered for VAT in December 2011 and paid the £25,000 to HMRC, finding the balance of £7,000 from his own resources.

HMRC imposed a late registration penalty of £4,754, which they later reduced to £2,502, being 10% of the late paid VAT. Had the taxpayer registered within 12 months of date when he should have done so, the penalty could have been reduced to nil.

The taxpayer appealed.

Decision:

The First-tier Tribunal said the penalty regime in FA 2008, Sch 41 was aimed at taxpayers who deliberately tried to avoid tax.

In this instance, the taxpayer had made a genuine mistake and made an unprompted disclosure of his fault. Referring to the House of Commons committee stage of the Finance Bill 2008, which emphasised that taxpayers who made genuine mistakes should not be deterred by the possible penalties from coming forward to put their affairs in order, the tribunal decided that special circumstances applied and the penalty should be reduced to nil, as if he had disclosed his fault within 12 months of the actual registration date. The fact that he had to pay £7,000 from his own funds in effect amounted to a penalty.

The taxpayer's appeal was allowed.

Comments - Neil Warren, independent VAT consultant, said that most retail businesses which register late "have no opportunity to reclaim any tax from customers", so it was "an unusual approach" for the tribunal to say that because the taxpayer had only been able to reclaim £18,000 of the outstanding VAT from customers, in this case the Legal Services Commission, it meant he had been penalised by £7,000 already. Neil said the outcome introduced "a shade of grey into a topic (VAT registration), that is usually black and white because the legislation is clearly based on dates and deadlines".

James Hillis TC2611

Restaurant is a going concern

The taxpayer owned a property and let out the basement to P who ran a restaurant from those premises. He registered for VAT with effect from 1 June 2006.

In 2009, P decided to give up the restaurant and gave notice of his tenancy to the taxpayer. The business was taken over by the taxpayer, whose son became chef. The taxpayer paid P £6,000 for the fixtures and fittings.

HMRC said there had been a transfer of a going concern to the taxpayer and that she should have registered for VAT on her first day of trading in June 2009.

The taxpayer claimed she had not taken over a going concern. The business was run differently from how P had operated it. For example, the opening hours were not the same, there was a different style of cooking and new staff and suppliers. There had also been a break of ten days between P's business closing and the taxpayer's opening.

Decision:

The First-tier Tribunal accepted there was no formal transfer of goodwill, although there "was goodwill in the address of the premises, the name of the restaurant and the length of time for which it had been trading successfully". This in effect reverted to the taxpayer when P gave up the tenancy. The closure of the restaurant for refurbishment was not relevant and was not long enough to disrupt the trading pattern. The fact that the opening hours and menu had changed was "immaterial", according to the tribunal. These were down to choice.

The judge decided that the taxpayer had acquired a business which she could carry on in "substantially the same way" as P had traded. HMRC were correct to say the business was a transfer of a going concern and that the taxpayer should have registered from VAT from June 2009.

The taxpayer's appeal was dismissed.

Comments - Neil Warren, independent VAT consultant, said: "With a VAT rate of 20%, the opportunity to make £79,000 of VAT free sales before having to register is a big incentive for a business owner trading with the general public. The tribunal dismissed all of the factors put forward by the taxpayer as to why a transfer of a going concern was not evident. In reality, it started as a restaurant under P and continued as a restaurant under the ownership of the taxpayer; therefore the argument of substance over form made it clearly a transfer of a going concern arrangement."

B Massey trading as The Basement Restaurant (TC2520)

Mixed VAT supplies **(Lecture B789 – 15.20 minutes)**

<u>What is a 'mixed supply'?</u>

A mixed supply basically means that a business is selling more than one item, or more than one service or a combination of goods and services, where more than one rate of VAT is involved in the transaction. So there would be no problem if a business sold a single package that consisted of a hardback novel and a pint of milk because both items are zero-rated. But there would be a VAT challenge if you substituted the milk for a bar of chocolate. The challenge is now as follows:

- Is the main supply the zero-rated novel with the value of the standard rated chocolate bar being an 'incidental' item that can be ignored - in which case the entire payment from the customer will be zero-rated
- If the customer clearly expects to receive two items in return for his payment, both subject to different rates of VAT, then the output tax must be apportioned.
- Unlikely, but if the main supply is the chocolate bar and the novel is 'incidental' then the whole payment will be standard rated.

