Tolley®CPD

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Autumn Statement 2015 (Lectures P926/ B926 – 17.19/ 9.27 minutes respectively)

Personal Tax

Company car benefits - diesel cars

Currently the appropriate percentage used to determine the amount of tax due on an employee's use of a company car is three percentage points higher if the car in question runs on diesel. That 3% supplement *was* due to be abolished for 2016/17 onwards. The Chancellor announced that the supplement will remain in place until April 2021.

Employment-related securities - internationally mobile employees

Finance Bill 2016 will include technical changes to simplify the rules for internationally mobile employees receiving employment-related securities (ERS) under tax-advantaged or non-tax-advantaged employee share schemes. These changes are to ensure that any charge to tax will arise under the rules that deal with ERS options, rather than being taxed as earnings.

Employment intermediaries - business travel and subsistence expenses

From 6 April 2016, tax relief for business travel and subsistence expenses of workers engaged through employment intermediaries is to be restricted so that the rules are in line with those which apply to employees. This restriction will only apply to workers providing services through personal service companies where the intermediaries legislation (also known as IR35) applies.

Note that this is separate from the HMRC discussion paper on tax relief for business travel and subsistence expenses to which responses can be made until 16 December 2015.

Tax-free childcare

The Chancellor also announced further changes to the new system of 'tax-free childcare' being introduced from early 2017. That new scheme, first announced in March 2013, will eventually replace the limited exemption available to employees in respect of employers' schemes to fund childcare or provide childcare vouchers. Those schemes will be closed to new entrants once the new 'tax-free childcare' regime is up and running, although the exemption for workplace nurseries and crèches will continue.

The changes announced by the Chancellor affect the parents that can qualify to participate in the scheme, as follows:

- the maximum income level per parent is reduced from £150,000 to £100,000
- the weekly income threshold for each parent is increased to at least 16 hours at the National Living Wage from 8 hours at the National Minimum Wage

Taxation of sporting testimonials

A statutory exemption of up to £50,000 will be available to employed sportspersons with income from sporting testimonials that is not contractual or customary. This will apply where the sporting testimonial

is granted or awarded on or after 25 November 2015, and only to events that take place after 5 April 2017. It replaces an extra-statutory easement on which the government consulted earlier this year. HMRC had received legal advice that both the employee benefit-in-kind legislation and disguised remuneration legislation could be interpreted as treating testimonial payments as employment income even when they are not paid under the employment contract. One point yet to be clarified is who will pay any secondary NIC that might be due, for events and collections which are nothing to do with the employer.

London Anniversary Games and World Athletics and Paralympics Championships
An exemption will apply to the earnings of non-resident competitors in the 2017 World Athletics and Paralympics Championships. Also, for the last time earnings of competitors in the 2016 London Anniversary Games will be exempt from income tax as the Olympic torch is passed to Rio de Janeiro.

Netherlands Benefit Act for Victims of Persecution 1940–1945
An exemption from income tax will be introduced from April 2016 for certain pension and annuity payments made by the Netherlands government, payable to victims of National Socialist and Japanese aggression during World War II.

Student loans

The Chancellor announced that the Government is broadening the range of students who can apply for tuition loans to include students:

- aged 19 to 23 studying for a level 3 or 4 qualification (start date to be confirmed)
- aged 19 or over studying for a level 5 or 6 qualification (start date to be confirmed)
- anyone seeking to retrain by taking a second degree in science, technology, engineering or mathematics (from 2017/18)

Student loans will also be made available to those aged under 60 studying for a postgraduate masters degree (from 2016/17).

All this means that employers will have to be more careful in the future about making sure that they ask all new starters to confirm whether they have a student loan to repay as part of their new starter process.

The Chancellor also confirmed that the repayment threshold for those with Plan 2 student loans is to remain at £21,000 until at least the 2020/21 tax year.

Non-domiciliaries

Unusually for recent years, there were no major announcements with regard to non-domciliaries. The summary of responses and draft legislation in respect of the deemed domicile changes announced in Summer Budget 2015 is expected in December 2015.

Having said this, there was a minor point within the Autumn Statement documentation on business investment relief; the mechanism introduced from 6 April 2012 which allows non-domiciliaries to invest foreign income and gains in UK companies without triggering a remittance.

The conditions for business investment relief are complicated and there are practical difficulties in disposing of the shares within 90 days should the conditions be broken. This is thought to be the reason why there has been lower take-up of the relief than expected.

The Government is to consult on legislative changes which will encourage greater use of the relief. For details of the existing rules, see the Business investment relief -- qualifying investments and Business investment relief -- clawback of exemption guidance notes.

Pensions

Further to the announcement at Summer Budget 2015, the Government has now consulted on fundamental changes to pension tax relief. One of the options is that instead of receiving tax relief on the contribution, the savings would work more like an ISA, with a Government top-up and tax-free extraction on retirement.

The Government will give a response at Budget 2016.

State pension

The government will increase the basic state pension by the triple lock mechanism by £3.35 per week, meaning it will increase to £119.30 in 2016/17. The new single tier state pension will begin in April 2016, at the rate of £155.65 per week. This applies to all those reaching their state retirement date from 6 April 2016.

Pension credit

Pension credit standard minimum guarantee will increase by £4.40 to £155.60 per week in 2016/17. The equivalent amount for couples is a rise of £6.70 to £237.55 per week. The savings credit element will have its threshold increased to £133.82 for a single senior citizen and to £212.97 for a couple. This will have the effect of reducing the single rate of the savings credit maximum by £1.75 to £13.07 and for a couple by £2.68 to £14.75.

Risk finance investments

The Chancellor stated in his speech that energy-generation would be an excluded activity for the purposes of the enterprise investment scheme (EIS), venture capital trusts (VCT) scheme and seed enterprise investment scheme (SEIS).

In fact most energy-generating activities are already excluded for the purposes of these schemes (including changes which apply with effect from 30 November 2015 which were legislated in F(No 2)A 2015, s 27), however any energy-generation activity which is not currently excluded will be so from 6 April 2016 in provisions expected in Finance Bill 2016.

Finance Bill 2016 will also contain provisions to increase the flexibility for replacement capital for EIS and VCTs (subject to state aid approval).

ISAs

As announced in Budget 2015, the list of qualifying investments for ISAs is to be extended from autumn 2015 to include crowdfunded debt-based securities.

The ISA, junior ISA and child trust fund annual subscription limits are to be frozen at 2015/16 levels in 2016/17.

Tax credits

Following the Government defeat in the House of Lords, the Chancellor has abandoned the changes to the income threshold, the income disregard and the taper rate for tax credits announced at Summer Budget 2015. The Autumn Statement documentation contains no mention of the proposed restriction of the child element (which was not to be payable in respect of the third or subsequent child born on or after 6 April 2017), however it is assumed that this amendment has also been dropped.

The Government believes that there is confusion amongst tax credits claimants about when joint claims should be filed instead of single claims. There is to be a consultation on how to make this requirement clearer.

Following a successful initial contract, HMRC is to continue to use the private sector to chase historic tax credit debt by phone calls, text messages and letters.

Disguised remuneration -- future retrospection warning

The Government remains concerned that its rules on disguised remuneration in ITEPA 2003, Part 7A are not secure enough to guard against all attempts to avoid tax on earnings.

In a move reminiscent of the Paymaster General's statement of 2 December 2004 warning that future anti-avoidance measures could be introduced with retrospective effect, the Autumn Statement documentation includes a notice that future Finance Bill measures needed to counter to any further new schemes intended to avoid tax on earned income may be enacted to have effect from 25 November 2015.

It is not at this stage clear whether the Government or HMRC has any particular arrangements in its sights for this type of retrospective counteraction.

Capital Taxes

Entrepreneurs' relief

The entrepreneurs' relief rules were tightened up by FA 2015, s 43, but it has come to the Government's attention that this may prevent relief being available in certain genuine commercial transactions. It will consider bringing forward changes to the legislation to deal with these unintended consequences.

Capital gains tax payment window

One of the motives for making tax digital is to accelerate the collection of tax. A further element in this strategy is the announcement that CGT on residential property will become payable within 30 days of the completion of the sale with effect from April 2019. At present, the payment date can be as late as 22 months following disposal, and even for contracts signed at the end of the tax year the tax liability does not arise until 10 months later.

Nevertheless, it does seem strange that the Chancellor has singled out (a) CGT, and (b) residential property for this treatment. It indicates firstly that almost all income tax can be expected to follow suit (along with the updating of the digital tax accounts).

Secondly, the 30-day time limit for payment has already been introduced for sales of residential property by non UK residents, so the system for collection has to be put in place. With the time limit applying to all residential properties, anomalies will be ironed out.

Unlike transactions in investments, sales of property tend to be occasional events, often by taxpayers who are unaware of the tax obligations. The 30-day time limit might be expected to integrate CGT on property sales into the legal process of conveyancing, in the same way that stamp duty land tax is reported by solicitors, thus ensuring that the tax is collected.

There are two points to note:

- it appears that the deadline for payment will be triggered by the date of completion, where as the date of disposal for CGT is the date of exchange
- this mirrors the 30-day deadline for the submission of the NRCGT return and payment of tax and may correct the current administration anomaly whereby some non-residents are required to pay the tax within 30 days and some do not have to pay the tax until the normal 31 January deadline.

SDLT on additional residential properties

The Government is to consult on an increase to the stamp duty land tax (SDLT) due on purchases of second or additional residential properties that complete on or after 1 April 2016. The use of the property is irrelevant and so it will apply whether it is to be rented or used as a second home.

The rate applied will be 3% **above** the current SDLT rate. Corporates and funds making 'significant investments in residential property' (thought to be a minimum of 16 residential properties) are likely to be exempted from the additional charge.

There are many areas that are yet to be clarified, including:

- where a zero rate applies to purchases of up to £125,000, will the rate be 3%?
- will this apply to higher rate purchases by non-natural persons, meaning that the top rate will be 18%?

There are two points to bear in mind when advising clients:

- there would appear to be no anti-forestalling measures, so if the purchase completes before 1 April 2016, the extra 3% SDLT will not apply
- SDLT applies to properties purchased in England, Wales and Northern Ireland only and so residential properties purchased in Scotland and overseas will not be affected (although land and buildings transaction tax (LBTT) will apply in Scotland and other taxes may apply in other jurisdictions)

This is another tax disincentive to the buy-to-let market, following on from the introduction of the restrictions to tax relief for finance costs legislated in F(No 2)A 2015, s 24 which apply from 2017/18.

