Tolley®CPD

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Autumn Statement

Personal Tax (Lecture P866 – 9.01 minutes)

Rates and allowances

The personal allowance for 2015/16 will be £10,600 (up by £100 from the figure of £10,500 previously announced in Budget 2014).

The basic rate band limit will be £31,785 in 2015/16, taking the threshold for the payment of higher rate income tax to £42,385. The additional rate threshold remains £150,000, meaning more taxpayers will pay tax at 45% through fiscal drag.

There are no changes to the rates of income tax for 2015/16.

The NIC rates and thresholds for 2015/16 have been published. The Class 1 upper earnings limit and the Class 4 upper profits limit are aligned with the higher rate income tax threshold of £42,385. There is no change to the percentage rates of NIC, although the weekly rates of Class 2 and Class 3 NIC will be increased.

Note that the new voluntary Class 3A NIC is to be introduced from October 2015, although this is not included in the rates published in the Autumn Statement.

Also, remember that under the National Insurance Contributions Bill currently going through the House of Lords, the collection of Class 2 will be brought within the Self-Assessment system from 2015/16 and will no longer be paid separately.

The proposal to restrict non-residents' entitlement to personal allowances has been delayed until at least April 2017. Although the summary of responses has yet to be published, it appears that respondents to the consultation document have highlighted the complex (and perhaps unintended) issues that will arise as a result. Although the Government "will continue to discuss implementation of this change", it is telling that a further consultation will only be issued "should" the Government decide to proceed.

Extension to employment allowance

As from 5 April this year, most employers have been entitled to claim a £2,000 reduction in the secondary NIC that they have to pay over to HMRC (see the Employment allowance guidance note). As currently drafted the employment allowance does not apply in respect of employees working on the employer's personal, family or household affairs. The Chancellor announced today that, as from 6 April 2015, that exclusion will be relaxed in the case of domestic care and support employees. This means that anyone employing someone to provide domestic care and support for themselves or a family member will come within the employment allowance regime and will not have to pay the first £2,000 of employer NICs due. This change is likely to be made by means of regulations.

Non-domiciliaries

In Budget 2011, when he announced the introduction of the two tier remittance basis charge (RBC), the Chancellor promised not to make any further changes to the taxation of non-domiciliaries in this Parliament.

True to his word, today he announced changes to the RBC, payable by those who are resident but not domiciled in the UK, which will take effect in the next Parliament:

- the RBC payable by those who have been resident in the UK for 12 out of the last 14 years will increase from £50,000 per tax year to £60,000 per tax year
- a third level of RBC will be introduced for non-domiciliaries who have been resident in the UK for 17 out of the last 20 years, set at £90,000 per tax year
- there will be a consultation on having the remittance basis charge apply for a minimum of three tax years to prevent non-domiciliaries from arranging their affairs to pay the charge only occasionally

The RBC for those who have been resident in the UK for at least seven out of the last nine tax years will remain unchanged at £30,000 per tax year.

According to the Statement, these changes will be introduced in Finance Bill 2015, however it is assumed that since the final bullet point will be subject to the consultation process, only the first two are likely to be legislated next year.

It is unclear whether these changes will be effective from the 2015/16 tax year or from the 2016/17 tax year.

Whilst the Conservatives may not be in Government following the 2015 General Election, it seems likely that the changes to the amount of the RBC will be legislated in Finance Bill 2015.

You may wish to write to your non-domiciled clients to inform them of these changes and explain that you will contact them again once more detail is available.

Pensions

The Chancellor reiterated the Government's commitment to the pension reforms outlined in the Budget 2014 and recent draft legislation.

He also confirmed the recent announcement to abolish the 55% charge which currently applies on death to all pension funds held by a person who dies over the age of 75, and on crystallised funds held by those who die under the age of 75.

The new proposals announced in the Autumn Statement are that when an individual dies:

- before age 75, the pension fund, whether crystallised or not, may pass tax free to a nominated beneficiary
- over the age of 75, the pension fund, when withdrawn, will be taxed at the beneficiary's marginal rate of income tax

This relaxation of the pension tax rules on death is extended to include a concession for annuities. Some pensioners, instead of holding a defined contribution pension fund, will have purchased a joint life or guaranteed term annuity. The income from these annuities is subject to income tax after the death of the pension holder. The proposal now is that the income will be tax free for the beneficiary of the annuity, and that these annuities may be passed to any beneficiary and not just spouses and dependants.

Following an informal consultation, the Government has now decided that no changes will be made to the upper age limit of 75 for tax relief on pension contributions.

Review of non tax-advantaged share schemes

Following its review of non tax-advantaged share schemes, the OTS recommended that there should be a new employee shareholding vehicle and that the tax rules on employment related securities should be changed to feature a new concept of a 'marketable security'. The Government confirmed today that it does not intend to proceed with either of these proposals.

Simplification on expenses and benefits

The Chancellor confirmed that the Government is accepting the recommendations of the Office of Tax Simplification (OTS) in their report on employee benefits.

Arguably the biggest simplification in terms of legislation is the removal of the £8,500 threshold below which employees other than directors can receive certain employment-related benefits tax-free. That general exclusion for lower-paid workers is to be replaced with new exemptions for benefits provided to carers and ministers of religion. All other employees, regardless of their rate of pay, will pay tax on employment-related benefits under the benefits code.

The simplifications with the biggest impact in terms of administration are likely to be the new exemptions for trivial benefits in kind and for reimbursed business expenses and the introduction of a statutory framework for payrolling of benefits.

The new exemption for trivial benefits will apply where the benefits provided to the employee have a cost to the employer of less than £50. Based on the consultation on this proposal, this £50 limit is likely to be an annual limit per employee, although more detail will become apparent when the draft Finance Bill clauses are published next week.

The new exemption for reimbursed business expenses is intended to do away with the need for employers to apply for dispensations each year or face the administrative chore of reporting all reimbursed expenses on each employee's P11D with the employee then having to claim a deduction in his self-assessment return or via form P87. HMRC consulted on the detail of this proposed exemption in June this year and raised a number of design issues. The draft Finance Bill clauses to be published next week will clarify how HMRC propose to deal with those issues in the light of the consultation responses.

The proposal for a system of voluntary payrolling of benefits is intended to allow employers to report and account for tax on certain benefits and expenses via the RTI system rather as part of the annual reporting on forms P9D or P11D at the end of the tax year. Like the other OTS recommendations on expenses and benefits this proposal was the subject of a consultation in the summer and, as with the other recommendations, we will have to wait for the draft Finance Bill clauses to be published for details of the design of the system.

Umbrella companies and similar intermediaries

Successive governments have made various legislative changes to crack down on arrangements designed to allow workers to obtain tax relief for travel expenses which would normally be denied to employees. The Chancellor indicated in his statement today that this Government intends to review the use of overarching contracts of employment by employment intermediaries such as umbrella companies, with a view to possible action at Budget 2015.

Tightening up on salary sacrifice schemes

The Chancellor also announced that the Government intends to prevent tax relief being claimed on reimbursed business expenses where those expenses are paid under a salary sacrifice scheme. This is likely to be achieved by means of an exception to the new exemption for reimbursed business expenses to be introduced in Finance Bill 2015 as part of the simplification measures outlined above.

Venture capital schemes

In 2016, HMRC will introduce a new digital process for investors and companies qualifying for Enterprise Investment Scheme, Seed Enterprise Investment Scheme and Social Investment Tax Relief.

Community energy generation will cease to be eligible for EIS, SEIS and VCT. This will occur as soon as the Social Investment Tax Relief scheme receives approval from the EU for expansion and investing organisations become eligible under that scheme.

Other companies benefiting from subsidies for the generation of renewable energy will be excluded from qualifying activities from 6 April 2015.

Social investment tax relief expansion

The Government intends to increase the investment limit to £5m per annum per organisation, with a maximum investment of £15m per organisation. The relief will also be extended to small-scale community farms and horticultural activities. The changes will come into effect from 6 April 2015, subject to EU approval.

Further to this, special purpose vehicles for subcontracted and spot-purchase social impact bonds eligible for SITR in Autumn 2015.

Finally, the Government will consult in early 2015 on the introduction of a Social Venture Capital Trust.

ISAs

The annual ISA allowance will increase from £15,000 to £15,240 from April 2015. With their longevity and ever increasing allowances, ISAs now represent a substantial portion of the savings of older people. It often comes as a shock to executors and beneficiaries that they lose their tax free status on death. In addition to the inheritance tax charge on the death value, tax is deducted from the income, and capital gains tax may become payable on the sale of the investments.

There were some rather confusing comments about the Chancellor's proposed changes to the 'death taxes' on ISAs, perhaps suggesting a radical overhaul of the rules and abolition of the inheritance tax charge. This is not the case.

As far as we can see from the limited information provided, the proposed changes are fairly minimal but nevertheless a welcome addition to estate planning tools. The changes relate solely to the tax consequences when a spouse or civil partner dies leaving a surviving partner.

Currently, if a spouse or civil partner inherits the ISA account of the first to die, it is exempt from inheritance tax under the general spouse exemption, so there has been no change in this regard. However, because ISAs can belong only to individuals and the amount invested is restricted annually, a spouse may find on inheriting the ISA savings on the death of their partner that they must now be kept in an ordinary taxable account. From 6 April 2015, a surviving spouse or civil partner will be granted an additional ISA allowance equivalent to the value of their partner's ISAs so that the (income and capital gains) tax free status of the savings may be preserved.

Presumably, the new rule will not prevent the deceased's ISA accounts from automatically switching to a taxed status until they are realised, although the spouse may be able to take immediate advantage of the increased allowance anyway and make a matching investment from other resources.

Capital Taxes (Lecture P867 – 11.58 minutes)

Annual exemption

The annual exemption will be £11,100 in 2015/16. This was pre-announced in Autumn Statement 2012 and reiterated in Autumn Statement 2013.

HMRC will introduce the capability for taxpayers to calculate their chargeable gains online using a CGT digital calculator. Taxpayers will also be offered the choice to bring forward payment of their CGT liability to the time when the gain occurs. This will be effective from October 2016. For taxpayers with multiple chargeable gains in the year this will probably not be a suitable option. However, for some individuals with a solitary gain in the tax year this may prove to be a practical way of setting aside their tax liability.

Denying Entrepreneurs Relief for disposals of goodwill to related companies

From 3 December 2014, entrepreneurs' relief will be restricted where an individual incorporates their trade, or their share of a trade operated through a partnership. The draft legislation published by HMRC introduces TCGA 1992, draft s 169LA which excludes certain goodwill from the definition of 'relevant business assets'. Entrepreneurs' relief is only available to individuals on the disposal of relevant business assets.

Where an individual disposes of goodwill to a close company to which they are a related party, that goodwill is not a relevant business asset and is not subject to entrepreneurs' relief. The definition of related party is that given by CTA 2009, s 835. In addition, if the company is not resident in the UK but would be considered to be a close company were it resident in the UK, it is considered to be a close company for the purposes of this new provision including whether the person is a related party.

The draft legislation contains an anti-avoidance provision that catches any arrangement where a main purpose is to circumvent the new provision.

Entrepreneurs relief on deferred gains

From 3 December 2014, gains which qualify for entrepreneurs' relief that are deferred into EIS or SITR qualifying investments will continue to be eligible for entrepreneurs' relief when the gain is realised.

SDLT on residential property

SDLT is charged on the acquisition of an interest in land. It is paid by purchasers, calculated with reference to the purchase price of the property. The most contentious aspect of the tax has been the application of a single rate to the whole property purchase price with the rates increasing on each property value band.

The effect is a stepped tax, with the biggest step occurring around the average price of a home. Under the old rules, SDLT on a property costing £250,000 was at 1% of the whole value, ie £2,500. If the property cost was £250,001, the SDLT would be at 3%, a charge of £7,500.

The effect of this rule in the housing market was to create an uneven distribution of property prices with a disproportionately high number of transactions below each rate threshold.

The new proposals abolish the slab tax approach and introduce graduated rates which apply only to the part of the property purchase price that falls within each band. It will therefore be applied in the same way as different rates of income tax are applied to each band of income and should encourage flexibility on pricing at the rate thresholds:

Purchase price / lease premium or transfer value	SDLT rate from 4 December 2014
Up to £125,000	Zero
£125,001–£250,000	2%
£250,001–£925,000	5%
£925,001–£1.5m	10%
£1.5m+	12%

Under the new rules, 98% of purchasers will pay less SDLT. The shortfall will be collected from high value transactions as illustrated by the following table:

Value of example properties	Tax paid under old rules	Tax paid under new rules
£125,000	0	0
£185,000	£1,850	£1,200
£275,000	£8,250	£3,750
£510,000	£20,400	£15,500
£937,500	£37,500	£37,500
£2,100,000	£147,000	£165,750

The change is immediate and provides the option to choose between the old and new rates to those currently between exchange of contracts and completion of their purchase. Buyers of high value properties will need to be advised to actively opt for the old rates. However, the vast majority of buyers will benefit from the new rates but they need to make sure that their conveyancers are aware of the changes to ensure they do not overpay SDLT on their behalf.

Since the change only applies to residential property transactions, in effect two separate regimes will apply to residential and non-residential properties.

Annual tax on enveloped dwellings (ATED)

ATED came into effect on 1 April 2013 as one part of a trio of anti-avoidance provisions in relation to residential properties held by 'non-natural persons', that is to say companies and partnerships. As the properties are not held directly, they are deemed 'enveloped,' and the underlying assumption is that ownership is structured in that way to avoid SDLT or capital gains tax or both. The other parts of the reform imposed a penal rate of SDLT on the purchase of the property and CGT on the sale, which might otherwise have been exempt. ATED fills the gap with an annual charge during the period of ownership.

To the Government's surprise, ATED has turned out to be more widely applicable than was anticipated and has raised five times the amount forecast for 2013/14. From 1 April 2015, the rates of ATED are as follows:

- £23,350 for properties worth more than £2 million but less than £5 million
- £54,450 for properties worth more than £5 million but less than £10 million
- £109,050 for properties worth more than £10 million but less than £20 million
- £218,200 for properties worth more than £20 million.

The Government has also announced that it will introduce changes to the filing obligations and information requirements for properties within the scope of ATED.

Inheritance tax exemptions

Following an announcement in the Budget 2014, the government issued a consultation document proposing a general exemption for inheritance tax for the estates of emergency services personnel who are killed in service, or by an injury sustained on duty when responding to a 'blue light' situation. Para 2.72 of the Autumn Statement confirms that the exemption will have effect for deaths on or after 19 March 2014. Legislation will be included in Finance Bill 2015.

Such an exemption is already granted to members of the armed forces who die as a result of an injury on active service. Death need not occur at the time the person is injured on active service. He may die from an injury or disease sometime after the event and the exemption will still apply provided a link can be demonstrated. See the Death on active service guidance note.

The consultation document proposed extending the provisions of IHTA 1984, s 154 to all emergency service personnel who would include those employed by:

• a fire and rescue authority

• an NHS body in the provision of ambulance or paramedic services

• a police force

• Her Majesty's Coastguard

• the Royal National Lifeboat Institution

• and other organisations working with those services

In a significant addition to the original proposal, humanitarian aid workers, such as those assisting with the ebola crisis in West Africa, are to be included in the exemption.

The current armed services exemption applies only to assets passing on death. The consultation document proposed that the new broader exemption should be extended to the additional charge on death, arising on potentially exempt transfers and chargeable lifetime transfers, which become chargeable because of the death.

In conjunction with the exemption for the estates of emergency service personnel, the existing exemption on the death value of medals and decorations for valour is to be extended to all decorations and medals awarded to the armed services and emergency personnel, and to awards made by the Crown for achievements in public life.

Inheritance tax and trusts

The latest Consultation on revising the method of calculating inheritance tax charges on relevant property trusts received a lukewarm response from the profession. Its principal proposal was to introduce a single 'Settlement Nil Rate Band' (SNRB), to be shared between all trusts created by the same settlor. Many commentators could foresee practical problems in the application of this policy, but were nevertheless resigned to the fact that the government seemed determined to go ahead. Although initially, the stated purpose was to 'simplify' the taxation of trusts, it was clear that the purpose in splitting the nil rate band was to extinguish the tax planning opportunities offered by pilot trusts. See the Pilot trusts and will planning guidance note.

The Chancellor said nothing on the subject in his speech, but the published Para 2.73 of the Autumn Statement announces that the single SNRB will **not** be introduced. They will instead target the avoidance facilitated by multiple trusts with different rules. There is no indication what these new rules will be. Presumably, we will find out when the draft legislation is passed next week. Also promised, is simplifying the calculation of trust tax rules.

The 'simplification' proposal has been on the agenda for so long now (since the first consultation in 2012), it is doubtful whether anything will be achieved in this Parliament.

Administration (Lecture P870 – 6.45 minutes)

Disclosure of tax avoidance schemes (DOTAS)

Tax avoidance schemes which meet certain 'hallmarks' must be notified to HMRC. Following FA 2014, taxpayers who invested in schemes notified under DOTAS, where the scheme is subject to an enquiry by HMRC, are required to pay the disputed tax via an accelerated notice. Therefore any changes to the DOTAS regime are of key importance to taxpayers and advisers.

Following the consultation in the summer, a number of changes will be introduced to the DOTAS regime in Finance Bill 2015:

- updating the existing hallmarks
- adding new hallmarks
- removing the grandfathering provisions (which relate to schemes available before 1 August 2006 or substantially the same as those schemes)

We must wait and see the draft legislation to see if the concerns of the professional bodies that, based on the wording of the consultation, straightforward tax planning could now fall into the DOTAS regime.