To give another example, if you buy a musical DVD e.g. the best songs of a particular performer, then the purchase is wholly standard rated, even though the package is likely to include a zero-rated leaflet giving details about the career and songs of the performer in question. The leaflet is incidental to the main supply of the music and, to use another phrase considered by the courts on the mixed supply issue, a tool to enhance enjoyment of the main supply. In contrast, if you travel on the Orient Express and pay for a package consisting of the train journey and a four-course meal with champagne, this is clearly a mixed supply of zero-rated rail travel and standard rated catering, with output tax apportionment being necessary.

CPP case.......did it clear the cloudy waters?

HMRC and the VAT profession thought (perhaps somewhat optimistically) that the issue of VAT on mixed supplies was fully resolved when the ECJ gave its landmark ruling in 1999 in the case of Card Protection Plan Ltd (case ref C-349/96). It gave a series of guidelines to follow in each transaction, the end result hopefully being a consistent approach on this topic throughout the EU. However, the CPP case did not solve the problem completely because we still get tribunal cases on this subject where both HMRC and taxpayers get things wrong.....and in some cases even the courts disagree with each other!

Key tip – look at the sale from the customer's viewpoint

The key challenge on this topic is to always look at a transaction from the viewpoint of the customer rather than the supplier. For example, if I opened the DVD that I mentioned earlier and there was no leaflet in the package, would I complain to the managing director of the DVD company? The answer is 'no' because the reality is that the leaflet is not an important (or crucial) part of the purchase that I have made. But I would certainly complain if I missed out on the champagne and caviar on the Orient Express trip......that is definitely a mixed supply.

Recent cases and inconsistencies

To give a practical feel of this subject, here are some recent tribunal cases that have given this subject plenty of court time:

Note – FTT below = First Tier Tribunal; UTT = Upper Tier Tribunal

- *The Honourable Society of Middle Temple (FTT case TC1245; UTT case [2013]UKUT250(TCC)* – in this case, the UTT overturned (in my opinion correctly) the decision of the FTT that a landlord was making two supplies to his tenant, namely zero-rated cold water and a standard rated building (the rent was standard rated because of an option to tax election). The landlord provided separate invoices for rent and the charge for cold water and the water charge was calculated by reference to the area occupied by the tenant.

  Outcome – the UTT concluded that the supply related to a single supply of rented property – the water supply was part of that single supply rather than being a separate aim in its own right.

- *Colaingrove Ltd (FTT case TC2534)* – the court agreed with the taxpayer that there were two supplies being made here, namely a charge for holiday accommodation in a caravan or chalet (standard rated) and then a separate charge of £5.50 a day for the use of electricity, the latter being subject to a 5% rate of VAT.

  Outcome – I expect HMRC to appeal this case on the basis that there is a single supply of serviced accommodation to the guest i.e. the same principle as in the Middle Temple case.

- *Antiques Within Ltd (FTT case TC2507)* – the taxpayer charged six antique dealers between £50 and £100 a week to rent space in its shop i.e. as a shop-in-shop arrangement. However, the company also tried to sell stock on behalf of the tenants if they were not present in the shop. HMRC viewed the arrangement as a standard rated supply of a selling agent service – the taxpayer treated the income as VAT exempt for rent i.e. use of land in the shop by the tenant.

  Outcome – this is an interesting case because the court disagreed with both parties and concluded a mixed supply outcome i.e. the customer (tenant) expected both the land in the shop and the energies of the landlord in trying to sell some of his stock. The conclusion of the court again highlights the key principle I mentioned earlier, namely the need to consider this subject from the viewpoint of the customer rather than the supplier.

- *WM Morrison Supermarkets Plc (FTT case TC2052; UTT [2013] UKUT247(TCC)* – consistency was achieved between the courts in this case (unlike in the Middle Temple case) with the conclusion that the supply of a disposable barbecue that comprised a rectangular foil tray containing charcoal and lighting paper was wholly standard rated i.e. it was not possible to only account for 5% VAT on the charcoal element of the product (charcoal is subject to the reduced rate of VAT – VATA1994, Sch 7A, Group 1).

  Outcome – the UTT held that UK legislation does not seek to carve out the charcoal element of the supply as a 'concrete and specific aspect' so as to subject it to a reduced rate of tax. The taxpayer made a compound supply that was standard rated.

- *Nuffield Health (FTT case TC2697)* – this case involved medical supplies and needed to consider whether the supply of drugs and surgical fitting of prosthesis to patients represented a single exempt supply of medical services, a mixed supply that also included zero-rated pharmaceutical products or, less likely, a single supply of zero-rated pharmaceutical products with the medical services being incidental.