Non-resident capital gains tax

Since 6 April 2015 non-residents have been subject to UK capital gains tax on the disposal of UK residential property. These provisions are known as the non-resident capital gains tax (NRCGT) rules and are discussed in the Capital gains tax charge on UK residential property owned by non-residents guidance note. FA 2015, Sch 7

The NRCGT rules are to be tweaked in Finance Bill 2016 to:

- remove an unintended double charge (with retrospective effect from 6 April 2015)
- charge an unintended omission (with effect from 25 November 2015)
- allow HMRC to prescribe circumstances under which a NRCGT return is not required
- allow CGT to be collected on a provisional basis

Extension of ATED and SDLT reliefs for non-natural persons

From 1 April 2016, relief from annual tax on enveloped dwellings (ATED) and the 15% SDLT charge which applies to non-natural persons is to be extended to:

- equity release schemes
- property development activities, and
- properties occupied by employees

Inheritance Tax

There were no major policy provisions on inheritance tax in this Autumn Statement, but it announced a couple of small refinements to the legislation.

Wartime compensation payments

It has been the practice of HMRC under ESC F20 to provide an exemption from inheritance tax for the value of compensation received for wrongs suffered during the World War II era. A number of schemes have been set up by various European organisations, some of them relatively recently. Historically the

exemption has applied to the original victims and surviving spouses. Often the compensation is received late in life and the sum would become chargeable to IHT without the exemption. The government will legislate for the concession in Finance Bill 2016 and specifically include a recent scheme known as the Child Survivor Fund, which makes payments to survivors who were children during the Holocaust.

Undrawn pension funds in drawdown pensions

The IHT charge on alternatively secured pensions (ASP) was removed with effect from 6 April 2011 when ASP funds became re-designated as drawdown pension funds. Since that change further reforms have introduced more flexibility and choice into the use of pension funds both in lifetime and on death. The key principle that keeps pension funds out of the inheritance tax net is that distribution is at the discretion of the pension trustees, and not at the direction of the pension member. However, the new opportunities for drawdown funds leave room for doubt as to whether the fund remains outside the control of the member.

Legislation is planned for Finance Bill 2016 that will ensure that an inheritance tax charge does not arise when a pension scheme member has designated funds to drawdown and has not drawn all the funds before death. The provision will be backdated to 6 April 2011.

Deeds of variation

Following an announcement in Budget 2015, a consultation ran over the summer to collect evidence about the use of deeds of variation for tax purposes. See the commentary in Budget 2015 -- IHT, trusts and estates overview. A detailed response to the consultation has not yet been published, but the Chancellor did announce that the government will not introduce any new restrictions on deeds of variation but would continue to monitor their use.

Administration

Digital tax accounts

The Chancellor confirmed the government's intention to invest £1.3 billion in 'making tax digital'. He originally announced 'the end of the annual tax return' in Budget 2015 and since then HMRC has published its plans for a digital Personal Tax Account and Business Tax Account for each taxpayer by 2016/17. Initially it was clear how employment income and most investment income could be fed through to HMRC automatically to pre-populate the digital tax account. HMRC already has the required links with employers, banks and company registrars. It was less obvious how landlords and small businesses could avoid the annual tax return because most of the information can only be provided by the taxpayers themselves.

In recent months, HMRC has been consulting with software developers on its Application Programming Interface (API) strategy. The aim is to develop tax software packages that enable taxpayers and their agents to feed information into the digital tax accounts, in the same way that agents currently use commercial software to file tax returns. However, instead of collecting all the information and filing it once a year, the key difference will be that the update will be piecemeal and incremental.

Today the Autumn statement, reveals that by 2020 most businesses, self-employed people and landlords will be required to keep track of their tax affairs digitally and update HMRC at least quarterly via their digital tax account. Necessary software will be available free of charge. So, instead of an annual tax return, a quarterly tax return will be required. For VAT-registered businesses, the additional filing required will be minimal. But those who stuff all their records in a 'brown paper bag' and deliver them to their accountant once a year will need to reorganise. Employees and pensioners will not be required to update their digital tax account unless they have secondary incomes of more than £10,000 per year.

The Autumn Statement says nothing explicit about payment of tax, although it could be inferred that quarterly instalments will be required. The government plans to consult on the details in 2016. It is interesting to note that it is forecasting a significant increase in tax revenue of £300 million by 2019/20 arising from 'reducing errors through record keeping'.

We are not aware of any specific announcement relating to a digital tax account for trusts. Trustee landlords may be expected to update HMRC quarterly in the same way, and details of investment income can be provided to HMRC through the usual channels. However, in view of the fact that trustees are still coping with the old style self assessment tax return, and that HMRC does not yet provide them with software for online filing, we may well expect the digital conversion of trusts to be delayed.

Simple assessment

It is 20 years since the tax system was overhauled to impose self assessment on taxpayers. In recent years HMRC has recognised that the self assessment sledgehammer is often not the best tool to crack a simple under- or over-payment nut. With improved software capability, many taxpayers have been taken out of self assessment, even before the digital tax account goes live. Once out of self assessment, which can be a burden for both taxpayers and agents in some circumstances, the problem then arises of how to correct simple mistakes.

It was announced in the Autumn statement, that the government will publish draft legislation to enable a simpler process for paying tax. It will be used for taxpayers who are in self assessment where HMRC thinks it already holds all the information it needs to calculate a tax liability. For example where employees have had an estimated figure in their PAYE Code, or where investment income has pushed them into a higher tax rate, an adjustment will be required. Although it is not entirely clear from the announcement, it appears that such taxpayers will not be required to complete a self assessment tax return and instead they will be sent a calculation of the tax they owe. The demand for payment will be legally enforceable, but taxpayers will be able to appeal the calculations. The process will be introduced in 2016/17, ahead of the universal roll-out of the digital tax account.

The procedure consisting of a tax demand followed by appeal takes us back to the old pre self assessment days, although it is to be hoped that improved information technology will avoid the endless round of estimates, appeals and counter claims that characterised tax practice before 1995. It will be interesting to find out how often HMRC does actually get it right. Whatever the outcome, the new simple assessment will prove to be an informative forerunner to making tax digital.

Simplified payment of tax

The government is to consult on simplifying the payment of tax as part of the strategy of making tax digital. It appears that what they have in mind is to bring tax payments forward so that they are closer to the point when profits arise, and it seems they are also suggesting a regular tax payment to cover all liabilities. January and July payment deadlines may become a thing of the past.

ISAs during estate administration

Under current rules, the tax advantages of an ISA end when the holder dies. From the date of death, the provider should switch the funds to a taxed account. If this has not been done, the personal representatives must declare and pay tax on the gross income. When the investments are sold, capital gains tax is payable on any increase over the date of death value.

In Autumn Statement 2014, the Chancellor announced that the spouse or civil partner would be able to retain the tax advantages if they inherited the ISA, but it was unclear how the fund would be dealt with during the administration of the estate.

In today's Autumn Statement, he announced that legislation would be introduced in Finance Bill 2016 to allow the ISA savings to continue to benefit from tax exemption during administration. Such a measure will resolve the problem of the taxed interval when the spouse inherits the account. For other beneficiaries, the funds will still presumably become taxable investments, unless the beneficiary has unused ISA allowance. However, the provision will simplify income and capital gains tax during administration, and it is suggested that this is the prime motive for retaining the tax free status. In many cases the tax liabilities arising are insignificant.

GAAR penalties

In its consultation on Strengthening sanctions for tax avoidance the Government set out proposals for the application of new penalties in cases successfully tackled by the application of the General Anti-Abuse Rule (GAAR). The Chancellor announced today that the new penalty will be set at a rate of 60% of the tax at stake. This new penalty will be legislated for in Finance Bill 2016 along with some other minor changes to the GAAR regime in relation to marketed avoidance schemes. It is not yet clear how the new

penalty would interact with other penalties potentially in play in respect of the same tax charge, such as a penalty for failure to comply with an accelerated payment notice. Parallel legislation is likely to be needed to apply the new GAAR penalty to NIC liabilities.

Serial avoiders

Also following on from the consultation on Strengthening sanctions for tax avoidance, the Government is to introduce a series of additional measures applicable to taxpayers who repeatedly use avoidance schemes. The additional measures outlined in the consultation would apply to any individual who has received a warning notice following use of an avoidance scheme that is defeated, and would include a new reporting requirement and a surcharge on the additional tax due as a result of a failed scheme. The names of serial avoiders could be published and those who persistently abuse reliefs could face restrictions on them accessing certain tax reliefs for a period. The legislation on serial avoiders is to be included in Finance Bill 2016.

Devolution
Northern Ireland

The Government has indicated that the Northern Ireland (NI) parties are keen to pursue the introduction of an NI corporation tax rate of 12.5% from April 2018. However, this is subject to the Government being satisfied that the finances of the NI executive are on a sustainable footing and that the range of commitments entered into in the Stormont House Agreement have been met. See the Devolution of corporation tax rate-setting powers to Northern Ireland and Will Northern Ireland profit from lower corporation tax rates? news items for further background.

Scotland

The Scotland Bill is expected to receive Royal Assent in early 2016 and work on the new fiscal framework is ongoing.

Wales

The Government has committed to removing the requirement for a referendum in Wales before the Welsh Assembly can introduce the Welsh rates of income tax. The framework is in place for SDLT and landfill tax to be devolved.

Tackling offshore tax evasion

HMRC intends to target offshore evaders and the enablers of offshore evasion with both civil sanctions and criminal offences and published four consultation documents on these provisions in July 2015. It would appear that the civil penalties and criminal offence for offshore evaders and the civil penalties for enablers of offshore evasion will be included in Finance Bill 2016 but it is unclear when the criminal offence for enablers will be legislated.

Indeed it is the criminal offence for enablers of offshore evasion that will be of most concern to advisers. Example 5 in Chapter 3 shows how accountancy firms could be within the scope of this offence, which is likely to apply to all UK taxes but may also apply to UK-based firms whose employees / agents facilitate tax evasion in other jurisdictions.

However it is clear HMRC believes that, given the existing requirements under anti-money laundering regulations and anti-bribery legislation, many firms will have robust internal procedures and policies in place to demonstrate that they took reasonable steps to prevent their employees or agents from criminally facilitating tax evasion.

Historic offshore non-compliance

There is to be a consultation on a new penalty regime to encourage individuals to correct any historic offshore non-compliance. As HMRC already has the framework to collect UK tax due on historic taxable income and gains it may be that this is to ensure the individual complies with the administrative rules of the relevant overseas jurisdictions.

High risk promoters

As expected, and further to the changes to the 'promoters of tax avoidance schemes' rules which were legislated in FA 2015, Sch 19, there are to be amendments introduced by Finance Bill 2016 to widen the regime to include "promoters whose schemes are regularly defeated". This follows the proposals in Chapter 6 of the consultation document published in July 2015.

Business Taxation

Profit extraction and exits for company owners

There was no further commentary with respect to the Summer Budget 2015 announcement regarding the increase in dividend tax rates and the dividend allowance due to apply from April 2016, so the expectation is that these will be introduced in the Finance Bill 2016 as previously announced.