In addition to the above, HMRC will gain powers in Finance Bill 2015 to publish summary information about scheme promoters and notified schemes. The Government will also allocate more resources to the DOTAS department within HMRC, creating a new taskforce.

General anti-abuse rule (GAAR)

The GAAR was introduced on 17 July 2013 to give HMRC powers to counteract abusive tax arrangements. Currently no specific penalties apply to any tax arrangement caught by the GAAR, although HMRC has the power to levy penalties of up to 200% under the existing penalties regime, see the Penalty rates and structure for inaccuracies in returns guidance note.

The Government is to consult on whether a GAAR penalty regime could be appropriate and how such a regime might work.

However, in the 18 months since this was introduced there have yet to be any referrals to the GAAR advisory panel so it remains to be seen whether the introduction of penalties associated with the GAAR will encourage HMRC to make more use of the rules.

Serial tax avoiders

As part of the continuing push on the part of HMRC to change the behaviour of taxpayers, there will be a consultation on the action that should be taken to discourage serial investors in tax avoidance schemes. These could include additional:

- financial costs
- compliance and reporting requirements

Whether this will be necessary with the introduction of accelerated payments notices where the schemes are notified under DOTAS remains to be seen.

High-risk promoters

New rules were introduced in FA 2014, Part 5 which subjected 'high risk' promoters to increased information powers, penalties and publication of their details.

However, the Government is to "further update and clarify" the rules (presumably in Finance Bill 2015, although this is not stated) to ensure that they work as originally intended. The changes concern connected persons under the control of a high risk promoter, and the time limits within which HMRC can issue conduct notices under the rules.

Power to close aspects of an enquiry

The Government is considering a new power to enable HMRC to close areas of an enquiry whilst leaving other areas open. This proposal will have the benefit of reducing the tax under enquiry for the purposes of the HMRC figures, but has a number of potential downsides for the taxpayer including:

- it will allow HMRC to collect some of the tax, penalties and interest due earlier
- could mean that the taxpayer has a number of separate appeals ongoing against the closure of different aspects of the enquiry
- it can complicate the administration of the enquiry as it may become difficult to track which areas are closed and which are still open

Direct recovery of debts

The summary of responses to the consultation on direct recovery of debts was published on 21 November 2014 and included a number of further safeguards. The Autumn Statement includes the commitment to introduce this power in Finance Bill 2015, however questions remain about the practicalities.

Anti-avoidance

Fee income on fund managers

Finance Bill 2015 will contain provisions to ensure fund managers are subject to income tax on payments for their services. Little detail is available at the time of writing, however it appears that this is to catch payments arising through partnerships or other transparent vehicles. Sums linked to performance and returns from investments by partners will not be caught.

Special purpose share schemes

From 6 April 2015, individuals who invest in companies that use a special purpose share scheme will be taxed on the issue of new shares as if they had received dividends. The scheme in question, often referred to as 'B share schemes', has been used by several listed companies to allow investors to receive returns on their investments as capital gains rather than dividend income.

Miscellaneous loss relief

Effective immediately from 3 December 2014, income tax relief is denied for losses arising from miscellaneous transactions as a result of relevant tax avoidance arrangements. Under the previous rules in ITA 2007, ss 152–155 such losses could be set against other miscellaneous income. It seems likely that this has been prompted by a specific scheme which utilised these provisions and as such is unlikely to affect many taxpayers.

Peer-to-peer lending

Peer-to-peer (P2P) lending has become a more widely available proposition with the increased number of P2P websites. The Autumn Statement contains a number of proposals in relation to this:

- a review of the regulatory barriers for P2P lending
- a new relief which will allow individuals lending through P2P platforms to offset losses from bad debts against other P2P income. This will be effective from April 2016 but transitional rules will allow individuals to claim relief for losses incurred from April 2015
- a consultation on the introduction of an income tax withholding regime to apply to P2P lending platforms. This is intended to come into effect from April 2017 and remove the need for lenders to file a Self-Assessment Tax Return.

Offshore tax penalties

Currently, the penalties for inaccuracies in relation to offshore matters can be up to 200% of the tax at stake (based on the territory involved) and are limited to income tax and capital gains tax. Following the consultation in the summer, the following changes will be included in Finance Bill 2015:

• the scope of the regime will be extended to inheritance tax (based on the location of the assets)

• the inclusion of undeclared income and gains arising in the UK which are hidden offshore

• the regime will be updated to include a new category of territory for countries which incorporate the common reporting standard (CRS)

• a new penalty of up to a further 50% where undeclared income and gains are deliberately moved between jurisdictions on a number of occasions to continue to evade tax

The first three bullet points will come into force from 6 April 2016, but the additional penalties will apply from Royal Assent.

Business Taxation (Lecture B866 – 6.37 minutes)

Restricting relief for internally generated goodwill transfers

From 3 December 2014, corporation tax relief is restricted on internally-generated goodwill and customer related intangible assets acquired from a related party on incorporation. The draft legislation published by HMRC introduces CTA 2009, draft ss 849B - 849D. These sections apply where a 'relevant asset' is acquired from a related party as defined in CTA 2009, s 835.

Relevant assets include intangible assets consisting of:

- goodwill of the transferor
- information relating to customers or potential customers of the transferor
- a relationship, whether contractual or not, that the transferor has with a customer
- an unregistered trade mark or other sign used by the transferor
- a licence or other right in respect of any asset listed above

Where the transferor did not acquire the relevant asset by a 'third party acquisition', no deduction is allowed for debits relating to amortisation of the intangible asset. Any loss made on realisation of the asset is treated as a non-trading loss.

A third party acquisition is one which does not occur with a related party or a connected person as per CTA 2009, s 842. Any acquisition which has a main purpose as obtaining a tax advantage is also a third party acquisition.

Where the transferor did acquire the relevant asset by a 'third party acquisition', there is an apportionment calculation required which prevents a deduction for a proportion of amortisation or splits any realisation of the asset between trading debits and non-trading debits. This effectively limits the relief available to the company to what would have been available to the transferor had they been entitled to relief on intangible fixed assets under CTA 2009, Part 8.

Research and development

There were three measures announced in relation to the R&D relief schemes.

These measures, all effective from 1 April 2015, are:

- the enhanced deduction under the SME scheme increases to 230%
- the rate for the above the line credit for large companies increases to 11%

• qualifying expenditure will be restricted to exclude the costs of materials incorporated in products

The increase in the amount of relief is beneficial to businesses that incur significant costs on qualifying R&D, though the increase in the SME scheme is relatively small.

The restriction on qualifying expenditure appears to be an attempt to provide a legislative backstop to prevent enhanced relief being given on materials that are ultimately incorporated into a product sold to customers. Currently consumable items must be ‘consumed or transformed’ through qualifying R&D activity, which excludes production activity itself. Therefore, this measure should not prove to be a significant alteration to the existing rules of the R&D scheme for most businesses. It may, however, impact on R&D claims for ‘first of class’ projects or those where materials are recycled or reused.

The Government will launch a consultation regarding smaller businesses’ issues in claiming R&D relief in January 2015. Already announced in the Autumn Statement is the introduction of an advanced assurance scheme for small businesses making their first claim. A voluntary advance assurance pilot was previously launched in 2011.

Creative sector tax reliefs

The Chancellor made the following announcements in relation to creative sector tax reliefs. These announcements will be subject to EU approval.

Children’s television tax relief

From 1 April 2015, a new tax relief will be available on the production of children’s television programmes. Qualifying production expenditure will be eligible for additional relief up to a maximum of 80% of core expenditure. This additional relief can be used to reduce the production company’s corporation tax liability or to claim a payable tax credit at a rate of 25%.

It is anticipated that this relief will predominantly follow the structure of the high-end television tax relief and will include a cultural test.

High-end television tax relief

The Government will consult with industry regarding reduction of the minimum UK expenditure to 10% from 25% and modernising of the cultural test.

Orchestra tax relief

The Government will consult on an orchestra tax relief. This is intended to be introduced in April 2016.

Corporation tax rates

The Chancellor has already announced that the main rate and small profits rate of corporation tax will unite from 1 April 2015. From that date there will be a single rate of corporation tax of 20% and no marginal rate relief.

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

Business rates

In his statement today, the Chancellor announced that the current doubling of Small Business Rate Relief will continue until April 2016, as will the 2% cap on the business rates multiplier which otherwise is tied to the Retail Prices Index.

There is further good news for the hospitality sector, in that shops, pubs, cafes and restaurants with a rateable value of £50,000 or less, which can currently benefit from a business rates discount of £1,000 a year, will see that discount increase to £1,500 in 2015/16.

In the longer term there is also to be a review of the structure of business rates, to be completed by Budget 2016. However, this review is unlikely to make a significant difference to the size of employer's business rates bills as one of the riders to the review is that it must be fiscally neutral. However, its scope will include administrative matters including looking at how to improve information, billing and appeals.

It is worth noting, though, that the above business rates proposals will only definitely apply to businesses in England. The position in Scotland, Northern Ireland and Wales may be different as those administrations all have, to some extent or other, devolved powers in relation to business rates. In relation to Wales in particular, the Chancellor's statement confirmed that a fully devolved business rates regime will be operational there by April 2015.

Abolition of employer NIC for younger employees and apprentices

As previously announced, as from 6 April 2015, employers will not have to pay secondary (employer) National Insurance Contributions (NIC) in respect of payments to an employee who is under 21 years old until that employee's earnings reach the Upper Earnings Limit (currently £805 per week).

In the Autumn Statement, the Chancellor announced that this exemption will be extended from 6 April 2016 to include apprentices under the age of 25. As with the exemption for the under-21s, employers would only have to pay secondary NICs in respect of payments made to apprentices under 25 in the unlikely event that the apprentice's earnings reach the Upper Earnings Limit. We can expect the legislation for this exemption to be included in a National Insurance Bill as it would be outside the scope of the Finance Bill.

Other corporate measures

Diverted profits tax

A new tax, known as the diverted profits tax, will be introduced from 1 April 2015. It is intended that this will deter multinational groups of companies from implementing aggressive tax planning which seeks to divert profits away from the UK, in order to minimise the group's overall corporation tax bill. The tax is intended to raise more than £1bn over the next five years by tackling aggressive avoidance.

Further details have not been provided, however draft legislation is expected to be introduced in Finance Bill 2015.

Country by country reporting

In September 2014 the UK became the first of 44 countries to commit to implementing the OECD's country-by-country reporting model, designed to increase transparency over the tax and business affairs of multinational enterprises and thereby reduce the risk of international tax avoidance.

Today's announcement confirms that Finance Bill 2015 will include provision for the Government to implement the OECD model for country-by-country reporting. As a result, multinationals operating in the UK will be required to provide information to HMRC regarding their economic activity, tax payments and profits in each jurisdiction to HMRC. This information is likely to be used to determine which areas of tax law require more attention to mitigate the opportunities for tax avoidance.

Hybrid mismatches

Today the Government opened a consultation on the potential rules to prevent multinational companies from avoiding tax through the use of certain international structures. This follows the UK's agreement to the OECD rules for tackling 'hybrid mismatch' arrangements. Such arrangements arise where, for example, one party gets a tax deduction for a payment while the other party does not have a taxable receipt, or there is more than one tax deduction for the same expense.

The consultation will run for 10 weeks ending on 11 February 2015, and it is expected that a summary of responses will be issued in summer 2015.

Repeal of the late-paid interest rules

The late-paid interest rules were originally introduced to combat avoidance where relief for late-paid interest was claimed as it was accrued. At first the rules applied to interest on all loans between connected parties if the lender was resident outside the UK. However, the rules were relaxed in 2009 and now most commonly apply only where interest is paid to companies in a non-qualifying territory (ie a tax haven).

In situations where there is a connection between a debtor and creditor (CTA 2009, s 374) or where a party to a loan has a major interest in another (CTA 2009, s 377), relief for interest which is not settled within 12 months of the end of the accounting period in which it accrues is currently only available when it is actually paid. There is also a parallel rule applying to deeply discounted securities (CTA 2009, s 407).

These rules can be exploited by companies who wish to pay interest to create a loss which can then be group relieved, in any accounting period of their choice. In this way, companies can work around group relief rules which only allow the surrender of current year rather than brought forward losses. Legislation will therefore be included in Finance Bill 2015 to repeal sections 374, 377 and 407 and close the loophole. It will be effective for new loans entered into on or after 3 December 2014. For existing loans, the provisions will be effective for interest accruing on or after 1 January 2016, or from the date of any material changes to loan terms (if earlier).

Modernising the taxation of corporate debt and derivatives

It was announced at Budget 2013 that the loan relationships legislation would be overhauled. It was confirmed today that detailed provisions will be published in draft Finance Bill 2015, following the consultation on modernising the taxation of corporate debt and derivatives. The overall intention is to 'update, simplify and rationalise' the existing legislation. According to HMRC, this will include a wide-ranging anti-avoidance rule countering timing advantages arising on loan relationships, the introduction of a new relief for companies in financial distress, and a stronger link between accounting profits and losses and their taxable counterparts.

Consortium relief

The government has announced the removal of all requirements relating to the location of the 'link company' from the consortium relief legislation. This is likely to be in response to the judgments of the Court of Justice of the European Union (CJEU) and Firsttier Tribunal (FTT) in the case of *Felixstowe Dock and Railway Co Ltd and other companies v HMRC*.

Prior to an amendment by FA 2010, the legislation contained an implicit requirement for the link company to be resident in the UK or carrying on a trade in the UK through a permanent establishment. FA 2010 extended the rules by explicitly stating that such a link company could be "established in the European Economic Area (EEA)". However, a caveat was included to prevent relief in circumstances where there is a company in the ownership chain between the EEA link company and the claimant / surrendering company that is not established in the EEA. The CJEU ruled that relief should be available to Felixstowe et al despite this condition not being met.

Personal Tax

Ascertaining holiday pay (Lecture B867 – 5.50 minutes)

Summary - The Employment Tribunal found that holiday pay must include amounts normally paid as overtime.

The appeals were test cases. The issue was whether Bear Scotland, which carried out road construction and maintenance, had made unauthorised deductions from the wages of two of its employees, by failing to include overtime and other payments associated with their work in calculating the holiday pay due to them.

Under the Working Time Directive (2003/88/EC), each employee is entitled to four weeks' paid annual leave, which cannot be replaced by an allowance in lieu (except when employment is terminated). This leads to complexities for employees whose remuneration is made up of different elements, as the purpose of the Directive is 'to put the worker during such leave, in a position which is, as regards remuneration, comparable to periods of work' (Robinson-Steele [2006] ICR 932).

Decision:

The Employment Tribunal found that 'normal pay' should be easily identifiable and that, where there was no such 'normal pay', an average over a reference period must be used.

The Directive is not directly effective (as it is between citizens). The Employment Tribunal must therefore decide whether UK legislation could be interpreted in conformity with the Directive under the Marleasing principle [1992] 1 CMLR 305. It found that the UK regulations had been made to implement the Directive and so adopting a conforming interpretation was not doing violence to the intention of Parliament.

Consequently, overtime which employees were required to work must be included in the calculation of 'normal pay' for the purpose of ascertaining holiday pay.

Comments - In confirming that holiday pay must include overtime pay, the decision may have PAYE and NIC ramifications for many companies. This has received a significant amount of publicity and may have significant impacts for many people.

Fulton and others v Bear Scotland UKEATS/0047/13/BI

Commercial decision is avoidance

Summary – The Tribunal confirmed that the appeals against s739 were unsuccessful for two of the appellants were unsuccessful but successful because of the EU dimension for the other taxpayer

The Fisher family ran a bookmaking business, Stan James, that offered telebetting. During 1999/2000 it and several other UK telebetting businesses moved to Gibraltar because the territory had a more favourable betting duty regime than the UK.

HMRC issued assessments to the taxpayers charging income tax under the transfer of assets abroad anti-avoidance provisions in TA 1988, s 739 for the years 2000/01 to 2006/07 and ITA 2007, s 720 for 2007/08. The taxpayers appealed.

The family said, for the anti-avoidance provisions to apply, there had to be avoidance in the first place. They moved the business to Gibraltar so they could compete with other bookmakers. The business would otherwise have failed. The family argued that saving tax was not the reason for moving.

Decision:

The First-tier Tribunal said it was "inconceivable the transfer would have gone ahead were it not for the betting duty being lower in Gibraltar", although this did not conflict with the decision being made for sound commercial reasons.

The taxpayers argued that the EU rights of freedom of establishment and freedom of movement of capital applied. The tribunal disagreed and referred to Commission v UK (Case C-556/08) which demonstrated that the UK is ultimately responsible for the implementation of EU directives in Gibraltar. It concluded that the freedoms of establishment and free movement of capital were not relevant to movements between the UK and Gibraltar. However, they did apply to one family member, Anne, who was an Irish national.

Finally, the tribunal dealt with the family's claim that the assessments were defective because they had been made under the discovery provisions in TMA 1970, s 29. It agreed that the conditions for discovery were not satisfied for 2005/06 and 2006/07 because the tax officer would have been aware of the relevant information as a result of responses to enquiries.

The appeals of Stephen and Peter Fisher were allowed for tax years 2005/06 and 2006/07. The appeals for the remaining years were dismissed. The appeals by Anne Fisher were allowed.

Comments – This is an interesting case involving an argument raising the issue that s739 may be contrary to the free movement of capital within the European Union. It is somewhat unusual that the members of the family came from different nations and therefore that impacted on the decision. Additionally this case highlighted how the places involved had a material impact on the decision as Gibraltar is effectively an extension of the UK for certain purposes.