  Outcome – this issue is interesting because, unlike the other cases considered above, the outcome is all about input tax rather than output tax i.e. because input tax can be reclaimed on costs that relate to zero-rated sales but not those that are exempt. The input tax at stake exceeded £1m. The court highlighted the fact that the patient (customer) had no idea what drugs they were being supplied with as a significant point, therefore concluding that the reality of the supply was an exempt supply of medical services (VATA1994, Sch 9 , Group 7, Item (4)).

Contributed by Neil Warren

Online VAT services (Lecture B790 – 12.54 minutes)

HMRC receive 210,000 applications for a VAT registration number each year and 250,000 requests for deregistration. In addition, there are about 395,000 variations they deal with in relation to particular matters relevant to existing registrations (change of trading address, amended bank account details etc).

The measures introduced on 5 November 2012 (a month later than originally planned) are as follows (note – none of the measures are mandatory – to quote the HMRC guidance: "paper channels will remain available for those unable to use the online system, including the disabled."):

- A business can apply for VAT registration by making an online application. The applicant can attach other papers relevant to the application e.g. an option to tax form VAT1614A or details about trading plans for an 'intending trader' applicant, or group registration forms VAT 50/51 etc.
- A business can apply for deregistration by making an online application i.e. the current VAT7 form is now an online option.
- Variations to a registration e.g. bank details and trading address etc, can be carried out online as well.
- The business can apply to join the flat rate scheme or annual accounting scheme – it can also amend its VAT periods (known as 'stagger') and view or print its VAT certificate.

The objectives of the planned measures are twofold:

1. To reduce the volume of processing paper forms by HMRC staff
2. HMRC view the online option as an important measure to assist the goal of improving the UK's international ranking for "ease of doing business"

Planned outcomes:

From November 2012 to March 2013, HMRC expect that an online application to register a business for VAT will produce a 4 to 6 day improvement in the time it takes for an application to be concluded.

From April 2013, HMRC's service delivery promise is even more challenging for them: "We expect further automation will reduce the time down to 3 working days in total."

Note – the online facility can be used both by clients on their own account, and also by agents acting on behalf of clients through their online agent facility.

However, an agent cannot change the trading address or bank details of a business – and if applying for VAT registration, a client doing the process himself will be automatically enrolled for online submission of VAT returns – if the registration is dealt with by the agent, there must be a separate application to complete VAT returns online. This is a security measure.

The maximum size for attachments is 5MB. To send large documents (over 5MB in total) or documents too large to scan (e.g. maps) it is possible to make the application online and separately post the documents to HMRC, clearly marking them with the acknowledgement reference the user is given at the end of the online submission process.

Notifying an option to tax

Notifying an option to tax can also now be done online by attaching the new online version of VAT1614A. The client must specifically authorise the agent to submit the notification by way of attaching a letter of authority authorising the agent to act on behalf of the business. Form 64-8 (Authorising your agent) is not suitable for option to tax purposes.

Reminder on time limits for submitting EU Sales Lists (ESLs)

If a UK business is selling goods to a VAT registered customer in another EU country, it must submit ESLs:

- Monthly – if the value of such sales has exceeded £35,000 in the current or four previous quarters – otherwise quarterly.
- Services – quarterly submission is required - but a business can choose a monthly option

Note – if a business is supplying both goods and services, and is required to submit monthly reports in relation to its sales of goods, it still has the option of submitting quarterly returns for the services it sells. All quarterly reports are submitted on a calendar quarter basis. The £35,000 threshold for monthly reports explained above took effect on 1 January 2012 – the previous threshold was £70,000.

Annual ESLs

If a business submits annual VAT returns it can contact HMRC to apply for approval to submit an ESL once a year provided it meets all of the following conditions:

- total annual taxable turnover does not exceed £145,000
- the annual value of sales to other EU countries is less than £11,000
- sales do not include New Means of Transport

Deadlines for submitting an ESL

From 1 January 2010 a business must submit its ESLs to HMRC:

- for online submissions - within 21 days of the end of the reporting period
- for paper ESLs - within 14 days of the end of the reporting period

According to HMRC "If you send the ESL in late, you may have to pay a penalty." - but I am not aware of penalties being levied as a matter of course.

Using an accountant to submit an ESL

An accountant or tax adviser can act on behalf of a business and submit the ESL but the business remains legally responsible for its accuracy and making sure it is sent to HMRC on time.

Final tip - a business that sells services abroad should never include these sales in Box 8 of the return as this Box only relates to goods sold to a VAT registered customer in an EU country outside the UK.

Contributed by Neil Warren