Interestingly, the announcement at Summer Budget 2015 that the government will consult on the rules concerning company distributions now includes narrative that they will amend the Transactions in Securities rules and introduce a targeted anti-avoidance rule to prevent income being converted into capital. Will this impact retained profits extracted on an exit or liquidation? It is unlikely to impact arm's length transactions, but we eagerly await the consultation details, as this could really impact business confidence and entrepreneurship if more uncertainty or cost enters this area.

Averaging of profits for farmers

Following consultation, the averaging period will be optional and self-employed farmers will be able to stick with the two-year period or extend to a five-year period from April 2016.

The two calculation mechanisms for five-year averaging were discussed in the July 2015 consultation document and their complexity may result in professional fees negating any savings made in choosing the most beneficial route.

The ability to retain the two-year option is welcome news. The two calculation mechanisms for five-year averaging which were discussed in the July 2015 consultation document were complicated and potentially time-consuming, meaning there was the risk that the professional fees incurred in working out whether the farmer should average his profits may have negated the tax and national insurance benefits of doing so.

Apprenticeships levy

As part of its strategy to see a marked increase in the number of apprenticeships offered by employers, the Government intends to introduce an apprenticeship levy, payable by large employers as from April 2017. The concept of the apprenticeship levy was first announced in the Summer Budget 2015 and was then the subject of a consultation which closed on 2 October 2015. Following that consultation, the Government has now announced that the levy will be set at 0.5% of an employer's pay bill and that it will be collected via the PAYE system. As explained in Annex B of the response to the consultation, the measure of an employer's pay bill is to be determined by reference to the total amount of earnings paid to the employer's employees - it will not include benefits in kind.

To ensure that the levy is effectively targeted at the largest employers, there is to be a threshold of £15,000 before any payment will have to be made. This means that at the rate of 0.5%, only those employers whose pay bill is £3m or more will actually contribute.

The apprenticeship levy will apply to employers across the UK. In England, the funds that the levy generates (along with potential top-ups from Government) will be administered through a digital account which all employers will be able to access to meet apprenticeship training needs with approved

training providers. Different rules may apply to how the apprenticeships funds may be used in Scotland, Wales and Northern Ireland as skills policy is a devolved matter.

The Department for Business, Innovation and Skills, and its counterparts in the devolved administrations will be engaging with employers and stakeholders on the development of the systems under which employers can access apprenticeship funds and the rules for how those funds may be applied.

Legislation on the imposition and collection of the apprenticeship levy is to be included in Finance Bill 2016.

Automatic enrolment for pensions

The obligation to automatically enrol employees in a workplace pension already applies to employers with more than 30 employees and will apply to all employers by 1 April 2017. The minimum rates of pension contributions required under the automatic enrolment regime start off at a low level but are set to rise in two steps, with those increases currently scheduled to be applied on 1 October 2017 and 1 October 2018.

The Chancellor announced today that the dates for those increases in minimum contributions will be delayed to April 2018 and April 2019, respectively.

Corporation tax on loans to participators

The Government has confirmed that Finance Bill 2016 will contain legislation to prevent a charge to corporation tax from arising on loans or advances made by close companies to charity trustees for charitable purposes. The measure will apply to loans or advances made on or after 25 November 2015. Charities do not need to account for the corporation tax charge that could arise between this date and Royal Assent to Finance Bill 2016. However, charities should be aware that they will be liable for the charge in line with the current legislation if this measure is not ultimately approved by Parliament.

Capital allowances and leasing

Two anti-avoidance measures relating to capital allowances and leasing are coming into effect immediately, ie for transactions taking place on or after 25 November 2015. The new rules have been introduced to counter schemes that have been revealed to HMRC under the disclosure of tax avoidance (DOTAS) rules.

The first measure seeks to counteract the manipulation of disposal values, which in turn leads to excess capital allowances being claimed.

The existing legislation in CAA 2001, s 215 restricts the capital allowances available in transactions that have an avoidance purpose. The measure announced today broadens the scope of this rule, so that it applies where the purpose of the relevant transaction or scheme is to enable a company to obtain a tax advantage in the form of a reduced balancing charge or an increased allowance. Where the relevant conditions are met, the disposal value is to be adjusted on a just and reasonable basis by reference to the payment received. The term 'payment' is widely defined and includes any form of value receivable.

The second measure is intended to counteract arrangements that generate non-taxable consideration received in return for agreeing to take over tax-deductible lease payments. Anti-avoidance legislation

that relates to leasing transactions is already contained in CTA 2010, Part 20; however, HMRC does not consider the scope to be wide enough to catch the disclosed schemes. The new legislation will ensure that the company will be chargeable to corporation tax on any consideration received when taking over lease payment obligations.

Related parties, partnerships and intangible assets

Draft legislation has been published today that intends to counteract current arrangements involving intangible assets, partnerships and LLPs, by clarifying when intangible fixed assets (IFAs) held by a partnership come within the IFA rules.

In order to be taxed under the IFA regime, the asset must be created or acquired from a person that is not a related party, by a company on or after 1 April 2002. Assets falling outside the IFA regime are taxed under the chargeable gains regime. The application of the related party rule is unclear in respect of partnerships. Further details on the current IFA regime can be found in the Intangibles -- old or new regime guidance note.

Prior to the changes announced today, the arrangements enabled a corporate member of a partnership to circumvent the related party rules to obtain a deduction under the IFA regime when establishing the profits of a corporate member; however, HMRC considered the asset should be taxed under the chargeable gains regime. The related party definition has now been widened by including the participation test in the transfer pricing legislation. Transfers will also be treated as taking place at market value.

The legislation will apply to transactions involving IFAs that take place on or after 25 November 2015. The changes will also apply to accounting debits or credits accruing on or after 25 November on a time apportionment basis, where the transaction had already taken place prior to this date. It would appear that HMRC is seeking to prevent any future benefit from being achieved where planning has already been implemented.

The Government has announced that it will also consider a review of the IFA regime as part of the Business Tax Roadmap, due to be published in April 2016.

Encouraging large business tax compliance

Following consultation earlier this year, the Government has confirmed that legislation will be included in Finance Bill 2016 to introduce the following measures:

- a new requirement for large businesses to publish their tax strategies in so far as they relate to UK taxation
- a new regime aimed at businesses that persistently engage in aggressive tax planning
- encouraging cooperative compliance

Loan relationships

Several amendments have been made to the loan relationships regime recently. The latest changes relate to the clarification of the relationship between tax and accounting, the introduction of a regime-wide anti-avoidance rule, and the introduction of a new corporate rescue relief (F(No 2)A 2015, s 31 and

Sch 7). The Government has announced that it will include legislation in Finance Bill 2016 to update the rules relating to loan relationships and derivative contracts so that it interacts correctly with new accounting standards in three specific circumstances. Further details are not yet available.

Relief for museums and galleries

The Chancellor announced that further support will be provided to museums and galleries that develop creative new exhibitions and display their collections for wide audiences. Further details have not been provided, however a consultation will be launched to gather opinions from interested parties. Given the introduction of other creative sector tax reliefs in recent years, it is possible that the future relief made available to museums and galleries will be structured in a similar way, although this remains to be seen. See the Television tax reliefs - key provisions and Video games tax relief -- key provisions guidance notes for further details of the existing creative sector regimes.

Deductions for grass-roots sports

A consultation will be published at Budget 2016 that will set out the Government's proposals for providing corporation tax relief for contributions to grass-roots sports.

Previously announced measures

A number of measures have been previously announced and these are set out below.

Hybrid mismatch arrangements

The OECD published the final package of 15 reports constituting its Base Erosion and Profit-Shifting (BEPS) action plan on 5 October 2015. Action 2 deals with the effects of hybrid mismatch arrangements. Broadly speaking, these arrangements exploit differences in the tax treatment of an entity or instrument under the laws of more than one tax jurisdiction, to achieve double non-taxation or a prolonged deferral of tax. The UK Government entered into a consultation process, which closed in February 2015, in order to shape the UK legislation required to bring the OECD's recommendations into effect. As previously announced, it was confirmed today that the legislation will apply from 1 January 2017. Draft clauses are expected in Finance Bill 2016.

Company distributions

As announced at Summer Budget 2015, the Government will consult on the rules concerning company distributions.

However, the Autumn Statement documentation includes further information as to the Government's thinking. It appears that the transactions in securities rules will be amended and a targeted anti-avoidance rule will be introduced to prevent income being converted into capital.

It is possible that this will impact profits retained in the company which can be currently extracted as capital on an exit or liquidation. Legislation is expected in Finance Act 2016 so it is hoped that more detail will be available in December 2015.

VAT

The Chancellor did not announce any significant changes with regards to VAT in the Autumn Statement. The changes that were announced are as follows:

VAT on sanitary products: equivalent donation for women's charities

The government announced that it has created a new fund that will make available £15 million a year (equivalent to the annual VAT collected on supplies of sanitary products) to support women's charities over the course of this Parliament, or until EU rules are amended enabling the UK to apply a zero-rate of VAT for sanitary products. Women's sanitary products are currently liable to the reduced rate of VAT as the government cannot currently tax these items at the zero-rate under EU law.

The government stated that it will be making an initial donation totalling £5 million to support The Eve Appeal, SafeLives, Women's Aid and The Haven. Further donations and recipients will be announced at Budget 2016.

VAT reduced rate for energy saving materials

The government announced that it will consult on legislation for Finance Bill 2016 that will ensure that the reduced rate of VAT on energy saving materials is maintained in line with EU law.

Sixth Form Colleges

As part of the government's one-off restructuring of post-16 education and training, Sixth Form Colleges in England will be given the opportunity to become academies which will enable them to recover VAT incurred on their non-business expenditure

Other recent developments

Personal Tax

Earnings and employee remuneration trust arrangements

Summary – The Court of Session found that the monies paid via Employee Remuneration Trusts were taxable under s62 ITEPA 2033

A group of companies, including Rangers Football Club, created an employees' remuneration trust for the benefit of employees and their families. The companies paid money into the trust directing the trustees to set up a subtrust for each employee. A loan facility was also made available to employees. The point in dispute was whether the payments into the trust and loan accounts should be taxed as emoluments (TA 1988, s 19(1)) or earnings (ITEPA 2003, s 62).

HMRC argued that the payments were made by the employer to the employees and were therefore subject to tax and National Insurance. They issued assessments, against which the taxpayers appealed.

The First-tier Tribunal allowed the taxpayers' appeal. HMRC were granted permission to appeal to the Court of Session.

Decision:

Lord Drummond Young, who delivered the opinion of the Court of Session, said the “fundamental principle” that emerged from previous cases on employee benefit trusts was clear: “If income is derived from an employee's services [in their capacity as] employee, it is an emolument or earnings, and is thus assessable to income tax, even if the employee requests or agrees that it be redirected to a third party.” This was “common sense”.

The judge said if the law were different an employee could avoid tax by redirecting income to members of his family to pay the bills that he would normally meet. The funds were ultimately consideration for the employee's services and, on that basis, were emoluments or earnings.