Anne Fisher, Stephen Fisher, Peter Fisher v HMRC TC3921

Gamblers' winnings are not taxable

Summary – The Court held for the Italian tax authority to treat winnings from casinos in Italy differently from those from casinos in other countries was discriminatory

Two Italian professional poker players appealed against the Italian tax authority's decision that their winnings from casinos in countries other than Italy, in and outside the EU, should be declared in a tax return and were subject to Italian income tax.

Their winnings from Italian casinos were taxed at source, did not have to be declared on a tax return and were not subject to income tax. The matter was referred to the Court of Justice of the EU for a preliminary ruling.

Decision:

The court said that for the Italian tax authority to treat winnings from casinos in Italy differently from those from casinos in other countries was discriminatory.

It followed that articles 52 and 56 of the Treaty of the Functioning of the EU precluded "legislation of a member state which subjects winnings from games of chance obtained in casinos in other member states to income tax and exempts similar income from that tax if it is obtained from casinos in its national territory".

Comments – The comments from the Court are self-explanatory.

Cristiano Blanco (C-344/13), Pier Paolo Fabretti (C-367/13), ECJ

Confusing tax rules

Summary – The Tribunal held that the special annual allowance charge did apply in the relevant tax year

The taxpayer invested £30,000 in a self-invested personal pension in January 2011 and included the sum in her tax return. After an enquiry into the return, HMRC ruled that this payment brought her within the special annual allowance charge under FA 2009, Sch 35 that applied for 2009/10 and 2010/11 to people earning more than £130,000.

Although the taxpayer accepted that the charge applied, she said the rules were confusing (and HMRC agreed) and there was nothing on the return that indicated how the amount should be treated. She appealed.

Decision:

The First-tier Tribunal said the taxpayer's belief and the advice she received "did not coincide" with the law.

HMRC made no allegations that she had behaved in an underhand way; the matter was simply whether the charge was correct. It was irrelevant that HMRC officials considered the law confusing and that the taxpayer, had she known that the charge would apply, would have arranged to make a smaller contribution for the year.

The charge was correct.

The taxpayer's appeal was dismissed.

Comments – There have very significant changes to the pensions legislation over the last few years and even more are planned for the future. The transitional charges in the years in question were regarded by all (including HMRC) as very complex and so it comes as no surprise that a taxpayer has come grief in this area. It demonstrates how aware one needs to be regarding tax provisions.

C V Lott v HMRC TC4060

Review of dividend waivers (Lecture B868 – 11.43 minutes)

The taxation of dividend waivers is a complex area as highlighted in the recent case of Donovan & McClaren (2014) TC3188. This case serves as a reminder that waivers should be considered carefully. In this article I will look at some of the factors that need to be considered when contemplating waiving a dividend and the potential tax consequences of getting it wrong.

When a shareholder waives his right to a dividend this increases the company's retained profits and/or enables a higher dividend to be paid to the remaining shareholders. In the latter case the waiver could still give rise to an income tax charge on the shareholder.

Timing

In order for a dividend waiver to be effective for tax purposes, the dividend must be waived (by form of a deed) before it is declared by the company, or if it is an interim dividend before it is paid. If the dividend waiver is after the dividend has been declared, the shareholder will still be subject to income tax on the dividend accruing to him. The waiver should also be for a period of less than 12 months so that it does not constitute a transfer of value for inheritance tax purposes.

Assuming these two pitfalls have been avoided the next points that need to be considered are:

- Whether the redirection of dividends from some shareholders to others represents a payment for services rendered to the company or some other form of remuneration; or
- Whether the settlements legislation applies.

Remuneration for service

Depending on the individual's circumstances, dividends are subject to income tax at an effective rate of 0%, 25% and 30.56% whereas employment income is subject to income tax at 20%, 40% and 45% and employer and employee class 1 NICs.

Given the lower rate of tax payable on dividends, many SMEs will consider paying dividends instead of salaries. To maximise the effectiveness of this, the use of dividend waivers may be contemplated so that employee shareholders are paid predominantly in dividends. To counter this, anti-avoidance legislation exists within the employment related securities provisions, to prevent this type of planning from being effective. Where this applies, the 'additional dividend' will be taxed as employment income in the hands of the receiving shareholder and be subject to income tax and NIC under PAYE.

Settlements legislation (ITTOIA 2005, s 264)

The settlements legislation is relevant where a shareholder in a close company waives the right to a dividend and as a result another shareholder receives an enhanced dividend. If the receiving shareholder is the individual's spouse or minor child then assuming that there is an element of bounty and that the arrangement is not part of an arm's length arrangement, the amount that has been waived will continue to be taxed on the waiving shareholder.

There is an exception for outright gifts to spouses where the gift carries a right to the whole of the income and the property is not wholly or substantially a right to income (ITTOIA 2005, s 626).

The circumstances where dividend waivers can be caught by settlements legislation are:

• Where the level of retained profits is insufficient to allow the same rate of dividend to be paid on all share capital;

• Although there are sufficient retained profits to pay the same rate of dividend per share for the year in question, there has been a succession of waivers over several years where the total dividends payable in the absence of the waivers exceed accumulated realised profits;

• Where there is other evidence which suggests that the same rate would not have been paid on all the issued shares in the absence of the waiver;

• Where the non-waiving shareholders are persons whom the waiving shareholder can reasonably be regarded as wishing to benefit by the waiver; or

• When the non-waiving shareholder pays less tax on the dividend than the waiving shareholder.

The application of the settlements legislation to dividend waivers was considered in the recent First-tier Tribunal (FTT) case of Donovan & McLaren v HMRC.

In this case Mr Donovan (Mr D) and Mr McLaren (Mr M) each owed 40% of a company with their wives holding the remaining shares, 10% each. Mr D and Mr M frequently waived their right to a dividend with the result that the shareholders received roughly the same amount of dividend each. Dividends in the previous nine years had also frequently been disproportionate to shareholdings.

HMRC argued that the settlements legislation applied to the dividend waivers so that all of the dividend income was taxable on Mr D and Mr M as settlors. Mr D and Mr M argued that the dividend waivers did not have a tax avoidance motive but represented a commercial decision to ensure that the company maintained reserves and cash balances to fund the purchase of the company's freehold premises.

The FTT found in favour of HMRC on the grounds that:

• The intention behind the dividend waivers was to take advantage of the wives' lower rate of income tax to make an overall saving.

• Mr D's and Mr M's suggestion that there was a commercial reason for the waivers was not convincing. A build-up of reserves in the company could have been achieved by other means, such as voting a lower dividend per share.

An arrangement within ITTOIA 2005, s 620(1) did not necessarily have to involve a tax avoidance motive. All that had to be shown was a definite plan to use a company's shares to divert income.

Mr D and Mr M would not have entered into the arrangements with a third party at arm's length. There was no commercial purpose for the waivers and they would not have taken place at arm's length, there was an element of bounty in the arrangement.

The wives had benefited from the dividend waivers and that benefit was property in which Mr D and Mr M had an interest.In the above case the use of a different share class could have avoided the need for dividend waivers and had this been done this case may not have ended up in the FTT.

Where used properly dividend waivers are valid planning. However, if regular waivers are anticipated it may we worth considering a reorganisation of share capital.

Article by Paula Tallon, Managing Partner of Gabelle

Capital Taxes

Capital gains tax on non-residents (Lecture P868 – 14.28 minutes)

A few days before the Autumn Statement, HMRC released their responses to the consultation.

From 6 April 2015 capital gains tax is being extended to non-residents disposing of UK residential property. The charge will apply mainly to non-resident individuals, non-resident trustees, personal representatives of a non-resident deceased person and some non-resident companies.

Key points

Rate of tax for individuals will be same rate as UK individuals i.e. 18% or 28% depending on total UK income and gains.

Individuals will benefit from the annual capital gains tax exemption

Rate of tax for corporates will be 20% although the 28% ATED regime will take precedence if the property falls within both regimes.

The chargeable gain will be on the growth from 6 April 2015. The property will be rebased to it's market value at 6 April 2015 with the growth from that point falling within the charge. Alternatively the taxpayer can elect to apportion the gain.

The taxpayer must report and pay within 30 days of disposal unless they are already in self assessment system.

Residential property

Residential property will be defined as property suitable for use as a dwelling.

The charge will not extend to:

- Non-residential property
- Care/nursing homes
- Purpose built (or converted) student accommodation:
- Properties where at least 15 bedrooms occupied > 50% of time by students attending a course of study, or
- Accommodation that is excluded from registration under the Housing Act 2004 as a house in multiple occupation controlled or managed by a HEI….
- Residential accommodation for school pupils

Impact on non-resident companies

The aim is to limit the extent of the charge to companies that are the private investment vehicle of individuals, families or small groups of individuals. This will be achieved by the introduction of a “narrowly controlled company” test. Starting point for the test is based on the existing close company definition.

As a result the charge will not extend to pension funds or companies not controlled by 5 or fewer persons.

Unless the gain is within the ATED regime it will be taxed at the 20% rate. Indexation will be available.

Losses on UK residential property are ring fenced and can only be offset against gains of UK residential property in current or future period.

Groups will be able to “pool” gains and losses on disposals of UK residential property by different members of the same group. Group definition is based on consolidated accounts condition.

Impact on individuals

Individuals will be charged at 18% or 28% depending on their total UK income and gains. The annual exemption will be available to them.

The taxpayer can offset losses on UK residential property against gains on UK residential property. The losses are effectively ring fenced and are set off against gains on UK residential property in the current period and then carried forward for set off against future gains on UK residential property.

The rate of tax for non-resident trustees will be 28% with half an annual exemption

Changes to principal private residence nominations

From April 2015 a person’s residence will not be eligible for PPR for a tax year unless:

- The person making the disposal was tax resident in the same country as the property for that tax year, or
- The person spent at least 90 midnights in that property – the “90 day rule”

The new 90 day rule also applies where there is an existing nomination.

Nominations remain unchanged on properties in a country in which you are resident so a UK resident owning two UK residences will not be affected by these changes – they can still nominate their second UK residence. A UK resident owning a UK residence and an overseas residence will however be affected by these changes.

HMRC example 1

Mr X has a house in the UK that was his only home from April 2005 to 2012 when he retired and moved to Australia. The property was let by him until April 2018 when it is sold. The post April 2015 gain is potentially chargeable.

Principal private residence exemption is available from 2005 to 2012 plus the last 18 months. Lettings relief and the annual exemption are also available.

There are no details on computation yet but it will undoubtedly be a different calculation depending on whether taxpayer is rebasing to April 2015 or apportioning.

HMRC example 2

USA resident Mrs Y bought a UK property in April 2005 for her own use when in the UK. She sells it in April 2018. The property is never let.

In 2006/07 she stayed in the property for more than 90 days.

On sale she can nominate the property for 2006/07 which will give her the last 18 months as PPR. For non-residents PPR nominations are to be made at the time of disposal.

There are no details on computation yet but it will undoubtedly be a different calculation depending on whether taxpayer is rebasing to April 2015 or apportioning.

PPR and Non-PPR land (Lecture P869 – 9.11 minutes)

Background

An individual's only or main residence may sometimes be sold with land which does not form part of that residence.

The question therefore arises how to calculate the values of the residence and the non-residential land respectively, for the purposes of calculating capital gains tax relief on disposal of the private residence (within TCGA 1992, ss 222-223).

Unfortunately, the legislation does not offer very much assistance. TCGA 1992, s 222(1), (10) provide:

"(1) This section applies to a gain accruing to an individual so far as attributable to the disposal of, or of an interest in—

(a) a dwelling-house or part of a dwelling-house which is, or has at any time in his period of ownership been, his only or main residence, or

(b) land which he has for his own occupation and enjoyment with that residence as its garden or grounds up to the permitted area."

"(10) Apportionments of consideration shall be made wherever required by this section or sections 223 to 226 and, in particular, where a person disposes of a dwelling-house only part of which is his only or main residence."

TCGA 1992, s 52(4) states:

"(4) For the purposes of any computation of the gain any necessary apportionments shall be made of any consideration or of any expenditure and the method of apportionment adopted shall, subject to the express provisions of this Chapter, be just and reasonable."

The statutory requirement for a 'just and reasonable' apportionment can give rise to difficulties in practice.

'Just and reasonable' apportionment

In Oates v Revenue & Customs [2014] UKUT 409 (LC), the appellant taxpayers (mother and son) sold a house with adjoining land for development in June 2006.

HMRC issued a determination to the taxpayers, apportioning the sale proceeds of £725,000 as to £170,000 for the house and £555,000 for the land. The taxpayers appealed, on the grounds that the correct apportionment should be £325,000 for the house and £400,000 for the land.

The apportionment of sale proceeds was relevant to the amount of private residence relief available (under TCGA 1992, s 222) in respect of the house, and TCGA 1992, s 52(4) provided for a 'just and reasonable' apportionment of the sale proceeds.

The taxpayers submitted a brief report to the Lands Chamber of the Upper Tribunal (UT) from a firm of valuers, estate agents and auctioneers, valuing the house at £325,000 ignoring any possible increase in the value arising from a ransom of the adjoining land. HMRC provided an expert valuation witness. He considered the apportionment using a number of approaches, and concluded that it was just and reasonable to apportion the sale price on the basis of £170,000 being the market value of the house and £555,000 being the value of the land.

The UT noted that the valuation report submitted by the taxpayers was exceedingly brief, and held that it was incompatible with the tribunal's requirements. No weight was therefore placed upon it. In the absence of any further evidence or submissions on the taxpayers' behalf, the UT analysed the report and methodology of HMRC's expert witness. The UT held that his adopted apportionment was incorrect.

It was noted that the Valuation Office Agency's (VOA's) Capital Gains and Other Taxes Manual (at 8.61) indicated that it was necessary to find the constituent values of the parts, and if these do not equal the whole then 'marriage value' should be allowed for, using the following formula set out in the VOA guidance (http://www.voa.gov.uk/corporate/Publications/Manuals/CapitalGainsTaxManual/sect8/b-cgt-man-s8.html#P368_29435):

$$\text{Open market value or sale price to be apportioned} \times \frac{\text{Constituent value of part}}{\text{Sum of constituent value of all parts}}$$

Adopting HMRC's market value for the house of £170,000, the formula from the VOA manual would indicate a value in the order of £209,210 for the land.

In the absence of evidence on the land value disregarding any development potential, the UT was satisfied that the existing use value of the land would not have been more than £209,210 at the date of disposal. Adopting the formula in the VOA manual, the appeal would therefore succeed because the figure to be apportioned to the house could not be less than the £325,000 for which the taxpayers contended.

The UT determined that a 'just and reasonable' apportionment of the sale proceeds was £325,000 for the house and £400,000 for the adjoining land. The appeals were therefore allowed.

VOA guidance

The UT found the formula in the VOA manual to be "less than satisfactory", and considered an alternative basis. However, the UT was nevertheless satisfied that the 'existing use' value of the site would not reach the level of value required by the formula to cause the appeal not to entirely succeed.

Contributed by Mark McLaughlin

Euro-risk bonds

Summary - The FTT found that bonds which could be redominated in euros, should the UK adopt the euro, were QCBs.

The taxpayer was a member of Tonnant LLP. It bought bonds on the secondary market at what it believed to be an undervalue, with the aim of keeping them until they matured or could be sold at a profit. Six bonds were later realised. They were in sterling and interest was payable in sterling, but they had been issued with a provision that they could be converted into euros if the UK adopted the EU currency.

HMRC considered that, because their terms allowed for their conversion or redemption in a currency other than sterling (TCGA 1992, s 117), they were not qualifying corporate bonds (QCBs). The taxpayer appealed.

Decision:

The First-tier Tribunal said that the effect of s 117(2)(b) was that the provision did not prevent the bonds being QCBs. The bonds were issued in sterling and, as long as their value was not changed by reference to another currency, they qualified for the exemption even if they were redeemed in a different currency.

The judge said:

"It is the case that the redemption value of the bonds in this appeal cannot vary by reference to another currency because the euro redemption value is fixed at the moment of conversion. The effect of the re-denomination in euros would be no more than to permit the bonds to be redeemed in euros but at the rate of exchange which prevails at the date of redemption (which must be the same rate as prevails at the date of conversion)."

Her point was that the intention of Parliament must have been to exclude from the special rules for QCBs any bonds that were not denominated in sterling and whose value was partly dependent on currency fluctuations. But this could not be the case if the UK adopted the euro as its own currency. She also suggested that, were the UK to adopt the euro, the exemptions currently in place for sterling bonds might no longer be considered appropriate, so it was difficult to guess the intention of Parliament in respect of an event so unlikely at the time the legislation was written (in 1984) or consolidated (in 1992).

On HMRC's hint that a ruling that the bonds were qualifying might "be contrary to the general understanding and might affect existing bonds", the judge said: "There is no rule of construction that legislation should be interpreted to be consistent with how HMRC and/or tax advisers and/or the 30 general public have interpreted the law after it was enacted."

In any case, most people also ensure that the bonds are not "normal commercial loans" as required by TCGA 1992, s117(1) (a), so that the bonds are non-QCBs for both reasons and the failure of the currency conversion clause should not be a problem.

The taxpayer's appeal was allowed.

Comments - The FTT dismissed HMRC's 'hint' that a ruling that bonds containing euro conversion clauses are QCBs would be contrary to the general understanding.