On employees other than footballers, the critical element was that bonuses were paid into the trusts on the basis of their work performance and the profitability of the employing company. The bonuses were discretionary, but were clearly based on the work carried out by each employee. The judge concluded that the payments into the trust were “a mere redirection of income” and therefore constituted emoluments.

On footballers, when a contract of employment ended, an additional side-letter provided for a discretionary trust payment and the bonus was typically negotiated by the player's agent.

Lord Drummond Young said it was “self-evident that the obligations in the side-letter were part of the employee's employment package, and provided him with additional remuneration. They were negotiated as part of the total employment package”. It followed therefore, that the payments represented emoluments or earnings of the footballer.

The judge accepted HMRC's argument that the payments made by the employer to the trust for employees were emoluments or earnings and were subject to income tax.

Further, the payments were made at the time of payment to the trustee, with the result that the obligation to deduct tax under the PAYE system fell on the employer which made such a payment.

The taxpayers' appeal was dismissed.

Comments – This is yet another stage in this saga but probably will not be the end as the Supreme Court remains the next and final stage. Lord Drummond Young spelled out the key principle - If income is derived from an employee's services [in their capacity as] employee, it is an emolument or earnings, and is thus assessable to income tax, even if the employee requests or agrees that it be redirected to a third party."

These arrangements would now of course be taxable as a result of Sch 2 FA 2011.

Advocate General for Scotland v Murray Group Holdings Ltd and others, Court of Session

Car and fuel benefits in kind - Appeal partially successful

Summary -The FTT allowed in part Mr and Mrs Jones's appeal against discovery assessments raised in respect of car and fuel benefits and also in part the appeal by the company against Class 1A National Insurance determinations in respect of the same benefits.

Southern Aerial (Communications) Ltd was a company wholly owned by Mr and Mrs Jones who were also the company's only directors. The Joneses had set up a partnership, the SAT Design Partnership (SAT), to receive fees from the company in respect of design work undertaken by Mr Jones and administrative work undertaken by Mrs Jones. The partnership also bore the costs, by way of a recharge by the company, of two cars used by Mr and Mrs Jones. HMRC raised discovery assessments on Mr and Mrs Jones charging them to income tax on the car and fuel benefits under ITEPA 2003, and issued determinations that the company was liable to pay Class 1A National Insurance contributions on the same benefits. Mr and Mrs Jones appealed the assessments and the company appealed the determinations.

Decision:

The FTT found, as facts, that:

- the company had entered into the hire purchase (HP) agreements in respect of both cars and that the company had paid the monthly HP payments and re-charged the amounts to an account with SAT;
- the use of both cars was mainly personal; and
- fuel and other running costs had been paid for by use of SAT's credit card which had been paid from SAT's bank account.

The FTT found that the commercial arrangements through which the partnership bore the costs of the monthly HP payments did not override the effect of the HP contracts and as it was the company who entered into these contracts, the company was the only person in a position legally to make the cars available. Accordingly, ITEPA 2003, s. 117 applied and the 'by reason of employment' test was presumed passed.
The FTT further found that the 'property' in the cars in the sense of ownership did not belong to the company but to the finance companies as was clear from the HP contracts. Accordingly, the making available did not transfer any proprietary right whether in the car or just rights under the HP contract. The cars were made available by the company. Therefore they were made available by reason of employment, without any property in the cars passing to the appellants, so ITEPA 2003, s. 114 applied and the appeals failed.

In the case of the fuel paid for by the partnership's credit card the FTT found that this was a credit-token within ITEPA 2003, s. 149(3)(b) which deemed it to be fuel provided for the purposes of the s. 149(1) charge to tax. However, as the liability to pay for the fuel and credit card bills fell on the Joneses (albeit in partnership), not their employer, there was no 'benefit' in economic terms which was an overriding requirement of the benefits code in ITEPA 2003, Pt. 3. Accordingly, the FTT noted that even if they had not so found, they would have allowed the appeal in respect of the Class 1A determinations (alone) because the SSCBA 1992 s. 10ZA imposed the liability on the person who provided the fuel, which in this case was SAT not the company on whom the determinations had been made.

Therefore, the discovery assessments under the *Taxes Management Act* 1970, s. 29 and the decisions under the *Social Security Contributions (Transfer of Functions, etc.) Act* 1999, s. 8 were to be reduced by the amounts relating to the fuel benefits.

Comments - Mr and Mrs Jones had set up a partnership to hold cars for the Joneses outside their company with a view to avoiding income tax under the car benefits code in ITEPA 2003 and Class 1A NICs. This case examines the operation of ITEPA 2003, s. 114 and whether cars are 'made available by reason of the employment', including the irrebuttable presumption in ITEPA 2003,s. 117 that cars are so made available when made available by the employer. This case also considered the relevant case law including, in particular, the Court of Appeal decision in the joint cases of Wicks v Firth (HMIT); Johnson v Firth (HMIT) in 1982

Southern Aerial (Communications) Ltd & Ors TC4692

UK source interest on which UK tax was deductible at source

Summary - The UT has confirmed that both taxpayers in this appeal had received UK source dividends on which UK income tax was deductible at source.

The issue in both appeals was whether the interest paid on cross-border loans arose in the UK, so that the payer was under an obligation to deduct UK tax when making the payment and to account for the tax to HMRC under s874 ITA 2007.

Decision:

The UT highlighted that *Westminster Bank Executor and Trustee Co (Channel Islands) v National Bank of Greece* (1970) known as the *Greek Bank* case was authority for the proposition that the source of the obligation must be ascertained by a multi-factorial enquiry.

The UT disagreed with HMRC's view that the most important factor in deciding whether UK interest has a UK source is the residence of the debtor and the location of the debtor's assets. The *Greek Bank* case did not determine any hierarchy of materiality or weight of factors.

However, in the *Perrin* case, the UT found that the FTT had been correct to give weight to the residence of the debtor and to the source of funds for payment and enforcement, which was the UK. The place where the credit was provided to Mr Perrin was not a relevant factor, and could not be regarded as the 'commercial source' of the interest.

Similarly, in *Ardmore Construction*, the FTT had been right to give weight to the residence of the debtor, which was in the UK. It was right to have regard to the substantive, and in this case actual, source of the payments, which derived from Ardmore's UK trading activities.

Furthermore, the residence of the lender and the place from which the money was lent (the place of credit) were not relevant.

Comments - The UT stated that, 'the paucity of domestic authority was a little surprising'. This comment was not surprising , given the relative longevity of the source principle in relation to the taxation of interest The only binding authority on the UT was the *Greek Bank* case.

Ardmore Construction and Andrew Perrin v HMRC UT

Profit extraction in 2015/16 and 2016/17 (Lecture P928 – 6.57 minutes)

Given that most OMB owners will see an increase in their tax burden from 2015/16 to 2016/17, advisers may wish to consider what is the most appropriate distribution strategy for their client business owners. This strategy will depend very much on the client’s personal circumstances and what levels of income he will be drawing from the company in future years, but some basic ground rules are fairly simple to develop.

These rules look at basic and higher rate taxpayers, but the principles are the same in relation to additional rate taxpayers.

The easiest way to consider the issue is by comparing effective marginal rates of tax on dividends, which are now set out for simplicity.

	2015/16			2016/17		
	BR	HR	AR	BR	HR	AR
Dividend paid	1,000	1,000	1,000	1,000	1,000	1,000
Tax credit	111	111	111			
Total	1,111	1,111	1,111	1,000	1,000	1,000
Dividend tax	111	361	417	75	325	381
Tax credit	111	111	111			
Net tax	0	250	306	75	325	381
Effective rate on net dividend	0%	25%	30.6%	7.5%	32.5%	38.1%

1. 0% < 7.5%

This rule indicates that taxpayers currently receiving basic rate dividends this year should pay additional dividends in 2015/16 if they would be liable to basic rate in 2016/17, reducing the tax charge from 7.5% to zero.

2. 7.5% < 25%

This formula identifies that dividends drawn by the basic rate taxpayer in 2015/16 should be restricted to the upper limit of the basic rate band, if they are to be liable to the basic rate in 2016/17. With a salary of £8,000 and no other income, this would restrict the total dividends in 2015/16 to £30,946.

3. 25% < 32.5%

This similarly indicates that if a taxpayer bearing higher rate on dividends were to draw additional dividends in 2015/16, he would save tax if the dividends are chargeable at higher rate in 2016/17.

4. 32.5% < 37.5%

Once again, this puts an upper limit on the additional dividends drawn in 2015/16, as if they result in the total income in 2015/16 exceeding £100,000, the personal allowance will be abated, resulting in a 50% increase in the tax charge suffered. Hence 25% x 1.5 = 37.5%. In this case, if the taxpayer has a salary of £8,000 and no other income, the maximum total dividend in 2015/16 is £82,800.

5. 0% < 25% and 30.6%

This looks at a slightly different scenario – a taxpayer who can draw dividends from his limited company, but for whom other income forms the main part of his taxable income. He is thus either a higher rate (25%) or additional rate (30.6%) taxpayer in relation to dividends in 2015/16. If his dividend needs are modest, he would be better to draw dividends in 2016/17 within the dividend allowance of £5,000 rather than drawing additional dividends in 2015/16.

Taking this further, if the total dividends drawn in the future exceed £5,000, the taxpayer is still better off than drawing the dividends in 2016/17 until the dividends forgone in 2015/16 reach the following sums:

	Higher rate taxpayer		**Additional rate taxpayer**	
	2015/16	**2016/17**	**2015/16**	**2016/17**
Dividend	21,167	21,167	25,250	25,250
Tax credit	2,407		2,806	
Taxable amount	24,074	21,667	28,056	25,250
Dividend tax	7,824	5,417	10,521	7,715
Tax credit	2,407		2,806	
Net tax	5,417	5,417	5,417	5,417

So a higher rate taxpayer could forgo dividends of up to £21,667 in 2015/16 in favour of 2016/17 (and subsequent years) and pay the same or less tax on the distribution. The equivalent amount for additional rate taxpayers is £25,250. Some clients may therefore wish to retain a debit balance on the director’s loan account rather than clearing it with dividends before 6 April 2016.

Distributable profits will restrict availability

In all of the situations considered above, the client company must have sufficient distributable profits to pay the dividends suggested in 2015/16, otherwise there is no possibility of using these ideas to reduce future tax on dividends.

Given that the dividends must be paid by 5 April 2016, it might be appropriate to invite clients to prepare their records up to date in February or March 2016 to allow the available profits for the period to date to be distributed. Some clients may not be able to take advantage of this because their record keeping is poor, but without a reasonable assessment of distributable profits there is a risk that illegal dividends will be paid.

Contributed by Rebecca Benneyworth

Interest relief restriction – domestic letting (Lecture P929 – 12.11 minutes)

At present, full tax relief is available for interest on a loan used in a property business. The funds may have been used to purchase the let property, to make major repairs, or just to fund the working capital of the property business.

From April 2017, tax relief on interest in property businesses (including single buy to lets) will be restricted so that by 2020, interest will not be an allowable expense in computing the profits of the business, but will attract tax relief at 20% as a "below the line" deduction.

The legislation is in Finance (No 2) Act 2015 at section 24, and introduces new ss 272A, 272B and 274A into ITTOIA 2005, plus similar restrictions for partnerships at 399A and 399B; the restriction also applies to trustees carrying on a letting activity. The change does not affect furnished holiday lettings. The change will be phased in as follows:

	2017/18	**2018/19**	**2019/20**	**2020/21**
% of interest allowed as a deduction (by new s 272A)	75	50	25	0
% of interest given as a relief at 20% (by new s 274A)	25	50	75	100

The effective interest deduction will therefore be:

- 2016/17 – 100%
- 2017/18 – 80% (75% + (20% x 25%))
- 2018/19 – 60% (50% +(20% x 50%))
- 2019/20 – 40% (25% + (20% x 75%))
- 2020/21 – 20% (20% x 100%)

A similar restriction applies to the cost of raising loan finance.

Where the interest charge exceeds either the taxable profit on the property business or the gross rents, the amount brought into charge is reduced to 20% of the lower of the latter two. Any interest unrelieved in the year will be carried forward for relief in future, carrying forward a gross interest cost, which will be restricted according to the rules above.

There is also a restriction to limit the relief to the individual's adjusted total income (as defined) where this is less than the total finance costs for relief. The adjusted total income for this purpose is the individual's total income less savings and dividend income, less any personal allowances available to him (new s 274A).

Illustration

Tom has income for the tax year 2019/20 as follows:

- Loss from a trade £20,000
- Rental profits (before interest deduction) £20,000.
- The interest on his borrowings related to his rental properties is £12,000.

Tom's adjusted total income for the year is:

Rental profit	20,000
Less allowable interest (25%)	(3,000)
Total income	17,000
Less personal allowance (say)	(12,000)
Adjusted total income	5,000

Gross finance costs for relief (the balance) £9,000. The relief would always be restricted to ensure that the gross finance costs for this purpose do not exceed the net property income – here £17,000. However in the absence of other income the relief is further restricted as follows:

Adjusted total income x Basic rate x Finance costs limited to rental profit

Gross finance costs

So : £5,000 x 20% x £9,000 = £1,000

£9,000

Commentary

A letting activity that has a low level of interest in relation to the borrowings will not be too badly affected, but larger property businesses using debt to expand the portfolio will find that their business model has been severely undermined.

Client scenario 1 – low gearing

Your client is a 40% taxpayer. He has purchased a buy to let property as an investment. As he has owned the property for some time, the outstanding debt on the property is relatively low. For background, this illustration is based on a current market value of £160,000, with borrowings of £50,000 at 5% fixed secured on it. The gross rents are £600 per month.

The current position is:

	2016-17
Gross rents	7,200
Repairs and other tax deductible costs (say)	1,000
Interest on mortgage	2,500
Net rental profit	£3,700
Tax at 40%	£1,480
Effective rate on actual rental profit of £3,700	40%

This tax charge will increase through the period 2017 to 2020, giving the following scenario after the change has worked through:

	2020-21
Gross rents	7,200
Repairs and other tax deductible costs	1,000
Net rental profit	£6,200
Tax at 40% on £6,200	2,480
Less interest relief at 20% on £2,500	500
Net tax liability on rental income	£1,980
Tax Increase 2017 to 2020	£500
Effective rate on actual rental profit of £3,700	53.5%

Because the gearing is low in relation to the rental income stream, this is sustainable, but the client will wish to consider whether a post tax yield of £1,720 is adequate for him. Advising him of the information above would not constitute investment advice, but would allow the client to meet with an adviser or decide for himself what is the appropriate next step.

Client scenario 2 – higher gearing

Using the same property and facts, except that the loan is treated as £100,000 at 5% fixed. This is less than two thirds loan to value, so would be the type of situation a recent purchaser might be in.

	2016-17
Gross rents	7,200
Repairs and other tax deductible costs	1,000
Interest on mortgage	5,000
Net rental profit	1,200
Tax at 40%	£480
Effective rate on actual rental profit	40%

The return is modest, as the loan interest is so high, but it currently shows a post tax return of £720 per annum.

Once the changes have worked through, the investor is a quite different position:

	2020-21
Gross rents	7,200
Repairs and other tax deductible costs	1,000
Net rental profit	6,200
Tax at 40% on £6,200	£2,480
Less interest relief at 20% on £5,000	1,000
Net tax liability on rental income	£1,480
Tax Increase 2017 to 2020	£1,000
Effective rate on actual rental profit of £1,200	123.3%

Here, the investor is suffering a post tax loss of £280 per annum, which is clearly unsustainable.

The fact is that he can only improve matters by reducing his interest cost, and he must now consider how that is to be achieved, or whether he wishes to continue to invest in this sector.

Summary – clients who are small investors

As shown above, the extent to which the interest charge dominates the rental accounts will determine whether retaining the investment is appropriate.

However, advisers must be careful not to offer solutions if they are not authorised to give investment advice.

Merely showing the client the outcomes is adequate briefing to allow the client to go away and make some decisions.

Client scenario 3 – large property portfolio

The clients are a married couple who have been running a substantial property portfolio for many years. They have not run this through a limited company due to the difficulty in obtaining finance for purchases with limited company status. Interest is quite high as a couple of recent investments are not yet producing a yield, and there is a programme of modernisation under way on some of the older properties.

Their current business structure produces the following:

	2016-17
Gross rents	600,000
Repairs and other tax deductible costs	200,000
Interest on mortgage	350,000
Net rental profit	50,000
Personal allowances (x2)	22,000
Taxable income	28,000
Basic rate tax (2 taxpayers)	5,600
Effective rate on actual rental profit of £50,000	11.2%

Both clients are actively managing the business on a daily basis, with the husband labouring on site with tradesmen when carrying out work on the properties.

They also employ one member of staff on the administration of the properties.

The position after the changes is unsustainable:

	2020-21
Gross rents	600,000
Repairs and other tax deductible costs	200,000
Net taxable rental profit	400,000
Personal allowances lost as each has income > £100,000	-
Taxable income	400,000

Basic rate tax (2 taxpayers)	12,800
Tax at 40%	94,400
Tax at 45%	45,000
	152,200
Less interest relief at 20% on £350,000	70,000
Net tax liability on rental income	£82,200
Tax Increase	£76,600
Effective rate on actual rental profit of £50,000	164.4%

Although the clients spend at least 35 hours a week on the business (and their cash return is modest) that is because they have ploughed most of their profits back into building up the portfolio, and taken risks to allow them to grow their business.

Summary – large portfolios

In this case there is the possibility of incorporating the property portfolio. Such a substantial portfolio may attract incorporation relief under s 162 TCGA allowing the properties to be exchanged at market value for shares in the company. Relief will probably be available from SDLT as these clients operate as a partnership, but this is far from certain for other individual investors. The main difficulty may be in persuading lenders to change the basis of lending to a limited company.

Contributed by Rebecca Benneyworth

Capital Taxes

Does the 10 year anniversary charge apply?

Summary – The Court found in favour of HMRC that the transfer back did not result in excluded property

Assets in the first trust, MDT, were excluded property settled by MD who was non-UK domiciled. It would have been free from the ten-year anniversary charge (IHTA 1984, s 64) had it remained in that trust. Some of it was transferred to another trust, DBJT, which had the same settlor who had become domiciled in the UK, so at that point it was no longer excluded property. It was then transferred back to MDT.

The taxpayers appealed against a determination of the ten-year charge. Barclays said the returning DBJT property had acquired or reacquired excluded property status because it had become part of the overall MDT and, when the MDT was created, MD had not been domiciled in the UK. Therefore, under s 48(3) all the property in the settlement was excluded.

Decision:

Mr Justice Mann in the High Court said it was necessary to look to the general law when ascertaining whether there had been a settlement and what it comprised. A settlement had to be made by a disposition (s 43(2)).

In this instance, when the property was returned to the MDT, MD had been the settlor because he had made the settlement of it within the meaning of s 44(1). For the purposes of s 48(3)(a), the settlement of the property was made when it accrued to the MDT. That view was "supported by logic and plausibility in overall taxation terms".

The judge said:

"The true construction of s 48(3) … requires one to look at the occasion of the settling of the property for the purposes of determining whether or not it is excluded property, and nothing else. It does not create a separate settlement for the other purposes of the Act, deemed or otherwise. The overall settlement for the purposes of s 64 remains the same."

The judge concluded that the words "the time the settlement was made" should be interpreted as describing the making of the original one and the subsequent addition of property to that settlement.

The taxpayers' appeal was dismissed.

Comments – The argument by the taxpayers had an intrinsic logic but Justice Mann followed the logic of the transaction which meant on the second transfer the protection of excluded property status was lost.

Barclays Wealth Trustees (Jersey) Ltd and another v CRC, Chancery Division

Multiple main residence claims

Summary – The First-tier Tribunal found that the farmhouse was the taxpayer's only or main residence at all relevant times and therefore the appeal failed in respect of the other properties

The taxpayer claimed only or main residence relief, TCGA 1992, s 222, on the sale of four properties during 2009/10 and 2010/11. He also owned a farmhouse which he said he used every day as part of his livestock farming business.

HMRC refused the relief on the ground that the taxpayer had failed to prove that he lived at any of the properties in question with any degree of permanence. He did, however, occupy the farmhouse permanently. They imposed penalties for the submission of inaccurate returns.

The taxpayer appealed, saying the properties were used as second residences and he made main residence claims for each of them.

Decision:

The First-tier Tribunal found that the farmhouse was the taxpayer's only or main residence at all relevant times. Although the tribunal accepted the taxpayer's definition of a second home as being a place he would rather live were it not for the farm, the judge said preference did not make a property a main residence. It was clear that one of the properties for which he claimed the relief had been let at all times.

The taxpayer's appeal was dismissed. On the penalties, the tribunal ruled that the taxpayer's behaviour had been careless rather than deliberate, and reduced them accordingly.

Comments – As stated with many previous cases involving the PPRR it must be considered carefully not just assumed. The Tribunal looked at the facts and it was obvious the claims were going to fail.

W Harrison v HMRC TC4693

Incorporation after 2014 – how best to structure? (Lecture P930 – 7.54 minutes)

The removal of entrepreneurs' relief poses a planning issue for clients who wish or need to incorporate their businesses. Paying capital gains tax at full rate on the disposal of goodwill (which must be valued at market value for the related party disposal) may serve to rob the business of available working capital and thus jeopardise its survival. Incorporation is certainly an important step in a business that seeks to continue to grow, allowing profits retained in the business for growth to be taxed at a lower rate, and providing flexibility about ownership and raising finance which is not available to the unincorporated business.