N M F Trigg v HMRC TC4079

Was a horse breeder carrying on a trade? – Taper Relief

Summary - The FTT held that the taxpayer did not carry on the trade of horse breeding.

Mr Blaney had claimed business asset taper relief from CGT on the disposal of a property, but HMRC had restricted the amount of taper relief on the ground that the property had not been a business asset (under TCGA 1992 Sch A1 para 5).

The issue was therefore whether Mr Blaney had used the land for business purposes. This in turn depended on whether his horse breeding activities constituted the carrying of a trade.

Decision:

The FTT had regard to the various badges of trade identified in Marson v Morton (1986) 59 TC 381. The evidence provided, inter alia, by Weatherbys (that manages a register of breeders) and the British Horseracing Authority suggested that Mr Blaney had owned neither a broodmare, nor racehorces during the relevant period. Additionally, Mr Blaney had not kept a record of his breeding activities.

Considering the findings of facts and the badges of trade (in particular, the frequency of transactions and intention to make a profit), the FTT concluded that Mr Blaney's principal motivation was 'his love of horses'.

Comments - The FTT applied the badges of trade to the facts, gathering as much evidence as possible. This case is particularly relevant to situations where the taxpayer is obviously carrying the relevant activities for his own enjoyment, without much of an eye for profitability.

Eugene Blaney v HMRC [2014] UKFTT 1001

Non-resident close companies and free movement of capital

Summary - The CJEU held that TCGA 1992 s 13 (before amendment by FA 2013) breached the principle of freedom of movement of capital.

The Commission was seeking a declaration by the CJEU that s 13 (prior to its amendment) — which attributes gains made by non-resident 'close' companies to their UK resident participators — infringed the principle of free movement of capital.

The Commission pointed out that the UK resident participators of a non-UK resident company were taxed immediately when the company disposed of assets and made a gain, the tax being calculated by reference to the gain made by the company. However, on a disposal by a UK company, tax was charged only in the event of the distribution of the gains to participators or when they disposed of their shares, on the basis of the amount actually received by the participators.

Decision:

The CJEU observed that both the free movement of capital and the freedom of establishment were in point, as s 13 only applies to holdings over 10%. It chose, though, to confine its analysis to free movement of capital, as the Commission focused on this principle.

The CJEU found that s 13 was 'not confined specifically to targeting wholly artificial arrangements which do not reflect economic reality and are carried out for tax purposes alone, but also affected conducts whose economic reality could not be disputed'. The CJEU concluded that s 13 went beyond what was necessary to achieve its objective of fighting tax avoidance.

Comments - Section 13 was amended by FA 2013, with retroactive effect from 6 April 2012, to include a motive test and to raise the holding threshold from 10% to 25%. However, some argue that this is not enough. In any event, individuals and companies that have paid tax under the former version of s 13 should now seek repayments.

European Commission v UK (C-112/14)

Incomplete SDLT return

Summary –The FTT found that a taxpayer did not have a reasonable excuse for the late filing of an SDLT return.

A penalty had been imposed upon the Helers for the late filing of an SDLT return. They had completed the purchase of a property on 4 April 2014 (a 'notifiable' transaction under FA 2003 s 77) and so should have filed their return (and paid the SDLT due) by 4 May 2014 (FA 2003 s 76).

The Helers' solicitor had gone on a two-week holiday shortly after 4 April and had only been able to deliver the return on 30 April. The return did not include the date of the transaction and was therefore invalid. HMRC sent it back on 6 May to be corrected.

The Helers' solicitor delivered the corrected return on 12 May, after the expiration of the deadline. He contended that HMRC should have telephoned him as his details were on the return; it was unreasonable for them to send the return back by post so close to the deadline.

The SDLT due had been paid to HMRC within the time limit, but it had been held in a suspense account as HMRC had been unable to match it with the relevant SDLT return.

Decision:

The FTT pointed out that HMRC had had no way of knowing that the filing deadline was close, as the transaction date had been omitted from the return. Furthermore, the fact that it had taken HMRC four working days to send the return back was not unreasonable. Finally, the solicitor should have filed the return online given the proximity of the deadline; this would have ensured that all boxes were filled.

The FTT concluded that the Helers did not have a reasonable excuse.

Comments - This was a rather unusual case. The paper return had been filed on time (and the relevant tax paid), but a penalty was imposed as the return was considered invalid. Clearly, online filing would have been (and is always) preferable.

Richard and Anne Heler v HMRC [2014] UKFTT 1002

Administration

Security for costs

Summary - The FTT found that HMRC was not entitled to security for costs.

HMRC had denied the recovery of input tax, on the grounds that the relevant transactions were connected with fraud and the appellants knew (or should have known) that this was the case.

HMRC filed a notice of application for security for costs of over £67,000, representing their expected costs at the UT. In the meantime, the taxpayers' solicitors informed HMRC that their client had taken out litigation insurance – in the form of after the event insurance (ATE) – which would be adequate to meet HMRC's costs. HMRC considered that the insurance policy did not sufficiently mitigate the risk that their costs would not be met.

Under the CPR rules (25.13(2)(c)), the FTT could make an order for security for costs if there were reasons to believe that the two companies would be unable to pay HMRC's costs if ordered to do so. As both companies would become insolvent if their appeal was unsuccessful, the issue was whether the insurance policy was adequate.

Decision:

The UT rejected HMRC's contention that the insurer had the discretion to decide whether the case was successful. The FTT also noted that, although a breach of the policy by the appellants would render it voidable, there was no reason why the appellants would engineer such a breach, having paid the insurance premium.

The UT's only concern was that the policy was written for the benefit of the appellants, so that any funds paid under the policy could fall into the general funds of the administration, to which HMRC would have no preferential entitlement. The UT satisfied itself that a payment by way of indemnity under the policy could be impressed with a Quistclose trust [1970] AC 567, as it would have been paid to the company for the specific purpose of discharging a liability to HMRC.

Comments - This case is a useful recap on the practical issues thrown by the use of ATE (after the event insurance) in litigation.

GSM Export and Sprint Cellular v HMRC [2014] UKUT 0457

Discovery assessment and negligence

Summary - The FTT found that discovery assessments were valid and that the taxpayers had been negligent.

In their tax returns, Rebecca and Sarah Thomas had claimed income tax share loss relief of £100,000 on the basis that the company had been struck off, as well as a deduction for tax already deducted (or which should have been deducted) from interest received on a loan made to the company.

HMRC issued discovery assessments disallowing the share loss relief claims and treating the interest as being gross rather than net. It also imposed penalties for negligently making incorrect returns.

Decision:

The FTT firstly found that the discovery assessments had been validly made as the information provided in the returns would not have enabled the 'hypothetical officer' to identify an insufficiency of tax (TMA 1970 s 29). The return only informed HMRC that the 'loss was made on a disposal by way of dissolution of the company'.

The FTT also found that the restoration of the company to the register meant that the company was deemed to have existed throughout the period so that the share loss relief claims must fail.

Additionally, the company's failure to deduct tax on interest due on loans granted by the taxpayers did not allow them to deem the interest to have been received net. There was no parallel with PAYE.

Finally, the taxpayers had been negligent in completing the returns. In particular, a hypothetical reasonable person who had lent money to a company of which her husband was a director would not have claimed to have received interest net on a tax return without first checking that tax had been deducted.

Comments - This was a complex case covering a range of issues. Clearly, the two taxpayers had simply relied on the husband of one of them without checking their returns. The FTT found that in so doing, they had been negligent.

Rebecca and Sarah Thomas v HMRC [2014] UKFTT 980

Much too late

Summary – HMRC were not liable to make a repayment because it was capped by s 80(4).

Mr Naylor was a sole trader until November 2006 when he incorporated his business (the taxpayer). He submitted form VAT 68 to retain the same VAT number as part of the transfer of the business as a going concern. He had failed to submit the return for the period 2/05. As a result, in April 2005 HMRC issued a central assessment to collect VAT of £3,295 which the taxpayer paid. About seven years later, Mr

Naylor, on behalf of the taxpayer, submitted a nil return for the period 2/05 and claimed a repayment of the VAT he had paid.

HMRC refused the claim on the ground that it was time barred under VATA 1994, s 80(4). The taxpayer appealed.

Decision:

The First-tier Tribunal agreed that HMRC were not liable to make the repayment because it was capped by s 80(4). The taxpayer's appeal was dismissed.

Comments - Neil Warren, independent VAT consultant, said: "It is difficult to understand why the taxpayer paid a central assessment of £3,295 if he had no trading for the VAT period in question, and also why it then took him seven years to identify and solve the problem by submitting a nil return. As a general strategy, it is important for a business to submit all returns and pay tax on time to avoid problems with the default surcharge regime but also to make business accounting issues as simple as possible."

APN Business Consultants Ltd v HMRC TC4020

Hardship applications

Summary - The UT found that two hardship applications by the same appellant should be decided independently and by reference to the appellant's financial position at the time of submitting the appeals.

ToTel had made a hardship application. This is an application for a direction that the appeal be entertained without the need to pay a deposit of the disputed tax on the ground of hardship (VATA 1994 s 84(3B)).

The issue has already been decided by the High Court, but the UT is not bound by decisions of the High Court as it is exercising a jurisdiction of equivalent status.

HMRC had denied two claims for refunds of input tax by ToTel. The first was denied on the ground that the relevant transactions could not have taken place, and the second was denied on the ground that they were connected with MTIC fraud.

Decision:

The UT first observed that, although there was ample authority for the proposition that a liability to tax cannot be split as a result of a hardship application, there was no requirement for the UT to consider whether a taxpayer could pay the whole tax relating to two distinct claims and hardship applications.

The UT also found that the hardship should be decided by reference to the date at which the appeal was brought, not to the time of the hearing. This meant that the payment of a dividend in the intervening period — which may have worsened the appellant's financial position — was irrelevant.

Comments - The UT found itself in the difficult position of having to review a decision of the High Court. A key finding was that hardship must be assessed by reference to the appellant's position at the time of lodging the appeal, not to the time of the hearing. In such circumstances, as suggested by the UT, such applications should be heard as quickly as possible.

ToTel Ltd v HMRC [2014] UKUT 0485

Cost direction

Summary - The UT found that it would be unfair to make a cost direction in circumstances where HMRC had changed its ground for appeal.

Mr Patel had appealed against HMRC's refusal to refund input tax incurred on building works under the DIY construction scheme (VATA 1994 s 35). The refusal was on the ground that the planning permission obtained did not relate to the works undertaken. Mr Patel had intended to extend an existing building but had realised once the works had begun that the building would need to be demolished and rebuilt.

Mr Patel had then obtained retrospective consent and the FTT had allowed his appeal. HMRC had appealed the FTT's decision on the ground that the retrospective application had been submitted to HMRC after the expiry of the time limit for submitting a claim under VATA 1994 s 35. HMRC had then changed its ground of appeal, arguing that the works had not been lawful at the time they had been carried out in any event.

HMRC sought a direction that Mr Patel be required to pay its costs in the UT. The UT accepted that Mr Patel should have failed in the FTT. It was unfair for Mr Patel to pay for the FTT's error but it would be equally unfair for HMRC, as successful litigant, not to recover its costs.

Decision:

The UT declined to make the requested direction, referring to HMRC's change of ground of appeal, which had led Mr Patel to obtain retrospective consent only to be told that it was insufficient. The UT also noted that HMRC had not mentioned its intention to make a cost application. Had it done so, Mr Patel may have conceded the appeal.

Comments - This case was difficult, in that any decision on costs was bound to be unfair to one of the parties. In the end, HMRC's lack of consistency proved fatal to its claim.

HMRC v Asim Patel [2014] UKUT 0484

Wide ranging information notice

Summary - The FTT found that an information notice was too widely drafted.

Mr Tee had been interviewed by police under caution and had admitted to earning £80,000 yearly and to not having paid any tax or NIC. He was subsequently sentenced to prison for benefits and mortgage fraud.

HMRC then issued an information notice under FA 2008 sch 36, demanding full details of Mr Tee's income as a financial adviser from the date he had commenced to 31 December 2009. Mr Tee did not comply and a penalty was imposed. He appealed.

At the hearing, HMRC confirmed that its only source of information was the police interview. Mr Tee explained that he had been unable to comply with the notice, as all the relevant documents were still with the police. He therefore claimed reasonable excuse.

Decision:

The FTT found that the information notice was vague and uncertain, so that Mr Tee had a reasonable excuse whether or not his claim was verified.

Comments - This case is a reminder that taxpayers should challenge the validity of information notices which are so widely drafted that they are nothing more than 'fishing expeditions'.

Victor Tee v HMRC [2014] UKFTT 977

Lack of funds and reasonable excuse

Summary - The FTT found that a sleeping director should have been aware of the tax liabilities of his company.

Trunkwell, which was owned by Mr Walton, provided catering facilities for weddings and other events. Mr Collins purchased 50% of the business, with Mr Walton becoming a sleeping director of a newly formed company.

Mr Collins changed the business address of the company so that Mr Walton was not aware of any correspondence from HMRC, or of the fact that it had issued a winding up petition. He only became aware of that fact on receipt of a call from the London Gazette. He then set out to rescue the business by paying any outstanding tax over a period of time and buying out Mr Collins.

The issue was therefore whether the company had a reasonable excuse (VATA 1994 s 59) for making late payments.

Decision:

The FTT observed that an insufficiency of funds was not a reasonable excuse but that the underlying cause for the insufficiency may be a reasonable excuse (Steptoe [1992] STC 757).

The FTT found that the causes of the cash flow shortages were such that the exercise of reasonable diligence and foresight would not have allowed the company to avoid the defaults in respect of the period 12/12. However, in respect of earlier periods, the FTT found that even though Mr Walton had not been in day to day control of the company, he was or should have been aware of its position and so no reasonable excuse was established.

Comments - The FTT focused on the main director of the business when deciding whether reasonable excuse was established. In so doing, it confirmed that being a 'sleeping director' had not exonerated him of his responsibilities.

Trunkwell Leisure v HMRC [2014] UKFTT 976

Striking off

Summary - The FTT found that the behaviour of the appellant's representative justified the striking off of the appeal.

The main issue was an application by HMRC to strike out the appeal (under the Tribunal Procedure (First tier Tribunal) (Tax Chamber) Rules, SI 2009/273, rule 8) because of the lack of cooperation of the appellant.

The appeal itself related to HMRC's refusal to refund input tax, on the ground that the transactions were connected with MTIC fraud. Nutro's latest advisers had informed the FTT that they were 'professionally embarrassed' and no longer able to represent Nitro.

The case had been beset with delays. The facts had taken place in 2006. In October 2013, HMRC had served a request for disclosure on Nutro, which had not responded. At a subsequent case management hearing, the FTT had made three directions (one of them being that Nutro appoint a representative); Nutro had failed to comply with all three directions.

HMRC had then made a striking out application.

Decision:

This was granted mainly on the ground that Nutro's representative had falsely claimed that the procedural defaults had been caused by its previous advisers, to whom it had passed all the relevant documents. The FTT added that a costs remedy would not be appropriate.

Comments - This was a rather unusual case. The FTT decided that the conduct of the appellant's representative was such that it made it impossible for the tribunal to deal with the proceedings fairly and justly.

Nutro UK v HMRC [2014] UKFTT 971

Special relief refused

Summary – The Tribunal held that special relief was not available to displace the determinations

The taxpayer, a barrister's clerk paid on a commission basis, did not submit his self-assessment returns for 2005/06, 2006/07 and 2007/08 by the due dates. He also owned several properties which he let. HMRC issued determinations charging tax of £10,000 for each of the first two years and for £100,000 for the third year. He filed the returns at the end of 2012 so was out of time to displace the determinations by his self assessments. Instead he claimed special relief under TMA 1970, Sch 1AB para 3A. Special relief applies when it would be unconscionable for HMRC to collect the tax.

HMRC refused the claim and the taxpayer appealed. Shortly before the appeal, HMRC withdrew the 2007/08 determination.

The issue for the First-tier Tribunal was whether its jurisdiction was limited to deciding whether HMRC's opinion that the unconscionable condition in para 3A did not apply was unreasonable or whether it could decide that it would be unconscionable for HMRC to enforce the determinations.

Decision:

The tribunal judge referred to Pegasus Birds v CCE [1999] STC 95 and John Dee v CCE [1995] STC 941 and found that the phrase “in the opinion of the Commissioners” was a statutory condition which limited the tribunal's jurisdiction to whether the opinion is reasonable. To do this, it was necessary to determine whether the review officer had taken into account all the information provided by the taxpayer.

The latter said he had relied on his accountants to look after his returns. The judge found that it was not unconscionable for HMRC to collect the tax shown on the determinations “simply because it was higher than” that on the returns. The taxpayer produced no supporting evidence of his income and expenditure, such as details of rental receipts or documents from his former chambers. Further, reliance on an accountant was rarely a reasonable excuse.

On the taxpayer's assertion that paying the determinations would lead to his bankruptcy, this did “not of itself make enforcement of the determination 'completely unreasonable'”. The taxpayer would have to explain why it would be unconscionable, but he did not do so.

The judge noted that the taxpayer had “significant assets and does not keep proper books and records. In the light of his further evidence about being paid on a commission basis as a barristers' clerk, it is even less likely that his earnings were exactly £100 a week, so as to make the total of £4,800 shown on his self-assessment returns”.

The taxpayer's appeal was dismissed.

Comments – Judge Ann Redston examined this case in depth and highlighted the phrase which limited the Tribunal’s jurisdsiction. These provisions require it to be unconscionable and the judge found that it was not unconscionable for HMRC to collect the tax shown on the determinations “simply because it was higher than” that on the returns.

Currie v HMRC TC3997

Witness summons issued to ex-liquidator

Summary - The FTT held that a witness summons should be issued to the former liquidator of a company.

Abbey was applying for a witness summons to be issued to Ms Brittain, the former liquidator of Abbey. Abbey's appeal was against two notices of assessment for excise duty issued at a time when Ms Brittain was still Abbey's liquidator.

Abbey was applying for permission to appeal out of time. It was in the context of this preliminary matter that Abbey sought the issue of a witness summons to Ms Brittain.

Decision:

The FTT observed that it can only issue a witness summons when there is a real likelihood that the evidence of the person summoned will materially assist the FTT.

The FTT held that 'material assistance' could be derived from the evidence of a liquidator about events which had taken place during her tenure. The fact that Ms Brittain had already provided information in the past did not diminish the value of direct evidence as to the reasons for the delay, at a time when Abbey's actions had been those of its liquidator. This was true even though Ms Brittain may struggle to recollect events which had occurred five years earlier. Finally, the fact that Abbey may wish to use Ms Brittain's evidence for a collateral purpose (in respect of other proceedings) was irrelevant.

Comments - The FTT found that direct evidence was preferable to any other type of evidence. This case therefore underlines the importance of witnesses at a hearing.

Abbey Forwarding v HMRC [2014] UKFTT 998

HMRC News

IR35 Business Entity Tests

The IR35 Forum has recently reviewed the new approach to administering IR35 introduced in 2012. This review included the Business Entity Tests (BETs) that businesses can take to self-assess their risk of IR35.

The review found the BETs were not helping customers as they're:

- used very little
- not fulfilling their intended purpose

As a result the review recommended withdrawing the BETs. HM Revenue & Customs (HMRC) has accepted this recommendation and will withdraw the BETs from 6 April 2015. Until then, businesses can continue to take the BETs if they wish or are asked to do so as part of a tendering process.

The BETs won't be taken into account when HMRC opens an IR35 enquiry on or after 6 April 2015. However, if HMRC opens an enquiry before then, and a business can show to HMRC's satisfaction that they have taken the BETs with an outcome outside IR35 or in the 'low risk' band, then HMRC will close the enquiry. They also won't open another IR35 enquiry for 3 years if the information provided is accurate and circumstances (in particular working arrangements) don't change in that time.

When HMRC has previously closed an enquiry based on a result of the BETs then they won't open another IR35 enquiry within the 3 year period previously notified to the business.

Where HMRC closes an IR35 enquiry based on the BET results, the business should keep those results and any evidence relied on to take the tests for at least the 3 year period involved.

HMRC will also withdraw the example scenarios published with the BETs from 6 April 2015. There are no plans to replace the BETs or example scenarios.

HMRC will shortly publish updated guidance on the GOV.UK website.

<u>State Pension Top Up: Class 3A Voluntary National Insurance Contributions</u>

A Tax Information and Impact Note provides information about the introduction of the voluntary Class 3A contributions.

Class 3A voluntary contributions will allow pensioners and those reaching State Pension age before 6 April 2016 who have entitlement to a UK State Pension the opportunity to increase their State Pension. The rate of Class 3A contributions have been set at an actuarially fair rate. Those eligible will be able to pay Class 3A contributions from 12 October 2015 and 5 April 2017.

<u>Stamp duty and stamp duty reserve tax: specifying a market for BX Swiss AG</u>

A Tax Information and Impact Note will specify BX Swiss AG as a ‘recognised foreign exchange' and as a ‘recognised foreign options exchange'.

The measure concerns transfers of UK securities that are traded on an exchange operating within the European Economic Area (EEA) and can be relieved from both stamp duty and SDRT if the ‘purchaser’ is a member of that exchange and is formally recognised as an intermediary in accordance with arrangements approved by HM Revenue and Customs (HMRC). A member of a non-EEA exchange can apply to be formally recognised as an intermediary and obtain the relief, provided the exchange is specified in regulations as a ‘recognised foreign exchange’.

Authorised Investment Funds - Interest Distributions and income from land and property

This notice gives details of the Government response to an issue which has arisen where authorised funds intend to pay an interest distribution but receive income from land and property.

Revenue and Customs Brief 39/14

This brief sets out HMRC position on the litigation in Brockenhurst College following the decision of the Upper Tribunal. Supplies closely related to education.

Revenue and Customs Brief 40/14

This brief provides an update on changes to how HMRC will recover some tax credit overpayments.

Deadline for final IR35 payments/returns - tax year ending 5 April 2014

Intermediaries who have operated the IR35 concession to delay making a final return and payment for the tax year ending 5 April 2014 have until 31 January 2015 to submit accurate figures and pay any outstanding amounts.

There's a new spreadsheet checking service for Employment Related Securities

As an employer or an employer's agent, use this service to check the formatting of ERS spreadsheets before submitting with your returns. You can read more in ERS bulletin 18.

Unauthorised Unit Trusts - Quarterly Instalment Payments of Corporation Tax

A Non-exempt Unauthorised Unit Trust now within the charge to Corporation Tax and which is large may be due to pay its tax by Quarterly Instalments.

DRD

The consultation on “Direct Recovery of Debts” (DRD) was published on 6 May 2014 and closed on 29 July 2014. It set out the process and safeguards to implement the Chancellor’s announcement, at Budget 2014, that HMRC would be given the power to recover tax and tax credit debts directly from the bank and building society accounts (including Individual Savings Accounts) of debtors.

The Government received 124 responses, from a wide range of individuals, organisations and businesses.

The Government has heard the concerns voiced during the consultation and is grateful for the constructive and informative suggestions it received – both from individuals and from representative groups, particularly those representing the tax and accountancy professions, businesses, the voluntary and community sectors and financial institutions. Many respondents shared the Government's objective to collect tax and tax credit debt from those who make a conscious decision to avoid paying what they owe. There was recognition that a small minority of individuals and businesses intentionally tried to "play the system" and hold off paying taxes until HMRC had pursued lengthy and expensive action to recover the money owed.

The Government is introducing robust new safeguards to address the points raised during the consultation.

In response to concerns about the risk of DRD being used in error and the potential impact on vulnerable customers, the Government is:

- guaranteeing that every debtor will receive a face-to-face visit from HMRC agents, before their debts are considered for recovery through DRD. This meeting will provide a further opportunity for HMRC to:
  - personally identify the taxpayer and confirm it is their debt
  - explain to debtors what they owe, why they are being pursued for payment, and discuss payment of the debt
  - discuss options to resolve the debt, including offering a Time to Pay arrangement to the debtor, where appropriate
  - identify debtors who are in a vulnerable position and offer them the support they need to settle their debts.
- Only debtors who have received this face-to-face visit and are not identified as vulnerable, have sufficient money in the bank and have still refused to settle their debts, or enter an appropriate Time to Pay arrangement, will be considered for debt recovery through DRD;
- establishing a new vulnerable customers unit, which will work closely with the voluntary sector and whose prime focus will be dealing with DRD cases in the early stages of its operation
- committing to work with voluntary organisations and professional bodies on HMRC's communications with debtors affected by DRD, to ensure they are well tailored and provides helpful advice on how to seek further assistance
- applying DRD to a smaller number of cases in the first year of its operation (2015-16), allowing HMRC to start the process on a small, targeted basis and gain experience and feedback.

In response to concerns about the importance of independent oversight and the need for clear channels for debtors to appeal their case, the Government is:

- extending the window for debtors to object to HMRC from 14 days to 30 days, once debt recovery through DRD has been initiated. Money will be held in the account but no funds will be transferred to HMRC until this period has passed
- introducing an option for debtors to appeal against HMRC's decision to a County Court on specified grounds, including hardship and third party rights
- strengthening HMRC's governance procedures for DRD, including oversight by the Commissioners of Her Majesty's Revenue and Customs
- committing to enhanced transparency on this power and publishing, in the Tax Assurance Commissioner's Report, statistics on the number of times this power is used and appeals that are raised
- a full review of DRD, covering its implementation and impact on customers, will be carried out by HMRC after the policy has been operational for two years, and laid before Parliament.

In response to concerns raised about debtors' privacy and the use of their bank account data, the Government has decided not to implement the requirement for banks to provide 12 months of data on a debtor's account history under DRD.

These new safeguards supplement those that were outlined in the consultation document, namely:

- only debts of £1,000 or more will be eligible for recovery through DRD
- HMRC will always leave £5,000 across a debtor's accounts, as a minimum, once the debt has been held
- only funds up to the value of the debt will be held
- a dedicated, specialist team in HMRC will be responsible for all DRD cases
- a dedicated helpline will be available for those affected to contact the DRD team directly. This will be available to debtors affected by this policy, banks and building societies, the voluntary and community sector and tax agents.

The Government understands that there have been some strong concerns about how this policy will operate and is extremely grateful for all of the feedback it has received. The Government believes that these new safeguards will help to ensure that this policy is targeted specifically at those debtors who are refusing to pay what they owe, and that robust protection is in place for vulnerable customers and those who need additional support.

Draft legislation will be published in due course for consultation. This will give a further opportunity for the Government to take suggestions on how best to structure this process and how to ensure debtors' rights – and HMRC's responsibilities - are properly reflected in legislation. In order to allow for an extended period of scrutiny, the Government intends to legislate in a Finance Bill in 2015, during the next Parliament.

Business Taxation

Intra-group acquisition of loan notes and the related party rule

Summary - The Court of Appeal found that, under the related party rule, a scheme failed which involved the intra-group acquisition of loan notes. The notes were transferred in consideration for the issue of shares at a premium, paid up by capitalising profits and appropriating those to a share premium account.

This was a lead case in which both the FTT and the UT had found against Vocalspruce.

The first issue was the scope of FA 1996 s 84(2)(a), which excludes from the profits, gains and losses to be taken into account in respect of loan relationships 'any amounts required to be transferred to the company's share premium account'. The scheme could only be successful if the accrued profits on the loan notes fell within the scope of the provision.

The second issue was the effect of FA 1996 Sch 9 para 12 (the related party rule) on the transaction under which Vocalspruce had replaced its parent company as creditor. The court found that the effect of the deeming provision was that the entire transaction must be disregarded, so that s 84(2)(a) could not apply in the absence of any transfer to the share premium account.

Decision:

Two out of the three judges found that the provision did apply to the profits, even though they had first been credited to the profit and loss account before being transferred to the share premium account under contractual arrangements. Only one judge thought that to allow the arrangements to be successful would make the payment of corporation tax optional.

The appeal was dismissed as a result of the Court of Appeal's finding on the second issue.

Comments - The legislation has been amended; however, there are a number of cases standing behind Vocalspruce. Interestingly, only one of the three judges was concerned by the element of 'bootstraps' which existed in creating a requirement to transfer a profit to a share premium account under 'elaborate contractual arrangements, otherwise meaningless'.

Vocalspruce Ltd v HMRC [2014] EWCA Civ 1302

Foreign subsidiaries and loss relief

Summary - Advocate General Kokott (AG) has declared in her opinion that a UK company holding a UK subsidiary and a UK company holding a non-UK subsidiary are not in an objectively comparable situation with regard to the principle of freedom of establishment.

Following the CJEU's decision in the Marks & Spencer case (C-446/03), the UK group relief provisions had been amended so that a UK company with a non-UK loss-making subsidiary could claim loss relief (CTA 2010 s 119(4)). However, such claims were subject to the 'no possibilities test' (NPT), which limited the application of UK group relief to situations where no relief was available in the jurisdiction of the subsidiary. The Commission considered that the UK provisions 'made it virtually impossible in practice to obtain' the relief and were therefore in breach of TFEU (art 49). This is because relief is only possible if the foreign jurisdiction offers no carry forward of losses or if the subsidiary enters into liquidation. The Commission brought proceedings accordingly.

Decision:

The AG noted that the recent CJEU decision in Nordea Bank Danmark (C-48/13) was authority for the proposition that 'resident and non-resident subsidiaries are not at all in a comparable situation having regard to the allocation of the power to impose taxes between member states'. Furthermore, Kronos International (C-47/12) suggests that member states must take account of losses from foreign activity only if they also tax that activity. The AG added that the aim of the group relief provisions was to allow companies in a group to be taxed as if they were one company; however, it would be inappropriate to treat a resident parent company and a non-resident subsidiary as one taxpayer.

The AG concluded that the UK is justified in principle not only in imposing stricter requirements for taking account of losses resulting from the foreign activity of foreign subsidiaries, but also in excluding them entirely from loss relief.

Comments - This opinion of Advocate General Kokott is likely to be received with a great degree of surprise, as it effectively suggests that the change in UK law which followed the Marks & Spencer case was not necessary. It remains to be seen whether the CJEU will follow her reasoning and, in particular, her suggestion that the NPT should be rejected as unworkable.

European Commission v UK (C-172/13)

Composite trade is not commercial

Summary – The Tribunal found that the two ventures had to be considered as a composite whole because the claim had been made in respect of both trades and the loss relief claim failed

In 2004, the taxpayer, an experienced horsewoman, set up an equestrian business with two horses. Four years later she began a new trade of asparagus farming which she anticipated would return substantial profits, although it would be three years before the first crop would be harvested.

In her 2008/09 self-assessment tax return, she claimed sideways loss relief under ITA 2007, s 64(1) and (2) in respect of her equestrian and asparagus businesses.

HMRC refused the claim. The taxpayer appealed. She said most of the losses related to the asparagus business, which HMRC had in effect ignored, and that the two trades should be treated as separate.

Decision:

The First-tier Tribunal said, for sideways loss relief to apply, the trade had to be commercial and carried on with a view to realising profits.

In this instance, the equestrian business made no money but bore the costs of keeping horses. It had the characteristics of being a business run by someone who loved horses but was not seriously interested in profit.

The asparagus trade was run on a professional basis, but the two ventures had to be considered as a composite whole because the claim had been made in respect of both trades. On this basis the trade could not be viewed as commercial because it included the uncommercial element.

The taxpayer's appeal was dismissed.

Comments – To get the loss relief the conditions have to be met – it was clear to the Tribunal that the two ventures had to be considered as a composite whole because the claim had been made in respect of both trades and thus they did not meet the conditions

J Thorne v HMRC TC3851

Deemed interest and FA 2003 s 195

Summary - The FTT found that FA 2003 s 195 did not mean that a company was treated as not having acquired shares.

Biffa issued 200m shares to Biffa Corporate, which in turn transferred them to Biffa Holdings. Biffa Holdings then sold 200m shares in Biffa for £200m to Biffa which cancelled them. On the same day, Biffa issued 200m shares to Biffa Corporate for £214m which it then sold to Biffa Holdings.

Biffa Holdings considered that the difference between the £200m which it received on the sale of the Biffa shares and the £214m it paid to buy Biffa shares should be treated as interest on a deemed loan of £200m by Biffa to Biffa Holdings. HMRC accepted this treatment.

Biffa contended that, from its perspective, the £14m was not deemed interest, as ICTA 1988 s 730A was disapplied by FA 2003 s 195. Section 195 provides that the acquisition of its own shares by a company is not to be treated as the acquisition of an asset.

Decision:

The FTT found, however, that the effect of s 195 was that the shares were not to be treated as an asset of Biffa, not that they were not acquired. Consequently, s 195 did not prevent the application of s 730A.

Finally, the FTT found that F(No. 2)A 2005 s 26, which deals with situations where a taxpayer takes advantage of different treatments under different tax codes, did not apply as Condition B was not satisfied. Condition B requires the making of a payment that is a contribution to the capital of a company and Biffa Holdings did not bear the economic burden of the contribution to capital made by Biffa Corporate.

Comments - In our view, this was a rather protracted case of tax planning under the guise of company financing. The scheme failed because it sought to take advantage of an asymmetry which the FTT did not recognise.

Biffa (Jersey) v HMRC [2014] UKFTT 982

What are accountancy services?

Summary – The First-tier Tribunal said it was necessary to define the meaning of accountancy services.

HMRC told the taxpayer, Thames Valley Payroll, that it should be registered as an accountancy services provider under the Money Laundering Regulations 2007.

After a dispute and under protest, the taxpayer agreed to register. HMRC then issued a £500 penalty for late registration, on the ground that the business should have registered before it began trading.

The taxpayer appealed. It said it did not provide accountancy services, but was concerned only with payroll computations for client companies. It did not offer professional advice in relation to tax or other matters.

Decision:

The First-tier Tribunal said it was necessary to define the meaning of accountancy services. Someone who offered accountancy services, generally known as an accountant, would be distinguished from bookkeepers because of the professional nature of the services and the extra levels of expertise required.

The term “accountant” denoted “a person who exercises some degree of professional skill in assessing the quality of the entries being made”, not someone who calculated the figures which formed the basis of transactions to be entered into a company's books.

The taxpayer's business involved solely “the performance, on an outsourced basis, of a mechanical task which results in the provision of information to be entered into a company's books and records”. As such, it did not provide accountancy services.

The tribunal added that this would not necessarily be the case for all payroll providers, but would depend on the facts.

The taxpayer's appeal was allowed.

Comments – This is an interesting case as it looks into the meaning of the words accountant and accountancy services and the skills involved in determining whether late registration penalty should stand.

Thames Valley Payroll Ltd v HMRC TC4063

Not too late for NI contributions

Summary – The Tribunal held that Class 2 NICs could be paid late due to lack of knowledge

In 2012, the taxpayer discovered that, although he had been registered as self-employed with HMRC since 1995, he had not paid any class 2 National Insurance because he had not informed the then Department of Social Security about his status. HMRC told him he could pay only the period from April 2009 unless he could show that the failure to pay the contributions was due to his ignorance and error.