If the business is to incorporate there are three possible scenarios to consider:

1. Pay capital gains tax at full rates, introducing goodwill into the company at full market value in exchange for a credit to the directors' loan account.
2. Shelter the capital gain using relief for incorporation under TCGA 1992 s 162.
3. Shelter the capital gain using hold over relief for gifts of business assets under TCGA 1992, s 165.

Each of these will now be considered in turn, using a goodwill value of £100,000. Only the gain on goodwill is considered; there may also be a property to consider, but frequently the owner will prefer to retain the property in private ownership, so no further consideration is given to the potential tax charge in relation to the disposal of the property

Option 1: Pay CGT at normal rates on goodwill

The disposer would be liable to capital gains tax at 18% and 28%, depending on his income. However, his plan might be that he will thus create a loan account in the company on which he can draw, in preference to drawing taxable income such as salary and dividend.

If the disposer is a higher rate taxpayer (likely in the final period of trade as a successful business ready to incorporate) the tax on the disposal of the goodwill will be £24,892 (25% effective rate) assuming that the annual exempt amount of £11,100 is fully available to him. This provides a loan account balance of £100,000 for him to draw against.

He will then draw income to the extent that the marginal rate is less than 25%. In 2016/17 that would indicate drawing a salary of around £8,000 (below the NI threshold), interest at 8% on his loan account, giving £8,000 which is tax free (£3,000 within the personal allowance and £5,000 attracting the savings starting rate of zero) and dividends of £5,000 which are also tax free. This provides him with £21,000 after tax. Further dividends can be drawn within the basic rate band as they suffer tax of only 7.5% in addition to the corporation tax which will be paid in any event. Once dividends reach a total of £27,000 (total income £43,000) the director would switch and draw from his loan account, rather than bear tax at 32.5% on any additional dividends.

Illustration

The profits needed to generate dividends of £27,000 in the circumstances set out above are £49,750. This will bear tax as follows:

	£	£
Profit		49,750
Interest on loan account	8,000	
Salary	8,000	
		16,000
Taxable profit		33,750
Corporation tax at 20%		6,750
Net profit (Dividend)		27,000

Personal tax computation

Salary		8,000
Interest		8,000
Dividends		27,000
Total income		43,000
Personal allowance		11,000
Taxable income		32,000
Tax on interest at 0%	5,000	0
Tax on dividends at 0%	5,000	0
Tax at dividends at 7.5%	22,000	1,650
	32,000	
Plus corporation tax		6,750
Total tax borne on £49,750		8,400
Effective tax		16.9%

Although this is a low effective rate, the payment of 25% effective rate on the loan account balance which might now be drawn on is in addition to the tax charge above. Without the loan account (which facilitates the interest charge), but with the same profits, the tax charge would be as follows:

	£	£
Profit		49,750
Salary		8.000
Taxable profit		41,750
Corporation tax at 20%		8,350
Net profit (Dividend)		33,400

Personal tax computation

Salary		8,000
Dividends		33,400
Total income		41,400
Personal allowance		11,000
Taxable income		30,400
Tax on dividends at 0%	5,000	0
Tax at dividends at 7.5%	25,400	1,905
	30,400	
Plus corporation tax		8,350
Total tax borne on £49,750		10,255
Effective tax		20.6%

So the ability to charge interest does permit a significant reduction in the tax charge on profits, but in practice, only looking at the detailed figures, including the value of the goodwill, the anticipated level of profit and the client's desired level of income can indicate whether this is an appropriate route to take.

Although we have become used to challenges to the value of goodwill, one might expect that if tax is to be collected at 28% on the value, HMRC will welcome over-optimistic valuations. However, as illustrated here, there is still a significant advantage to those with very profitable companies in setting a high value to goodwill in spite of the tax liability it creates. It is likely, therefore that HMRC will still look carefully at goodwill valuations.

Option 2: Incorporation relief under TCGA s 162

This relief has been rarely used for many years, but may now see a resurgence as a result of the changes. However, in many situations the conditions associated with the relief make it somewhat impractical to use.

Conditions for the relief

There are three main conditions:

- All of the assets of the business other than cash are transferred to the company.
- The business is transferred as a going concern to the company which carries on the trade after the transfer.
- The transfer is wholly or partly in exchange for shares.

Where the conditions are met relief is given by rolling the gains on the chargeable business assets (in this case the goodwill) into the base cost of the shares, therefore inflating the gain on eventual sale. If

any part of the consideration is given as cash (or loan account) this produces a gain at the time of transfer, the balance of the gain being rolled over.

The amount chargeable in this case is the proportion of the gain represented by cash as a proportion of the total consideration. The assets are treated as acquired by the company at market value for the purposes of subsequent disposal.

The attractive proposition with this option is that if the shares are subsequently sold, the full gain will attract entrepreneurs' relief, thus effectively re-instating the relief on the gain related to the disposal of the goodwill.

Example – S162 relief in action

The goodwill is valued at £100,000. There is no property in the business. The value of non-chargeable assets such as tangible fixed assets, stock and debtors is £50,000. The mechanism of the relief is as follows:

	£
Total value of assets transferred	
Fixed and current assets	50,000
Goodwill	100,000
	150,000
Shares issued: 10,000 £1 shares @ £15.00	150,000
Less gain rolled over	(100,000)
Base cost of shares for future disposal	50,000

Alternatively, if a loan account credit is to be created for 25% of the proceeds (amount to the credit of loan account is £37,500):

Shares issued: 10,000 shares @ £11.25	112,500
Gain rolled over (75%)	(75,000)
Base cost of shares for future disposal	£37,500
Gain immediately chargeable (25%)	£25,000
Tax liability at 28% (after annual exemption)	£3,892 (15.6%)

Onward sale

If the shares acquired above are subsequently disposed of under circumstances where entrepreneurs' relief will apply, the following applies:

Sales price of shares (say) £20 per share	200,000
Less base cost	(50,000)
Chargeable gain	£150,000

This gain will be charged at 10%, and comprises the gain on the goodwill resurfacing of £100,000 plus the uplift in value since incorporation of £50,000.

Practical issues

The key disadvantage of this relief is that all of the assets of the business must be transferred in order for the relief to apply. This means that debtors must be transferred under deed, and if there is a business property, the owner has no option but to transfer it into the company. While this serves well if the company is to continue to own premises in the long term, clients may be reluctant for a variety of reasons to put this property into the company.

Option 3: Holdover Relief under TCGA s 165

This relief applies to disposals of chargeable assets used in the trade where the disposal is not an arm's length transaction. It is commonly used in the transfer of a business to a company, as it allows the retention of the debtors and creditors by the trader who will then "clear down" the balance sheet of the trade and allow the company to start up with a clean sheet. It will also allow the trader to retain any property used in the business, which may be necessary if borrowings are secured over it.

The transfer may be made for no cash consideration at all – in which case the company acquires the asset at the disposer's base cost, or for some cash consideration. In the latter case only the gain in excess of the cash consideration can be rolled over.

The effect of the relief is therefore to reduce the base cost of the asset in the company. Here, the liability for tax on the eventual disposal has passed with the asset to the new owner, whereas incorporation relief leaves the tax liability on the gains with the original disposer.

The condition for relief is that the asset has been used in the trade throughout its period of ownership by the transferor. The impact of the relief is as follows;

Example – s 165 relief in action

If the goodwill is transferred for no cash proceeds, the transaction works as follows:

	£
Value of goodwill (gain)	100,000
Less held over	(100,000)
Chargeable amount	NIL
Base cost to the company	NIL

If cash proceeds are included (as a credit to the director's loan account):

	£	£
Value of goodwill (gain)		100,000
Held over gain : full amount	100,000	
Less paid in cash	(25,000)	
Net held over gain		(75,000)
Chargeable amount		£25,000
Tax liability (as above)		£3,892 (15.6%)
Base cost to the company		£25,000

As can be seen, by combining cash consideration and triggering a partial gain, the disposer and his adviser have adequate opportunity to plan for the best possible outcome, particularly after taking into account the benefits of having at least some credit on the loan account to enable interest to be paid to the director and income based drawings to be managed. This is particularly relevant where the disposer has some basic rate band available in the year of disposal, reducing at least part of the tax charge to 18%, or indeed capital losses to be used.

However, transferring a capital gain into a company, where if it is to be realised as funds in the taxpayer's hands is not a sensible option. Tax will be borne twice to turn the proceeds into cash in the hands of the owner. For some owners, the additional corporation tax on the disposal of the goodwill presents an unattractive outcome for onward sale. It is fair to say that if the business is disposed of subsequently, purchasers are still more likely to opt to purchase assets rather than shares (in spite of the removal of tax relief on purchased goodwill – see above) and the s 165 route to incorporation would therefore resent a much higher tax charge. However, there are many businesses where a third party sale is unlikely, and therefore the additional tax is unlikely to arise.

Contributed by Rebecca Benneyworth

Administration

Jurisdiction agreed in appeal over reasonable excuse

Summary – The Upper Tribunal found that the FTT had jurisdiction over the determination of a reasonable excuse.

The taxpayer submitted her 2006/07 self-assessment return on 14 January 2008. It showed a tax liability of about £18,000. The taxpayer believed the amount due was the result of a mistake but, instead of amending her return under TMA 1970, s 9ZA, she claimed repayment under TMA 1970, Sch 1AB in October 2011. HMRC rejected the claim as out of time.

The First-tier Tribunal said the matter did not fall within its jurisdiction because the claim had been made outside the statutory four-year time limit. The taxpayer appealed.

Decision:

The Upper Tribunal said that the letter of 13 October 2011 could not constitute a claim in time and could not therefore constitute one under Sch 1AB unless s 118(2) applied with the effect that it was treated as having been made in time.

On this, the judge considered that nothing on the face of s 118(2) indicated that the words "required to be done" should be limited to mandatory acts and must exclude voluntary ones. However, for an act to be valid, there was a requirement that it be done by a certain time or in a particular way. He decided that s 118(2) could therefore apply to a claim made under Sch 1AB.

The court concluded that, if the taxpayer had a reasonable excuse for not filing a claim within the time limit and made the claim without unreasonable delay after the excuse had ceased, s 118(2) would deem her claim to have been filed within the relevant time limit so that the appeal could fall within Sch 1A.

The First-tier Tribunal had jurisdiction to decide this point.

Finally, referring to *Portland Gas Storage v CRC* [2014] STC 2589 (a case concerning stamp duty land tax) the judge noted that the opening and closing of enquiries did not require any formalities, although that case did not consider whether one document could open and close an enquiry. He said the legislation did not specify a minimum length of time between the opening and the closing of an enquiry. As a result, a single letter may constitute, in substance, both the opening and the closing. This was the case with the letter sent by HMRC to the taxpayer informing her that the claim had been reviewed and rejected. The case was remitted to the First-tier Tribunal. The taxpayer's appeal was allowed.