Decision:

Following the decision in Dr J Schonfield (TC2658), where the tribunal had allowed the appeal because the taxpayer had relied on his accountant to deal with his financial affairs, the First-tier Tribunal noted that the taxpayer had appointed an adviser who had been recommended to him. The adviser had helped him set up in practice as a sole practitioner, arranged his VAT registration, and dealt with all his tax affairs.

The taxpayer's failure to pay the contributions was because of his lack of knowledge. This was not due to a failure on his part to exercise due care because he had relied on his accountant.

The taxpayer's appeal was allowed.

Comments – There have been a number of cases such as Kearney v HMRC where individuals wish to pay contributions after they would normally do so. The Tribunal apply a strict test to this. In this case the taxpayer's failure to pay the contributions was because of his lack of knowledge. This was not due to a failure on his part to exercise due care because he had relied on his accountant.

S Murphy v HMRC TC3855

Losses claimed out of time

Summary - The FTT found that it did not have jurisdiction to review HMRC's decision not to allow losses out of time.

Mr and Mrs Chauhan were appealing against HMRC's refusal to allow losses out of time. Their four months' delay were the result of computer difficulties.

Decision:

The FTT found that the Chauhans did not have a reasonable excuse. They earned over £50,000 between them and any reasonable businessman reliant on his computer would have made sure that it worked. A three year period of malfunction was unacceptable. In any event, following Steibelt [1999] BTC 184, the FTT found that it did not have jurisdiction with regard to HMRC's failure to exercise its discretion under CRCA 2005 and that the reasonable excuse defense would be of no assistance.

Comments - The taxpayers were only four months late; however, the persistent malfunction of their computer over a three year period was considered unreasonable.

Chauhan v HMRC [2014] UKFTT 851

AIA and 'qualifying persons'

Summary - The FTT held that an LLP made up of an individual and a company was not a 'qualifying person' for the purpose of the 100% annual investment allowance (AIA).

The appellant was an LLP whose partners were Dr Thorogood, a professional drilling engineer, and Thorogood Consultants, a company of which Mr Thorogood and his wife were directors. The LLP wished to claim the AIA on the upgrade of a plane used by Mr Thorogood. The question was whether the LLP was a 'qualifying person' under CAA 2001 s 38A and thus entitled to AIA. Section 38A provides that a 'qualifying person' is: an individual; a partnership of which all the members are individuals; or a company.

Drilling Global contended that it was a company for these purposes as a result of CTA 2009 s 1259, which requires mixed partnerships to be regarded as companies for the purpose of calculating corporation tax.

Decision:

The FTT observed that under the 'clear and unambiguous provisions of s 38A', the partnership was not a 'qualifying person'. It added that the provisions of the Income and Corporation Taxes Acts intended references to a partnership to include references to an LLP. Furthermore, if Parliament had intended an LLP to be treated like a company for the purpose of AIAs, it would have expressly provided for this.

Comments - Since their creation under UK law in 2000, the characterisation of LLPs for tax purposes has raised many difficulties. This case is a reminder that, although they are body corporates under the Limited Liability Partnerships Act 2000, they are, in the main, treated as partnerships for tax purposes.

Drilling Global Consultant v HMRC [2014] UKFTT 888

Capital allowance scheme failed

Summary - The UT found that an avoidance scheme using capital allowances did not work.

The issue was whether the partnership had incurred 'qualifying expenditure' within the meaning of CAA 2001 s 437 (expenditure on research and development relating to the partnership's trade). This raised two further questions: whether the partnership was trading; and, if so, what was the quantum of the expenditure.

Under a research agreement, the partnership had paid £193m to a company, Numology, in contemplation of a research sub-contract entered into between Numology and another company, PepTcell, which carried out the research for a payment of £14m.

Decision:

The UT accepted the FTT's finding that, although the evidence was not conclusive 'beyond all doubt', on the balance of probabilities the partnership's activities of funding and supervising PepTcell amounted to a trade. The UT added that the arrangements were commercial in nature, as their objective was the development of a vaccine which would yield royalties. Finally, the activities of the partnership went beyond that of a passive investor.

As for quantum, the UT noted that a 'factual enquiry' was required, by reference to a 'realistic approach of the facts'. Referring to Tower MCashback [2011] UKSC 19, the UT added that it may not be sufficient to look at what was paid to acquire the rights in order to ascertain the relievable expenditure.

A key issue was the circularity of funding: Numology's £86m contribution to the partnership was funded out of the £193m payable to it under the research agreement. The UT pointed out that circularity in itself did not preclude the conclusion that the partnership had expended the monies under the research agreement. However, the UT accepted the FTT's finding that Numology's contribution represented funds put into a 'loop' for tax avoidance purposes.

The UT also agreed with the finding that the partnership's expenditure in relation to the financing arrangement was to produce guaranteed licence fees for investors (the partners) and so was not 'on research'.

The UT concluded that only £14m constituted 'qualifying expenditure'.

Comments - The case applies principle derived from two very important decisions; Tower MCashback (supra) and BMBF [2005] 1 AC 684. Interestingly, the circularity of funds was not lethal to the scheme. It was the 'realistic' analysis of the purpose of the arrangements which proved fatal.

The Vaccine Research Limited Partnership and Mr Vaughan v HMRC [2014] UKUT 0389

Quantum of betting business takings

Summary - The FTT accepted the taxpayer's evidence on his business takings.

The taxpayer appealed against an assessment, which was based on HMRC's belief that his actual betting business takings were in excess of his declared takings. This was, in particular, due to the existence of blank betting slips and of unexplained deposits made into the taxpayer's personal account.

Decision:

However, the FTT was not convinced that blank betting slips were placed through the till and, in the absence of cameras, relied on the evidence of witnesses. Similarly, the FTT accepted the taxpayer's evidence that he paid his takings into his personal account to avoid bank charges. The FTT also accepted the taxpayer's claim that the substantial cash inflows into his personal bank account came from cash betting. The FTT observed that the taxpayer's refusal to provide his personal bank account records to HMRC was common among taxpayers; this was often the result of advice from professional advisers to the effect that personal records should not be produced in a business enquiry. Finally, the FTT accepted the taxpayer's evidence that he had been 'topping-up' the business account to avoid it becoming overdrawn.

Comments - Although appearances were clearly against the taxpayer, the FTT was prepared to look beyond HMRC's suspicions and to accept evidence submitted by the taxpayer.

Peter Devine v HMRC UKFTT 855

Determinations and deliberate failure by the taxpayer

Summary - The FTT found that determinations issued by HMRC were valid.

Spring Salmon & Seafood carried on business as suppliers, distributors and processors of seafood. Mr Thomas was its director. He also carried on a business in partnership with his brother as consultants and seafood dealers. The main issue was the liability, if any, of the company to pay PAYE and NIC in respect of a £900,000 bonus to Mr Thomas and his brother and wages and salaries of £178,230. The FTT had to decide whether the monies had been paid by the company to the individuals, whether HMRC's determinations were time-barred and whether an alleged 2007 agreement barred HMRC from pursuing the liabilities.

Decision:

The FTT observed that the company's cessation accounts referred to the £900,000 bonus, which was credited to the director's account. It was therefore unreservedly at the disposal of Mr Thomas and his brother (who was a de facto director). Moreover, the company was solvent. Payment was therefore established. As the accounts were prepared by Mr Thomas, who was an experienced businessman, the failure to account for PAYE and NIC must have been deliberate. The PAYE determinations issued by HMRC were therefore not time-barred (TMA 1970 s 36).

Finally, rejecting the appellants' contentions, the FTT found that HMRC had not entered into an argument precluding it from pursuing PAYE and NIC in relation to the sum of £900,000. The agreement not to seek to charge PAYE or NIC was conditional on the company agreeing that the amount was not to be allowed as a deduction from profits. However, the £900,000 bonus had been credited to the director's account in breach of the condition.

Comments - The FTT had clearly very little sympathy for the taxpayer, who it described as 'aggressive and devious'. It also insisted that the failures to account for PAYE and NIC had been deliberate. In such circumstances, the FTT's conclusion that HMRC's determination should stand was to be expected.

Spring Salmon & Seafood v HMRC [2014] UKFTT 887

Proposals on the operation of the CIS

HMRC is consulting on proposals to improve the operation of the Construction Industry Scheme and the introduction of mandatory online CIS filing for contractors.

Qualifying conditions

Currently, subcontractors who meet certain qualifying conditions can apply to be paid gross with no deductions taken from their payments. There are two main tests: a turnover test and a compliance test

It is proposed that the threshold for the upper limit of the turnover test should be lowered to help more established businesses with multiple partners or directors qualify for gross payment status. The proposed new upper threshold could fall from £200,000 to £ 150,000, £120,000, or £100,000. The new threshold would also apply to closely held companies.

HMRC believes that for sole traders and the smallest partnerships and multi-director companies the minimum turnover threshold of £30,000 paid for construction activities per partner or director (excluding materials) remains appropriate to maintain the integrity of the scheme and ensure compliance with tax obligations.

To ensure that smaller businesses are not disadvantaged compared to larger ones HMRC proposes using fewer tests in the initial and annual review. The initial and annual tests for subcontractors who are also contractors will be restricted to a requirement to make monthly contractor returns, make timely payments of CIS deductions and to make an annual self-assessment return on time.

Mandatory CIS online filing

HMRC considers that many of the benefits of system improvements would only be fully realised if all CIS returns were made online. It is therefore proposing to remove the option to make monthly CIS returns on paper and to mandate online filing.

New CIS online appeals service

If a contractor fails to submit returns on time, HMRC charges penalties. To work alongside the new CIS online service, HMRC intends to adopt an automated system for processing CIS penalty appeals.

Taxpayers would be notified by an online messaging service in real time if their appeal was accepted immediately or referred for manual review. HMRC anticipate this process will replace the current paper based appeals service from the date of implementation. The paper based service will still be available for legacy penalties.

The nil return obligation - Change

Many of the penalties currently issued to contractors are for 'nil returns' where no payments to subcontractors have been made. In response to representation HMRC intends to remove the statutory obligation to report a nil return, removing the potential for a penalty to arise in these circumstances.

However when a return is not received by the filing date, HMRC systems will not know whether the reason is because the contractor is simply late filing the return or there is no return due. Therefore HMRC intends to operate a simple nil voluntary notification to enable contractors to notify HMRC if they did not pay subcontractors and this will stop a penalty notice being sent out. Otherwise subcontractors will be able to use the online service to appeal against penalties received if no payments were made to subcontractors.

'My Tax' programme

HMRC's vision is to build on the proposed improvements already set out by integrating CIS into its existing digital programme 'My Tax' to enable taxpayers to log on and have instant visibility of transactions. 'My tax' could operate as a 'one stop shop' where Unique Taxpayer References and Company Reference Numbers are integrated in one location and businesses can amend their details online if they change status from a sole trader to a limited company. This will minimise account confusion and reduce errors within the CIS system.

An improved online service would be able to offer a facility for contractors to search for previous verifications. The new service may also include a facility to verify more than one subcontractor at a time. HMRC are also exploring ways to improve the online service to match the service levels given by telephone operators. For example a telephone operator is able to offer assistance in matching subcontractors who have a UTR but a misspelt name or other missing data.

Parent-Subsidiary Directive

The Economic and Financial Affairs Council of the EU has agreed to an amendment to the Parent-Subsidiary Directive. The amendment is intended to prevent cross-border companies from planning their intra-group payments so as to result in double non-taxation where hybrid loan arrangements are involved.

The effect of the amendment is achieved by providing that the member state of the parent company will refrain from taxing profits from the subsidiary only to the extent that such profits are not tax deductible for the subsidiary.

The provisions of the original Directive required member states to exempt from taxation the profits that parent companies received from their subsidiaries in other member states. The intention was to ensure that profits were not taxed twice, and that cross-border groups were thereby not put at a disadvantage compared to domestic groups. However, hybrid loan arrangements enabled cross-border groups to avoid paying taxes altogether by exploiting mismatches between national tax rules. In such cases, the received distributed profits were not taxable in the member state of the parent company, whilst they were treated as a tax-deductible expense in the member state of the subsidiary.

Member states will have until 31 December 2015 to transpose the amendment into national law.

BEPS

The OECD has released its first set of 'deliverables' from its ongoing BEPS action plan. In a press conference which unveiled the first package of seven measures, OECD secretary-general Angel Gurría hailed the recommendations as 'a historical achievement on the long road to global tax justice', adding: 'The G20 has identified base erosion and profit shifting (BEPS) as a serious risk to tax revenues, sovereignty and fair tax systems worldwide. Our recommendations constitute the building blocks for an internationally agreed and coordinated response to corporate tax planning strategies that exploit the gaps and loopholes of the current system to artificially shift profits to locations where they are subject to more favourable tax treatment.'

The seven areas are intended to:

- Ensure the coherence of corporate income taxation at the international level, through new model tax and treaty provisions to neutralise hybrid mismatch arrangements (Action 2). In particular these rules will address structures that use the US 'Check the Box' Regulations where they are used to create hybrid entities.
- Realign taxation and relevant substance to restore the intended benefits of international standards and to prevent the abuse of tax treaties (Action 6). Countries will still be able to fight treaty shopping as they wish but the OECD and G20 Countries have also agreed on a common minimum standard which will require the adoption, at a minimum, of either (1) a combination of the 'limitation-on-benefits' (LOB) rule and of the 'principal purpose test' (PPT) rule; (2) the inclusion of the PPT rule, or (3) the inclusion of the LOB rule supplemented by a mechanism that would deal with conduit financing arrangements.
- Assure that transfer pricing outcomes are in line with value creation, through actions to address transfer pricing issues in the key area of intangibles (Action 8).
- Improve transparency for tax administrations and increase certainty and predictability for taxpayers through improved transfer pricing documentation and a template for country-by-country reporting (Action 13). The country-by-country reporting template will require multinational enterprises (MNEs) to provide annually for each jurisdiction in which they do business, the amount of revenue, profit before income tax, and income tax paid and accrued. Also their total employment, capital, retained earnings and tangible assets in each tax jurisdiction. Finally, the report also requires a listing of all entities doing business within a

particular tax jurisdiction, as well as the nature of the main business activities carried out by each entity. The information must be provided to the relevant governments; to protect the confidentiality of potentially sensitive information, it will not be made publically available.

- Address the challenges of the digital economy (Action 1). The report is not recommending the adoption of a 'virtual' permanent establishment. Instead it outlines a new threshold for taxation based on a Significant Digital Presence. Under such a proposal, an enterprise engaged in a 'fully dematerialised digital activities' could be deemed to have a taxable presence in a country if it maintained a 'significant digital presence'.
- Facilitate swift implementation of the BEPS actions through a report on the feasibility of developing a multilateral instrument to amend bilateral tax treaties (Action 15). The goal of a multilateral instrument is to expedite and streamline the implementation of the measures developed to address BEPS, in particular by modifying bilateral tax treaties. It would have the same effect as simultaneous renegoriation of the 3000-odd treaties currently in force.
- Counter harmful tax practices (Action 5). The report notes that a preferential tax regime such as a patent box is useful in supporting growth and innovation in a country if it attracts real activity. It is not so useful if it merely encourages companies to shift profits from the location in which the value was actually created to another location where they may be taxed at a lower rate. One of the key priorities of the BEPS Project has been to focus on whether or not there is substantial activity associated with any preferential regime. The initial focus of this work has been on preferential regimes related to intangible property (IP) and 15 of these regimes are identified in the interim report. Several approaches, with the common goal of ensuring that profits are taxed where substantial activities take place, have been explored. Much of the work has been on the nexus approach, which makes a link between the expenditure incurred in a country (essentially capturing the work or activity undertaken) and the amount of income that can benefit from a preferential regime.

The remaining eight elements of the project are due to be released in 2015.

Next steps

The seven deliverables from the 2014 BEPS package will be presented to G20 finance ministers in September, and to G20 leaders in November. Work has already commenced for the remaining eight elements of the 2015 package, which the OECD Committee on Fiscal Affairs (CFA) will deliver, together with the resolution of pending technical issues and the completion of the implementation measures for the 2014 deliverables. A draft mandate is planned in January 2015 for the CFA's consideration regarding the 'negotiation of a multilateral convention to streamline the implementation of the BEPS action plan', according to the OECD's explanatory statement.

The statement added that: 'Once finalised, these measures are expected to become applicable via changes to bilateral tax treaties or through the multilateral instrument, through changes in domestic laws and with support from internationally agreed guidance.' However, the OECD has given no indication on the actual timing of implementation of the BEPS actions. With more work needed in 2015, it seems likely that 2016 or 2017 would be the earliest period for enactment, although the final action plan to be adopted by all countries involved will need to be translated into domestic legislation.

CIOT tax policy director Patrick Stevens said: 'This first wave of reports is a significant step forward, but the test will be getting international agreement for and implementation of a set of rule changes where there are a range of different perspectives and interests.'

FII: HMRC cannot rely on the standstill provisions

Summary - The Court of Appeal explained its decision to dismiss HMRC's appeal.

The issue was whether HMRC could amend its defence to rely on the standstill provision in TFEU art 64(1) to deny claims by the claimants for the time value of advance corporation tax (ACT) on third country foreign income dividends (FIDs). The claimants were otherwise entitled by reason of the breach of TFEU art 63, pursuant to the CJEU's decision in the FII Group Litigation (C-446/04). The standstill provision allows some legislation in force as at 31 December 1993, which would otherwise infringe TFEU, to continue.