Comments – This case confirms that the concept of 'reasonable excuse' could extend to a delay in making a claim. This may prove to be helpful to many taxpayers in future. It is worth noting that a single letter can constitute both the opening and the closing of an enquiry. It will therefore be possible for the taxpayer to appeal HMRC's decision.

Dr Vasiliki Raftopoulou v CRC, Upper Tribunal

Costs awarded in part in FII Group litigation

Summary – The High Court examined the question of costs in this litigation saga.

The saga of the *Test Claimants in the FII Group Litigation* continued in the High Court when it was asked to consider the question of costs of the liability proceedings in the High Court and the Court of Appeal.

Decision:

The High Court held that, considering all the circumstances, HMRC should pay the test claimants 75% of their costs of the first reference to the Court of Justice of the EU and 65% of those arising from the liability proceedings in the High Court and the Court of Appeal.

The judge said it was legitimate to treat the Court of Justice of the EU costs separately because the decision had laid the crucial foundations for the successful claims subsequently established.

On the other court costs, the judge said "an enormous amount has happened over the last six years, and the court is now immeasurably better placed to form a just estimate of how the costs of the liability trial should be borne".

Comments – The decision is self-explanatory.

Test Claimants in the FII Group Litigation v CIR and another, Chancery Division

Judicial review and tax appeals

Summary - The Upper Tribunal upheld the FTT decision striking out part of proceedings in Shiner TC 3505. The UT found that the Court of Appeal decision in R (on the application of Shiner) v R & C Commrs in 2011 was binding on the FTT.

The appellants had entered into a tax avoidance scheme which involved claiming an exemption from income tax under ITTOIA 2005 s858. HMRC had issued closure notices denying the exemption. The taxpayers appealed the closure notices but had initially applied for judicial review that the retrospective application of s58 FA2008 was incompatible with art. 56 of the European Community Treaty. That claim had been heard and dismissed by the Court of Appeal (R (on the application of Shiner) v R & C Commrs. The Supreme Court had further refused the taxpayers' application for permission for onward appeal. HMRC applied to the FTT to have that part of the taxpayers' case struck out of the appeal proceedings.

The FTT granted HMRC's application and struck out from future proceedings the part of the appellants' case relating to the incompatibility of FA 2008,s58 with European law. The point of law had already been aired and concluded on by the Court of Appeal by judicial review. It was binding on the tribunal and it would be an abuse of process to allow the point to be relitigated.

The appellants appealed to the UT on the basis that:

1) The Court of Appeal decision was not binding as a matter of *stare decisis* (the doctrine of precedent). On this issue the appellants submitted that:

a) The decision of the Court of Appeal was a decision of fact, and not a proposition of law within *stare decisis*.

b) The decision of the Court of Appeal was not binding in these circumstances, especially where a subsequent decision of the ECJ points away from it.

c) Insofar as the Court of Appeal determined questions of law, such decisions could be taken again in a lower court or tribunal because it could be shown to be inconsistent with subsequent decisions of the ECJ, it was reached *per incuriam* (i.e. incorrectly) because existing ECJ cases were overlooked, and a lower court could, even when faced with a decision of the Court of Appeal which was apparently binding, nonetheless take the view that the point required a reference to the ECJ.

d) If any of those points were right then it could not be abusive of the process to raise the art. 56 point in the appeal because there was a genuine possibility that the result in the FTT might be different. Furthermore, the different nature of judicial review proceedings (in particular the absence of a fact-finding function), the nature of the FTT jurisdiction, the fact that there were other similar cases in the pipeline which would raise the points anyway were other reasons for the FTT appeal on this point not to be an abuse.

2) In the circumstances it was not an abuse to seek to run the art. 56 point again in the tax appeal.

Decision:

The UT found the argument that the Court of Appeal decision was a finding of fact and not a finding of law to be wrong; the finding was a conclusion of law on the facts before the court.

On the issue of abuse of power (i.e. that the appellants should not be allowed to re-litigate the issue) the UT referred to principles stated by Lord Bingham, in Johnson v Gore Wood & Co [2002] 2 AC 1.

The UT found that the mere fact that the appellants took their art. 56 point in the Court of Appeal did not automatically mean that they could not take it again in this appeal. The issue was broader than that and had to weigh all the circumstances and consider the justice of allowing or not allowing a second attempt to challenge HMRC's decision to deny exemption. The appellants put forward several arguments of why an appeal to the FTT was not an abuse in *Johnson* terms, but the UT concluded that there was no ground for supposing that an appeal, if allowed, would reveal that there were or might have been sufficient grounds for questioning the Court of Appeal judgment so as to justify a reference to the European courts. The appellants were not entitled to run what would otherwise be a hopeless or abusive appeal in the hope that something would turn up. In the light of the authorities and principles identified they must establish there is a realistic prospect of establishing grounds for referring, and in the light of the previous decisions of the Court of Appeal and Supreme Court the UT did not consider that there was. In those circumstances the prospect of there being such a reference did not save the appeal from what would otherwise be the conclusion that it is an abuse of process.

The appellants also argued that: for the strike-out application to fail they only had to establish that one or more of their bases was arguable; the Court of Appeal appeared to incorrectly have said that there was no movement of capital; and the Court of Appeal reached its conclusion on the basis of inadequate

facts (and further facts would be put forward on an appeal). The UT found that: the 'arguability' point was wrong; the Court of Appeal did not decide that there was no movement of capital, but that there was no movement of capital affected by the interaction of art. 56 and FA 2008, s. 58; and although if an appeal was allowed to be heard the evidence would have included material not before the Court of Appeal, given that the strike-out application was made before the factual points were fully defined it was impossible to say that the facts were materially different.

The appeal was dismissed.

Comments - HMRC had applied to have part of the taxpayers' case struck out on the basis that the particular argument had already been the subject of judicial review before the Court of Appeal and in respect of which the Supreme Court had refused the taxpayers' permission for onward appeal. Given this affirmation of the FTT's decision to strike-out the relevant part of the case, the taxpayers' appeal against the closure notices issued by HMRC to counter a tax-avoidance scheme may now proceed minus their argument that FA 2008, s. 58 is incompatible with EU law. It would have been an abuse of process to allow the appellants a second attempt to challenge the issues which had already been the subject of judicial review.

Ian Shiner & David Sheinman v HMRC UKUT 596

Fine balance on the question of discovery assessments

Summary – *The Upper Tribunal overturned the FTT decision on discovery assessments - The UT found that the FTT had made an error of law and the FTT should have allowed the appeals.*.

HMRC had raised discovery assessments on Brimheath for the accounting periods ended 30 November 1999 to 2008, apart from 2000. They had also raised discovery assessment on Mr Burgess, the sole director and shareholder of Brimheath, in relation to his self-employment as a sole trader, trading as M J Bradleys, for the years 1996/97 to 1999/2000.

The First-tier Tribunal upheld the assessments apart from that for the period ended 30 November 1999. The taxpayers appealed on the basis that the tribunal had not dealt with the competence and time limits or, if it had done so, the conclusions it reached were based on applying the burden of proof incorrectly.

Decision:

The Upper Tribunal said it was common ground that the burden of proof on the substantive issues rested with the taxpayers and that on validity and time limits with HMRC.

It found that the First-tier Tribunal had considered the substantive issue only and made no findings on whether the assessments were valid under TMA 1970, s 29 and s 36(1A) or FA 1998, Sch 18 para 41 to para 43 and para 46. In so doing, the First-tier Tribunal had erred in law. It was not that it had failed to address a relevant issue, it was that, in the absence of a positive case put by HMRC, the First-tier Tribunal had erred in law "in not finding that HMRC had failed to discharge the burden of proof in those respects such that the assessments could not be regarded as having been validly made".

The First-tier Tribunal's decision was set aside. But the judge said to remit the appeal to the First-tier Tribunal "would allow HMRC to have a second bite of the cherry" and that would go against the interest of justice and fairness.

The judge added that the result might appear unsatisfactory because the taxpayers had "seriously understated their income over an extended period" and taxable income would remain untaxed. On the other hand, parliament had ensured that there was a balance between HMRC and the taxpayer. Part of that balance, in the case of discovery assessments, was that HMRC had to show the conditions for making them were met. Should they not have been met, the taxpayer might escape paying tax, but it was "not for this tribunal to seek to achieve any result other than that prescribed by law".

The assessments were reduced to zero and the taxpayers' appeals allowed.

Comments - The UT recognised that its decision may appear unsatisfactory, as each appellant had been found by the FTT to have seriously understated their taxable income, and as a result of this decision that taxable income would remain untaxed. However it had to be recognised that the assessment system is designed to provide a balance between HMRC and the taxpayer, with part of that balance being that HMRC have to satisfy the FTT that the relevant conditions for discovery assessments to be validly made have been met. In this case HMRC failed to do this and therefore the taxpayer escaped tax.

M Burgess; Brimheath Developments Ltd v CRC, Upper Tribunal

Unreasonable demand – Special relief

Summary – The taxpayer's appeal against HMRC's refusal to allow special relief was allowed

The taxpayer was late submitting his 2006/07 self-assessment tax return. In the meantime, HMRC determined tax of £17,121, imposed self-assessment late-filing penalties and surcharges for late payment of tax.

HMRC accepted that the actual tax liability for the year was £325.71 but said the taxpayer was out of time to challenge the determination.

The taxpayer claimed special relief under TMA 1970, Sch 1AB, on the ground that it would be "unconscionable" under para 3A(4) for HMRC to recover the amount of £17,121 they said was owed.

Decision:

The First-tier Tribunal said its jurisdiction was limited to considering whether HMRC's decision had been unreasonable. This had to be done in light of the information that was available to the officer at the time and could not take into account evidence that had become available afterwards.

The tribunal and HMRC agreed that the definition of "unconscionable" included the words "unreasonably excessive". The judge noted that the tax claimed by HMRC was substantial in absolute and relative terms, being some 52 times the amount for which the taxpayer was actually liable. Further it was two-and-a-half times the taxpayer's self-employed income for the period.

It was "incumbent" on HMRC to consider whether the substantial excess was unreasonable, but they failed to do so.

The judge said the department had given the taxpayer's adviser's representations no consideration and this rendered its decision "so outrageous that no reasonable decision-maker could have reached it".

The judge went on to say that, in failing to explain the reasons for its decision to the taxpayer, HMRC had acted against the taxpayer's charter which included the statement that HMRC will "make decisions in accordance with the law and published guidance and explain them clearly to you".

The taxpayer's appeal against HMRC's refusal to allow special relief was allowed and the tax reduced to £325.71. However, the tribunal decided the taxpayer had no excuse for failing to submit his 2006/07 tax return on time and upheld the late-filing penalties.

Comments - The FTT noted that it is almost inevitable that all cases involving a claim for special relief will involve a numerical disparity between the amount determined and the amount actually due. Where the reviewing officer fails to give adequate reasons to their decision that an amount determined is reasonably excessive (and so conscionable) HMRC run the risk of having that decision overturned by a tribunal.