Decision:

The Court of Appeal found that HMRC was estopped per rem judicatam from raising the issue, as it had already been decided in the High Court [2008] EWHC 2893 and in the Court of Appeal [2010] EWCA Civ 103. In particular, the declarations of the Court of Appeal could only be consistent with the conclusion that the composite FID regime was not saved by the standstill provision.

The court added that the amendment sought by HMRC would be an abuse of process, applying Henderson v Henderson (1843) 3 Hare 100. HMRC's argument was that the obligation under the FID regime — imposed on a UK company to account for ACT on dividends matched with dividends received from third countries — was a separate restriction protected by the standstill provisions. This argument is a point that could have been taken, but was not taken in the High Court and in the Court of Appeal.

Comments - This decision is the latest instalment of an extremely complex judicial saga. Since the decision of the Court of Appeal referred to in this case, there has been a further appeal to the Supreme Court and two further references to the CJEU on separate but connected issues.

HMRC v The Test Claimant in the Franked Investment Income Group Litigation [2014] EWCA Civ 1214

Exclusion of tax advantage on cross-border transactions

Summary - The CJEU found that the exclusion of a tax advantage in a cross-border transaction was not a restriction to the freedom of capital.

Kronos, a US incorporated company managed in Germany, was a holding company which held direct holdings in companies incorporated in other European jurisdictions and in Canada. The dividends paid by foreign subsidiaries, which were exempt from tax under the relevant double tax treaties (the exemption method), were not taken into account in the calculation of the relevant basis for the calculation of Kronos' liability to German corporation tax.

Decision:

The CJEU accepted that in a situation where the company receiving the dividends made a loss, the refunding of the tax paid by the company distributing them could be seen as a tax-flow advantage and that the exclusion of this advantage in a cross-border situation may be a restriction to the free movement of capital. However, the CJEU found that a company receiving foreign-sourced dividends was not in a situation comparable to that of a company receiving nationally sourced dividends. This was because Germany had waived its right to tax foreign-sourced dividends and it could not be required to reimburse a sum originating in the tax system of another country. The lack of refund was also counterbalanced by not taking the dividends into account when determining the basis of assessment.

Comments - The CJEU found that a German company receiving foreign-sourced dividends was not in a comparable situation to that of a German company receiving nationally sourced dividends. This was a rather unusual finding for the CJEU, which stemmed from the fact that Germany had foregone its right to tax (or to take into account) the relevant foreign-sourced dividends.

Kronos International v Finanzamt Leverkusen (C-47/12)

Taxation of foreign holdings

Summary - The CJEU found that the flat rate taxation of a holding in a foreign investment fund was a breach of the principle of free movement of capital, due to the lack of disclosure by the fund to the tax authorities of the country of the investor.

The van Casters owned units in non-resident capital investment funds held on deposit with a Belgian bank. Because these investment funds had failed to observe certain disclosure obligations under German tax law, the Casters' holdings were taxed at a flat rate, regardless of whether the value of their investment had increased or decreased.

The issue was whether the disclosure obligations — which apply without distinction to resident and non-resident funds — are compatible with the principle of free movement of capital.

Decision:

The CJEU confirmed that the flat-rate tax was likely to deter taxpayers from investing in funds which did not comply with German disclosure obligations, for instance because they did not actively target the German market. The German provisions therefore constituted a restriction to the free movement of capital. Furthermore, the CJEU found that such restrictions could not be justified by the need to ensure effective fiscal supervision and effective tax collection, since they did not allow the taxpayer to provide evidence or information allowing him to prove his actual income. The CJEU added that exchanges of information between tax authorities could supplement any information provided by taxpayers and that this additional administrative burden could not justify a barrier to the free movement of capital.

Comments - This case may be relevant to any situation where a taxpayer is not able to benefit from the most advantageous tax treatment in relation to a holding in an investment fund, due to the lack of disclosure by the fund. It also confirms that a tax treatment which is identical for both domestic and foreign funds can actually be discriminatory.

van Casters v Finanzamt Essen-Süd C-326/12

Definition of 'convertible securities'

Summary - The FTT found that deferred shares were convertible securities.

The shares in Mr Bruce-Mitford's company, VFB Holidays, were acquired by VFB Group in a share for share exchange. Mr Bruce-Mitford additionally acquired 270,000 deferred shares in VFB Group.

In the 2006/07 tax year, Mr Bruce-Mitford sold 310,000 ordinary shares. The issue was whether an income tax charge arose on the disposal of the shares on the basis that the deferred shares were 'convertible securities' (ITEPA 2003 s 436, as amended with effect since 1 September 2003).

Decision:

The FTT found that the deferred shares were 'convertible securities'. This was because the articles of the company made provision for the conversion of the deferred shares into ordinary shares. The deferred shares were therefore 'employment-related convertible securities' for the purposes of ITEPA 2003 ss 438, 439 and 440 and their disposal triggered a charge to income tax.

The FTT added, referring to Prince and Others [2012] UKFTT 157, that it did not have jurisdiction to decide whether HMRC should have adopted the concessionary practice set out in its manual (Employment Related Securities Manual at ERSM40040).

Comments - This case confirms that the 'new' definition of 'convertible security' is very wide and includes a re-designation in the articles of the company.

Michael Bruce-Mitford v HMRC [2014] UKFTT 954

VAT

Postal services exemption

Summary - The High Court found that UK legislation was compatible with EU law.

TNT Post provides postal distribution services. Its main business is the collection, sorting, procuring and delivering to Royal Mail regional depots of its customers' mail.

VATA 1994 Sch 9 Group 3, which implements the Postal Services Directive, exempts from VAT the supply of public postal services by a universal service provider (USP). It was accepted that Royal Mail is the USP in the UK.

TNT Post's submission was that in TNT (C-357/07), the CJEU had confined the exemption to those services supplied by the USP 'as such', that is, by virtue of their status as 'public postal services', and so only those services forming part of the universal service were exempt from VAT.

Decision:

However, the High Court found that the CJEU had deliberately kept open the possibility that the USP might 'as such' supply certain services, not directly forming part of the universal service, which nonetheless were supplied under conditions (especially as to price) that applied uniquely to the USP, by virtue of its status as USP.

The High Court concluded that the UK had amended the relevant VAT legislation in a way that was compatible with EU law.

Comments - TNT presumably hoped that further changes would be made to the scope of the UK exemption for postal services. The High Court found that no such changes were required.

The Queen on the application of Whistl UK (formerly TNT) v HMRC and Royal Mail [2014] EWHC 3480

VAT on car parking provided by local authorities

Summary - The UT found that local authorities had been correct to charge and account for VAT on the provision of off-street car parking.

This judicial saga started in 2006. The issue before the UT was whether the local authorities should have charged VAT on supplies of off-street car parking, which depended on whether they were entitled to be treated as non-taxable persons in respect of their supplies of off-street parking. This, in turn, depended on whether non-taxation would lead to significant distortions of competition (Sixth VAT Directive art 4.5 now replaced by the Principal VAT Directive art 13).

The appellants contended that the FTT's finding that the absence of taxation would reduce the upward pressure on prices was fatally wrong, because it failed to take into account the Road Traffic Regulations Act 1984. They relied inter alia on Djanogly [2010] EWHC 1825 as authority for the proposition that a local authority cannot raise money (that is charge more than is necessary to cover costs) from car parking.

Decision:

The UT was, however, not persuaded that the FTT had misunderstood the legislative framework.

Moreover, there was no reason to displace the FTT's finding that in the absence of taxation, the upward pressure on local authority charges would be reduced. The UT also found that the FTT had been right to find that the non-taxation of local authority-provided off-street parking would distort the provision of outsourcing. This was because local authorities would take into account the fact that commercial provision of car parking would be taxed, whereas local authority provision would not.

Comments - This case may be relevant in any context where a local authority provides services which can also be provided by a privately owned business.

Isle of Wight Council and others v HMRC [2014] UKUT 0446

Insurance services exemption

Summary - The UT found that the services of a company providing a networking facility to insurance brokers were not exempt.

Brokers paid Westinsure a membership fee. Westinsure identified suitable insurers to take on as 'partner insurers': the partner insurers provided exclusive products and beneficial commissions to Westinsure's members; and in return, Westinsure agreed to promote their products to its members.

The issue was the categorisation of the services Westinsure provided to its members. Westinsure contended that its services were 'related services performed by insurance brokers and insurance agents' (Principal VAT Directive art 135.1(a)) and therefore exempt insurance services.

Decision:

The UT noted that under CJEU case law, in order to decide whether a person is an insurance broker, one has to see whether 'they are doing what an insurance broker … typically does'. It added that a broker 'provides a service to a potential insured party who is looking for insurance by finding suitable insurance for him'. This is different from asking whether the services are those of an 'intermediary' or are 'negotiation'.

The FTT had found that the services provided by Westinsure were too remote from the effecting of particular transactions to amount to the services of an insurance broker. The UT agreed, noting that CJEU case law requires the broker to have a relationship (direct or indirect) with the insured.

Comments - The case is a useful recap on the CJEU case law not only on insurance, but also on intermediary and negotiation. It may therefore be relevant in other contexts where the taxpayer provides a facility for transactions to be concluded.

Westinsure v HMRC [2014] UKUT 00452

Place of supply

Summary - Goods manufactured in Italy but finished in France before delivery to a French customer were supplied in France.

In 2001 Fonderie 2A manufactured metal parts in Italy which it sold to Atral, a French company. Before those parts were supplied to Atral, Fonderie dispatched them on its own behalf to another French company, Saunier-Plumaz, which painted them, before forwarding them to Atral.

The sale price for the parts on Fonderie's invoice to Atral included the finishing work. Saunier invoiced Fonderie in respect of the finishing work for an amount which also included VAT on that work. Fonderie applied to the French tax authorities, on the basis of the national provisions implementing the Eighth Directive, for a refund of the VAT.

That application was refused on the ground that the place of supply of the goods was in France. The issue was referred to the ECJ.

Decision:
The ECJ observed that art.8(1)(a) of the Sixth Directive stated that the place of supply of goods was to be deemed to be 'the place where the goods are at the time when dispatch or transport to the person to whom they are supplied begins'.

On a literal interpretation, the place of a supply such as that between Fonderie and Atral was therefore not Italy. The goods had been dispatched first of all to Saunier which was established in France which then dispatched them, after carrying out finishing work, to Atral. The only goods that were the subject of the contract between the supplier of the goods and the person to whom they were supplied, were accordingly, 'at the time when dispatch or transport to the person to whom they [were] supplied [began]', already in France.

That literal interpretation was borne out by the broad logic of that provision. When a supplier of goods, such as Fonderie, dispatched the goods to a service provider such as Saunier, he did not transfer the right to dispose of the goods in question as owner to the person to whom the goods were being supplied. Such a dispatch was concerned solely with rendering the goods in question compliant with the supplier's contractual obligations so that a supply to that person could subsequently take place.

Art.8(1)(a) also required the existence of a sufficient temporal and material link between the supply of the goods in question and the dispatch of those goods, as well as continuity in the course of the transaction. Such a link and such continuity were lacking if the dispatch of the goods by the supplier to the service provider was for the purpose of processing them before they were supplied to the person acquiring them.

In those circumstances, the place of the supply was deemed to be the place where the goods that have become compliant with the contractual obligations between those two parties are.

The ECJ therefore ruled that the place of supply of goods sold by a company established in a Member State to a person established in another Member State, and on which the vendor, to make them fit to be supplied, has had finishing work carried out by a service provider established in that other Member State, before having them dispatched by the service provider to the person to whom they are being supplied, must be deemed to be in the Member State where the latter was established.

Comments – This represents an important case when examining where the place of supply is when considering goods which are subject to a process

Fonderie 2A v Ministre de l'Économie et des Finances, Case C-446/13

Restricted use

Summary - The UT held that a dwelling subject to a specific occupation condition was not a dwelling for the purpose of the DIY Builders Scheme.

The taxpayer had kept horses since 1993 at premises in County Down. In 2006, he applied for planning permission for the construction of an equestrian facilities manager's residence on the property. Permission was granted subject to certain conditions, one of which was that the occupation of the dwelling should be limited to a person employed solely by the equestrian business at the property and any dependants.

The residence was built between April 2008 and September 2009. The taxpayer and his wife moved in during April 2010.

The taxpayer claimed a VAT refund under VATA 1994, s 35(1A)(a). HMRC refused the claim, on the basis that the property did not qualify as a result of note 2(c) to Group 5 of Sch 8 because of the occupancy condition.

The First-tier Tribunal allowed the taxpayer's appeal. HMRC appealed.

Decision:

The Upper Tribunal said for the purposes of note 2(c), it was necessary to decide whether a term of any statutory planning consent forbade the separate use or disposal of the dwelling. The description "equestrian facilities manager's residence" restricted who could occupy the dwelling but was not enough for note 2(c) to apply.

However, the planning permission specified that the dwelling could be occupied only by a person who worked at the equestrian business at that address. Any use of the property that was separate from the equestrian business carried on at the same address was not allowed.

This was an exclusion within the meaning of note (2)(c) and the dwelling was not, therefore, a building "designed as a dwelling" for VAT purposes.

HMRC's appeal was allowed.

Comments - The UT found that two previous cases turning on similar issues had been wrongly decided: Phillips [2011] UKFTT 372; and Bull [2013] UKFTT 92. In both cases, the planning permission had been subject to occupation by an employee of the business near which the property was situated.

Shields v CRC, Upper Tribunal

Zero-rating on supplies to handicapped people

Summary - The FTT found that supplies of mobile homes adapted for handicapped people were zero-rated.

Tyne Valley traded in mobile homes. It had treated its supplies as zero-rated (under VATA 1994 Sch 8 Group 5) on the basis that they were aids to handicapped people. The vehicles were mass produced motor homes and the only adaptations were additional handles to facilitate access.

The supplies could fall within Group 5 Note 2A, as the supplies of 'a qualifying motor vehicle to a handicapped person who usually uses a wheelchair or who is usually carried on a stretcher'.

Decision:

The FTT found that the reference to 'a handicapped person' must be to a particular handicapped person. The definition of 'handicapped' in Note 3 as 'chronically sick or disabled' suggested an element of personal characteristics appropriate to an actual person.

The FTT added that the correct interpretation of the provisions was that the adaptation should enable a handicapped person to perform any of the three activities mentioned; namely, entering, driving, and/or being carried. Finally, the adaptation must be substantial and permanent.

Turning to the facts of the case, the FTT noted that the fact that the handles may be used by an able bodied person was irrelevant. It accepted witness statements and medical certificates to the effect that, without the grab handles, people in wheelchairs would be unable to access the vehicles. Although the handles could be removed, the holes would remain, making their removal unlikely. The adaptation was therefore substantial and permanent.

Comments - The case confirms that even a seemingly light adaptation, which only enables access to a vehicle for handicapped people (without improving their transport conditions), can satisfy the zero-rating provisions.

Tyne Valley Motorhomes v HMRC [2014] UKFTT 969

Customs classification and toys

Summary - The FTT found that cuddly toys fitted with a sound box must still be classified as cuddly toys.

The issue was how two soft children's toy animals, which contained a sound box that produced soothing sounds designed to help babies and young children sleep, should be classified for customs purposes.

The toys fell within the category of 'toys representing animals or nonhuman creatures'. That category was subdivided into two categories. If the toys were 'stuffed' animals, they were subject to 4.7% duty; but if they fell into the 'other' category, no duty was payable. Finally, if — taking account of their purpose, rather than their appearance — the toys were categorised as 'electronic devices', 4.7% duty was payable.

The two toys, a stuffed giraffe and a stuffed sheep, were both covered by good quality soft outer skins. The appellant contended that the purpose of the toys was to help children sleep; they were therefore not cuddly toys, but rather 'sleep promoting devices'. Furthermore, both animals had Velcro straps to attach them to the side of the cot.

Decision:

The FTT found that the appearance and composition of the toys was that of stuffed toys. The fact that they were to be used as 'sleep aids' did not change their attractive appearance, or the fact that they could be cuddled. This was even of some significance in relation to their sleep-aid function, as a child may prefer to be lulled to sleep by a much loved sheep or giraffe rather than by a plastic box.

Comments - Rather than choosing between appearance (cuddly toy) and function (lulling children to sleep), the FTT found that the cuddly appearance of the toys served as their function.

Cloud B v HMRC [2014] UKFTT 997

Adjournment due to chronic ill health

Summary - The FTT decided to go ahead with a hearing without the representative of the appellant, who could not attend due to ill health.

HMRC had denied claims for input tax refunds on the ground that the relevant transactions were connected with MTIC fraud.

The appellants had applied for an adjournment of the hearing, arguing that their solicitors had ceased to act for them and that the case was too complex for them to represent themselves. The FTT had, however, rejected the application, noting that Mr Kohli was a director of each of the appellant companies. He was therefore well placed to comment on the transactions at issue. Furthermore, he had been with the appeals since their inception. The FTT did, however, agree to adjourn the hearing by five days to allow Mr Kohli to prepare. The hearing had then been postponed again several times due to the ill health of Mr Kohli, who was suffering from cardiological problems caused by stress.

Decision:

The FTT eventually decided not to further postpone the hearing. This was based, inter alia, on the fact that there was no certainty that Mr Kohli would ever be fit enough to attend a hearing; and the appellants had not chosen other measures to ensure that they were represented. The appellants had not shown any willingness to fully cooperate with the FTT; they had not complied with directions and had failed to respond to evidence served by HMRC.

The FTT made directions to ensure that as much information as practicable would be at the disposal of the FTT at the date of the hearing.

Comments - The FTT explained that, given the lack of certainty of a recovery by the representative of the appellant, postponing the hearing was tantamount to accepting that the hearing would never take place, which would be unacceptable.

Westminster Trading and another v HMRC [2014] UKFTT 985

No exemption for yoga lessons

Summary – The Tribunal found that teaching of yoga is not commonplace in schools or universities

The taxpayer was a full-time yoga teacher. He ran a studio where he taught about 17 classes a week. He claimed that his supplies of yoga were private tuition “in a subject ordinarily taught in a school or university” and, as such, qualified for the VAT exemption under VATA 1994, Sch 9 group 6 item 2. HMRC disagreed, saying yoga was recreational rather than educational and was not taught ordinarily in schools or universities.

The taxpayer appealed.

Decision:

After examining the facts and other relevant decisions, the First-tier Tribunal concluded that the practice of yoga was not education for the purposes of the VAT exemption or “in the narrow sense used in case law”. Nor was the teaching of yoga commonplace in schools or universities.

The taxpayer's appeal was dismissed.

Comments - Neil Warren, independent VAT consultant, said: “The taxpayer supplied a range of evidence to the tribunal to support his view that the classes he gave were educational and also that yoga was a subject taught widely in schools or universities. However, both arguments were rejected by the tribunal and this decision is consistent with another recent case which concluded that belly dancing lessons did not qualify for exemption under the private tuition rules (Fleur Estelle Belly Dancing School TC3148). However, the tribunal noted with surprise HMRC's view that private golf lessons did qualify for exemption, showing how difficult it is to interpret the legislation on this particular issue.”

S Tranter trading as Dynamic Yoga (TC4071)

Relevant charitable purpose

Summary - The UT found that a building was used for a relevant charitable purpose, even though recipients of the services provided in the building partially paid for those services.

Longridge, a charity, provides a wide range of day and residential courses and activities (principally water-based). The building at the centre of the dispute was a training centre.

The issue was whether the building was used 'solely for a relevant charitable purpose otherwise than in the course or furtherance of a business'. If it was used solely for these purposes, the services consisting in its construction which had been supplied to Longridge were zero rated (VATA 1994 Sch 8 group 5).

HMRC's main contention was that the FTT had erred in law by focusing on the price charged by Longridge, which in most cases did not cover its costs, to conclude that its activities were not profit making. However, the UT observed that there is a 'dividing line' between situations where the activities do amount to the furtherance of a business, even though they are not aimed at making a profit (Morrison's Academy [1978] STC 1); and situations where the activities are not conducted as a business, even though payment is made by the recipient (Finland (C-246/08)).

Decision:

The UT added that the FTT had considered the scale of the payments, the way they were calculated and the finances of Longridge in a way that showed an understanding of the law. Looking at the 'totality of the observable features' (Yarburgh Children's Trust [2001] EWHC 2201) of the activities carried out by Longridge, the FTT had held that these activities were not economic and the UT could not interfere with this finding.

Comments - The UT rejected the notion that, following Finland, consideration paid for services establishes a presumption that there is an economic activity. This case may therefore be powerful ammunition against any argument by HMRC that a charitable purpose cannot be established where recipients pay for services.

HMRC v Longridge on the Thames [2014] UKUT 0504

Input tax recovery in the absence of invoices

Summary - The FTT found that, in the absence of invoices, VAT on the purchase of mobile phones was not recoverable.

Xpress purchased iPhones from Apple stores and resold them in bulk at a profit to wholesalers. Because Apple would only sell two phones per retail customer, Xpress used 'runners', who attended Apple stores personally to purchase phones. HMRC accepted that the phones bought by runners had then been sold to wholesalers, as the IMEI numbers on Apple's invoices matched those on the invoices issued by Xpress.

However, HMRC disallowed the input charge on the phone purchases, on the ground that no formal VAT invoices had been issued by Apple. An inspection had revealed that many invoices did not include the name of the purchaser and had raised suspicions, as the same 'runner' had supposedly made 18 purchases on the same day — which was impossible in HMRC's view.

Decision:

The FTT noted that the runners would have been able to request their names to be included on the receipts, but probably chose not to; if they identified themselves as multiple purchasers, Apple staff may not serve them. Consequently, the runners were acting in their own names when purchasing the phones and so, under VATA 1994 s 47(2), the phones were supplied by Apple to the runners and then by the runners to Xpress. As the runners were not registered for VAT, there had been no taxable supply to Xpress, capable of giving rise to recoverable input tax.

Comments - There was ample evidence that the phones sold by the appellant had been bought on its behalf from Apple stores. However, the FTT placed great emphasis on the fact that the runners were unlikely to have acted as disclosed agents.

Xpress Telecom v HMRC [2014] UKFTT 1003

Dilatory behaviour and barring orders

Summary - The UT lifted a barring order imposed on HMRC.

BPP (which supplies education and books) had appealed HMRC's decision to treat its supplies of books as standard rated. It contended that these supplies should be zero rated (under VATA 1994 Sch 8 group 3). HMRC was appealing against a barring order by the FTT.

The decision which underlined the appeal had been made by HMRC after lengthy correspondence and several meetings and had been subject to a review which had taken six months. HMRC — which had been given 60 days as respondent to serve the statement of case — had taken two weeks longer.

The FTT observed that the reason given for the delay — that HMRC needed to 'engage in internal consultation' — was 'impossible to understand', given that this internal consultation should have taken place at the time of the decision or at the very least at the time of the review.

Additionally, HMRC's failure to apply for an extension of time in advance was 'lamentable'. The UT also regretted the very succinct statement of case eventually served by HMRC, as well as the delay in providing further information and the 'shifting' of HMRC's grounds.

Decision:

The UT concluded that HMRC's behaviour meant that BPP could reasonably claim to have been unaware of HMRC's exact case and to have been put to unnecessary expense as a result. Furthermore, the uncertainty of the tax treatment of its supplies over a long period of time had been harmful for BPP.

However, there was a public interest in the correct application of tax law. Although it was true that the FTT had little by way of sanction it can impose, this did not justify the ultimate sanction in circumstances where a fair hearing could still take place. A direction for costs was therefore the appropriate remedy.

Comments - Although the UT clearly had little sympathy for HMRC's behaviour, the fact that a fair hearing could still be held weighed heavily, as did the public interest of ensuring the correct payment of tax by BPP. Outside extraordinary circumstances, an application for costs is therefore more likely to be successful than an application for a barring order.

HMRC v BPP Holdings Ltd [2014] UKUT 0496 (TCC))

VAT MOSS relaxation for micro entities **(Lecture B869 – 16.18 minutes)**

There were no major VAT announcements in the Autumn Statement but there was an important announcement the day before.

Legislation has been introduced in Finance Act 2014 to tax business to consumer (B2C) supplies of the following services according to the member state in which the customer is located:

- telecommunications services
- broadcasting services
- e-services

This is a major change when supplying EU consumers as these services are currently taxed in the country in which the service provider is established i.e. B2C supplies. The changes will take effect from 1 January 2015 and implement already agreed EU legislation into UK legislation, ensuring that these services are taxed fairly in the Member State of consumption.

This is likely to create multiple EU registration obligations for affected suppliers selling to EU individuals.

To save the need for businesses affected by these changes having to register for VAT in other Member States, a Mini One Stop Shop (MOSS) will also be introduced from 1 January 2015. This is an IT system that will give affected suppliers the option of registering in the UK and accounting for VAT due in other EU countries using a single MOSS return.

MOSS will avoid the need for a business having to register in each EU country where it sells electronic services (and also in relation to broadcasting and telecommunications services) to non-business

customers. The supplier would still charge their customers the local VAT rate e.g. Hungarian VAT to Hungarian customers, but they would account for the VAT collected on a single MOSS return.

The MOSS return will not have any facility for recovering EU VAT incurred and any affected supplier would need to submit an electronic cross border refund claim for any such VAT incurred.

In order to register under MOSS the business would have to be UK registered – even if their UK turnover was below £81,000. HMRC have now conceded that while micro companies are still obliged to register for VAT in the UK to use MOSS, they will no longer be forced to charge UK VAT on their domestic sales.

A spokesperson for HMRC said: "Businesses below the current VAT registration threshold that can separate their sales to UK customers from sales to EU customers can voluntarily register the cross border element of their business, and then use that registration number to register for MOSS. This means that their domestic sales will remain VAT free."

Three party transactions – recent cases (Lecture B870 – 15.25 minutes)

Transactions involving three parties often produce challenges in the world of VAT. In arriving at a decision concerning either the liability of a sale, or in fact who is acting as the principal and who is the agent, great care and attention to detail is needed to fully review contracts and other paperwork. It is also necessary to consider the views and perceptions of customers – who do they think they are dealing with when they part with their money? Which party would they complain to if something went wrong with the purchase of goods or services they have made?

In this section, I will review four recent First-tier Tribunal cases involving three parties to highlight some of the key issues to consider when dealing with similar transactions.

VICTORANGLE LTD (TC2994) – placing bets on horses…….what is the service and/or consideration?

This was a bizarre case, linked to the company director placing bets on horses by using third parties to place the bets with bookmakers in their own names on the company's behalf. The reason was apparently because he could not place bets himself because most betting shop chains had closed the accounts he held with them because he was so successful with his choice of horses and was costing the bookmakers too much money. The chain of events was as follows:

- The director contacts a third party acquaintance and asks him to place £x on a particular horse in a particular race – if the horse wins, the company gets all of the winnings; if it loses, he pays the third party for the stake ie there is no financial loss to the third party

- The benefit for the third party is that he or she gets advance knowledge of horses the director (an expert in betting tips for some 30 years) thinks will do well in the races. It is then up to the third parties to decide whether they place their own bet(s) on the horse(s) in question ie with scope to win money based on the tips of an expert.

HMRC's view was that any winnings paid by the third party to the company represented taxable income as a supply of horse racing tips. The company felt there was no consideration for any supply of services because the third party was merely repaying the company any winnings that ensued after the race – there was no link between a 'consideration' and supply of services.

The tribunal allowed the appeal and felt that the third parties were actually supplying services to the company rather than the other way round by acting as an agent in arranging the bets. But these services were supplied for no consideration on the basis that the complete winnings were paid back to the company ie they did not charge or retain any commission. The fact that the third parties might use the information gleaned from the bet for their own personal gain was not considered a relevant issue.

An interesting question is: why didn't the director just ask a friend to place bets on the various horses as a private transaction outside of his business? I wonder whether the company was making a profit or loss – and if the latter, what would be the situation with corporation tax losses? Food for thought.

WENDY LANE T/A SPOT ON (TC2909) – was business acting as agent or principal in supplying cleaning services to holiday home owners?

This case did not produce a happy ending for the taxpayer, who provided a comprehensive cleaning, maintenance and gardening service to owners of holiday homes in Cornwall. According to HMRC, she exceeded the VAT registration threshold in September 1999, and should have registered on 1 November 1999. This left her with an 8-year VAT liability as the problem was identified by HMRC on a visit in 2007. However, the taxpayer claimed that she was not directly supplying services to the holiday home owners but only acting as an agent ie the main supply was between the self-employed tradesmen and cleaners and the home owners. The income that the taxpayer retained (and referred to as 'commission') was below the VAT registration threshold.

The two key issues considered by the tribunal were:

- the nature of the terms and conditions agreed between the property owner and taxpayer (which were inconclusive because they contained inconsistencies)

- the actual reality of the arrangement as far as the basic facts were concerned. A key comment in the tribunal report was as follows:

"In the event of any damage caused by a cleaner the property owner would be likely to complain to and seek a remedy from Spot On with whom he or she had contracted rather than the cleaner"

The taxpayers appeal was dismissed – she was deemed to be acting as a principal.

Comment – there is a tendency for advisers to see three party transactions in the best possible light as far as VAT is concerned when the reality might be very different. Think about this issue if you act for any

taxi, hairdressing or beauty industry clients where a main business such as eg a hairdressing salon utilises the services of a range of self-employed individuals such as stylists. Always remember that HMRC can go back up to 20 years to correct a belated VAT registration – the time period is not capped at four years as is the case with the correction of errors on previous VAT returns. In the Spot On case, an overall analysis of the facts clearly demonstrated that the commercial arrangement was between the taxpayer and the homeowners.

RAPID SEQUENCE LTD (TC2826) – were supplies of locum doctors by an employment agency VAT exempt as relevant to medical services?

The company supplied overseas locum anaesthetists to NHS hospitals in the UK and treated the supplies as exempt from VAT on the basis that medical services were being carried out by a qualified medical practitioner, with a view to treating patients (ie medical care). HMRC's view (and supported by the tribunal) was that Rapid Sequence was making a supply of staff rather than medical services, and the fees were standard rated.

Note – the structure of the arrangement was that the locum would invoice Rapid Sequence for 'x' hours of time at an agreed hourly rate; Rapid Sequence would then apply a mark-up to this rate and charge the NHS hospitals. The difference between the hourly rate charged and paid was effectively its gross profit. A key point in the tribunal's analysis was that the doctors were instructed by the hospitals as to the nature of their duties, rather than the doctors acting under their own instruction to perform a specific medical function eg a heart operation. To quote from the report:

"The doctor provided by Rapid Sequence, whilst exercising his own judgment as to how to perform his services does so in the hospital under the direction and control of the relevant NHS administrators or medical staff. As far as the patient is concerned, he is receiving services from a doctor working under the supervision of the NHS Trust, not Rapid Sequence. Rapid Sequence plays no part in deciding how the doctor concerned provides his services."

This case reaffirms the view of HMRC that the services of a doctor supplied to a medical institution by an employment agency are standard rated, even though the doctor is providing medical services to patients, with a view to improving the health of the individual in question. The tribunal was sympathetic to the taxpayer because of the misleading wording in the legislation (VATA1994, Group 7, Item 5) but felt that the exemption in both UK and EU law should only apply to medical services provided directly by the institution dealing with patients. Rapid Sequence was deemed to be making a supply of standard rated staff.

Comment – although supplies by employment agencies generally relate to a supply of staff and are therefore standard rated, be aware of the 'nursing agencies concession' where supplies of nurses to third parties could be exempt from VAT rather than standard rated (HMRC Notice 701/57, para 6.5).

As a final comment, the key issue in all three cases considered in this section was how the three parties interacted with each other. In fact, you could say that the Rapid Sequence case involved four parties ie to include the patients as well.

ROGER AND SUSAN LAFFERTY (TC3493) – supplies by a taxi firm to account customers were made on an agency basis

The business was VAT registered and hired out a fleet of vehicles to self-employed taxi drivers, with charges based on a mileage calculation, and subject to output tax. It also had a number of account customers (the general public) for whom it arranged transport, with an invoice/bill raised to the customers based on the number of journeys that had been carried out in a particular period.

HMRC assessed tax on the basis that the business was acting as principal rather than agent in such cases but the tribunal considered the circumstances of the arrangement and disagreed and therefore allowed the appeal. Significant factors identified by the tribunal was that any bad debt would be a loss to the driver rather than the taxi business; the full fare was passed to the drivers; there was no selection of drivers by the taxi business – they merely allocated jobs on a first come, first served basis.

Comment:

It is very unusual for appeals of this nature to succeed, mainly because the account customers consider they are dealing with the main taxi business and have no direct dealings with the drivers, who are effectively providing their services to the main business. It is possible that HMRC could appeal this case but the decision of the tribunal highlights how difficult it is for a business involved in three party transactions to arrive at the correct decision regarding the agency/principal relationship. This case is fact sensitive but all taxi firms should consider their own arrangements on a regular basis to check they are dealing correctly with VAT.

WILTONPARK LTD ….and various Secrets companies
(TC3255) – VAT on charges to dancers for cashing 'Secrets money'

Patrons at a range of Secrets lap-dancing clubs were able to pay dancers on a private basis (typically £250 per hour) for either table company or private dances. The patrons could either pay the dancers with cash or "Secrets money". They would have acquired the latter (effectively face value vouchers) with a debit card or credit card payment to the Secrets club.

The patron paid a 20% commission to the club (eg face value £100 required a £120 payment) and then the voucher would be used to pay the dancer for £100 of benefits as above. However, the dancer was then required to pay a commission to the club when she cashed in the voucher ie she would receive £80. The issue before the tribunal was whether the 20% deduction on the amount paid to the dancer represented an exempt supply of handling money (no output tax due by the club) or a standard rated benefit ie effectively giving more trading opportunities to the dancers, whose earnings potential would be limited without the vouchers because the patrons would not have enough cash to pay for their services.

Legislation – VATA1994, Sch 9, Group 5, Item 1 – provides exemption for "The issue, transfer or receipt of, or any dealing with, money, any security for money or any notes or order for the payment of money."

The tribunal dismissed the appeal and noted that there was a single supply of taxable services provided by the trading companies to the dancers (the right to trade in the premises and earn fees from patrons), which was partly paid by the dancers as an entry fee to the club for each evening they danced (typically £80) plus the value of the 20% commissions relevant to Secrets money.

Comment:

Although the tribunal accepted that Secrets money represented a 'security for money' as defined by Group 5, Item 1, the key issue was to consider the nature of the supplies made by the clubs to the dancers, and this was deemed not to be a payment handling service that could be exempt from VAT. The decision is consistent with many other tribunal cases heard over the years, and is another example of how VAT issues can get complicated when there are three parties involved in a transaction.

Contributed by Neil Warren