The FTT also pointed that not providing reasons for a decision is discourteous and goes against the Taxpayer's Charter which says that taxpayers can expect that HMRC will 'make decisions in accordance with the law and published guidance and explain them clearly to you'

M D Montshiwa v HMRC TC4701

Cash flow problems do not form the reasonable excuse

Summary – The tribunal concluded that the taxpayer did not have a reasonable excuse for the late payment

The taxpayer suffered cash flow difficulties from 2010/11 and, during that year, was unable to pay the PAYE and National Insurance due. A time-to-pay arrangement was set up, but later cancelled by HMRC. This was on the ground that the taxpayer had broken it by spending money on its business rather than paying HMRC. They lodged a winding-up petition on the company, but this was later dismissed. By February 2012, the taxpayer had paid the outstanding tax and National Insurance.

HMRC imposed penalties under FA 2009, Sch 56 for the late paid tax. The taxpayer appealed. It said it had reasonable excuse because of the length of time to reach a settlement in connection with alleged illegal action by local authorities to comply with procurement law.

Decision:

The First-tier Tribunal said it was clear that the taxpayer had cash flow problems in the period, but other creditors and staff were paid. The fact that HMRC remained unpaid suggested to the tribunal that the taxpayer “was being selective in deciding which creditors to pay”.

The local authorities' actions contributed to the cash flow problems, but these were long-term issues and a reasonable trader would realise that they would not be settled quickly.

The tribunal concluded that the taxpayer did not have a reasonable excuse for the late payment and dismissed the appeal.

Comments – This case demonstrates the importance of making a time to pay arrangement and then ensuring that the terms of the arrangements are kept.

Bromcom Computers plc v HMRC TC4691

Business tax

Extending Samadian principles (Lecture P927 – 11.27 minutes)

The last time I wrote about the case of *Samadian*, ('Wholly inarticulate', *Taxation*, 6 February 2014, page XX) I expressed the hope that it might lead to a revision of the rules for self-employed travel expenses, just as *Elderkin v Hindmarsh* [1988] STC 267 did for the employed. Since that seemed unlikely, I was really hoping that a subsequent case would come along and limit the impact of the case. Unfortunately the reverse has happened; there have been two more cases that have confirmed and possibly even extended it.

The first of these was *N White* (TC3354), where a self-employed flying instructor was denied a deduction for traveling from home, which he claimed as the base for his business, to the two airfields from which he flew with pupils. Since this was almost directly analogous to Dr Samadian's claim, also refused, for travel expenses to the two hospitals where he met patients, it was perhaps not too surprising that Mr White also failed in his claim. Anecdotally, however, it seemed that many doctors were waiting for a further medical case to see if *Samadian* was an aberration. Well, now there has been one, and it is not.

Below, I have first set out the facts and rationale for the decision in *Dr David Jones* [2015] UKFTT 477. I have then, in what is undoubtedly a futile exercise, explained why I still think this whole line of reasoning is misconceived and not in line with the relevant Court of Appeal authorities. Finally I have looked at what the implications are on the basis that this decision does not get overturned.

The facts

Dr Jones was a consultant anaesthetist. He lived some 20 miles from Newport, where the hospital he normally worked in as an NHS employee was situated, the Royal Gwent Hospital. He also had a private practice, mainly at the same Royal Gwent Hospital and at St Joseph's, another Newport hospital. Occasionally he also practised at three other hospitals in and around Newport; however he never travelled directly between home and these hospitals, only to and from one of the other hospitals. HMRC accepted that travel between hospitals when he was working at both in his private practice was deductible.

Unlike Dr Samadian, who used to attend the two hospitals where he worked on fixed days of the week renting consulting rooms by the hour where he could meet his patients, Dr Jones had no consulting rooms at the hospitals, and indeed no direct connection with them at all.

He was booked to be the anaesthetist for a particular operation by one of a large number of surgeons with whom he worked, and the hospital arrangements were dealt with by the surgeon who booked him. He had no regular pattern of work; he might do two operations in the same day, on consecutive days, or on one occasion 27 days apart. His counsel submitted that these were significant differences between the facts in his case and those in *Samadian*, and that he should therefore be able to claim his travel expenses from home or his employment and the hospitals where he was working privately. It should be said that HMRC accepted there was no attempt to claim travel to the Royal Gwent for the purposes of his NHS employment.

Decision

Unfortunately, the tribunal disagreed. It took as its starting point a statement from Mr Justice Sales in the Upper Tribunal judgment in *Samadian* [2014] STC 763 that travel expenses between a home and a

place of business were only allowable in exceptional circumstances, even when the home itself was also a place of business – for example, hypothetically realising once at the hospital that the patient's notes had been left at home, and going back to get them. This is on the basis that travel between home and workplace will always reflect in part the decision to live in a different location from the workplace.

The tribunal in Dr Jones' case therefore did not consider the differences relevant. Neither the fact that Dr Jones did not hire consulting rooms, even on a temporary "name on the door" basis, nor that he was a subcontractor to a surgeon rather than working directly for the patients he was treating, made any difference.

The tribunal accepted, as was also the case in *Samadian*, that Dr Jones had a "place of business" at his home. It expressed the test of deductibility as whether "there was a pattern of regular and predictable attendance to carry out significant professional functions as more than just a visitor." This would be sufficient to distinguish the Court of Appeal decision in *Horton v Young* [1972] Ch 157 where a self-employed bricklayer was held to be an itinerant worker operating from his home, and therefore could claim travel expenses to the sites at which he worked during the year.

Applying this test to the facts, the tribunal held that the number of journeys to the two hospitals from home in the year, approximately 100 round trips to one and 50 to the other, were sufficient:

> "The simple number of journeys in the space of a year to just two locations strongly indicates a pattern of regular and predictable attendance. The fact there is a range in the number of days between operations across the year does not, in our view, disturb the pattern, particularly as the length and timing of the longer 'gaps' are consistent with the taking of holidays in the normal course of professional life."

Wrong in principle

As I indicated earlier, I cannot resist the temptation to try once more to explain why this is wrong, and inconsistent with the distinction drawn in the two Court of Appeal authorities that we have; the aforementioned *Horton v Young*, which distinguished *Newsom v Robertson* (1952) 33 TC 452. Since *Newsom* was the earliest case, it should be considered first.

Mr Newsom was a barrister, with chambers in London and a home in Whipsnade. Put simply, his claim was that he could claim the costs of traveling between the two because he worked at home as well as at chambers.

The three judges in the Court of Appeal found unanimously against the taxpayer, but none of the judges entirely adopted the reasoning of either of the others. It is Lord Justice Somervell's reasoning that is picked up most clearly by *Samadian* – there was a dual purpose of getting home at night or leaving the home that he had returned to the following morning. This was not a business purpose. However, the judge also distinguished the situation where there were two separate offices from which the business was genuinely run, and where traveling between them would be allowable. That did not apply because chambers "remained his professional base."

Lord Justice Denning, concentrates entirely on this latter argument. He looks for the base, or bases, of Mr Newsom's business, and finds that Whipsnade is not such a base, albeit that some work is done there. The base of his business is chambers, and thus traveling to chambers is not a business expense.

While Lord Justice Romer picks up the point that travel to and from home has a dual purpose, he also re-emphasises the deductibility of travel between two genuine places of business. However, for Romer the

most important point is that there was no *need* to go to Whipsnade to work – the whole practice could have been carried on from chambers, but it could not have been carried on from Whipsnade.

Lord Denning (as he was by then) was also one of the judges in *Horton*, and drew on his judgment in *Newsom*. He searched again for the "base of business" and said that it was Mr Horton's home where he kept his records and entered into contracts, rather than the various building sites on which he worked, which counsel for the Revenue argued became successive bases of business as he moved from one to another.

Crucially, both Lord Justices Salmon and Stamp (and a more impressive bench it is hard to imagine) begin their judgments by saying "I agree" with Lord Denning. The ratio of *Horton* is therefore that traveling expenses are allowable when traveling from the place, or if more than one, one of the places, where a business is based to either another base of the business or another place where the activities of the business are undertaken.

The judgment in *Samadian* and now in *Jones* tries to limit this to "itinerant" trades. It is worth saying that the word "itinerant" only occurs in Lord Justice Stamp's judgment, where he disagrees with using this as a distinguishing factor. In fact the ratio is one which applies just as well to *Newsom* as it does to *Horton* – in the former the single base of business was chambers, in the latter the single base of business was Mr Horton's home. Unfortunately in *Samadian*, Mr Justice Sales says that "The statutory 'wholly and exclusively' test does not depend on identifying a single base of business, though in some circumstances it might be useful to do so to assist in the application of the test." This is then picked up in Jones: "Our analysis follows the UT's guidance in *Samadian* in not seeking to identify a single base of the appellant's business, given our finding that the appellant had multiple places of business." Quite how the Upper and First-tier Tribunals consider that they can ignore a ratio set out so clearly and unequivocally by Lord Denning and agreed to by Lord Justices Stamp and Salmon is beyond my powers of understanding.

The description in para 37 of Jones of *Horton* as "the single case to have held that travel expenses of journeys from and to a taxpayer's home to be deductible" (sic) could charitably be termed misleading – in fact, so far as I am aware, *Samadian* and the cases that follow it are the first to hold that such expenses are not deductible except where there was a clear and single base of the business that was not the home.

The absence of other cases deciding this simply reflects the fact that it has not been challenged by the revenue authorities until recently. For example, although it was not the point at issue, it is clear from the judgment of Lord Justice Nolan in *Hall v Lorimer* [1994] 1 All ER 250 that Mr Lorimer's expenses included the maintenance of a home office and "the cost of running his car or otherwise travelling in the course of his work" even though he carried out almost all his billable work at one studio, Molinaire. If *Samadian* is right, Lorimer should not have been claiming those expenses, as Molinaire is a place of business and they are therefore home to work travel.

The future

That, however, is a matter for a future appeal if there is one. For now, advisers need to interpret the judgment as best they can, and distinguish the travel expenses that are allowable from those that are not.

Perhaps the most helpful part of the judgment in *Jones* is para 75:

"Mr Wright is right that the appellant's position (viz his instructing surgeons) made it possible that the surgeons would ask the appellant to work at a wide variety of different locations, and the appellant would accept such offers of work; and if such a scenario came to pass, the appellant might well not satisfy the criterion of having a pattern of regular and predictable attendance at any particular location."

The problem is in determining what such a pattern would look like. Clearly it should involve less than weekly attendance, given that the one hospital to which Dr Jones went 50 times in the year was a place of business. Exactly how infrequently is hard to know. It is unfortunate that the other hospitals were never attended direct from home, but it is perhaps relevant that there were 123 single journeys in total between St Woolos hospital and other hospitals, yet these were allowed.

The other element of this area which has yet to be tested is whether the same rules apply when visiting the client's own premises. All of the cases so far have been where the location treated as a place of business of the taxpayer is "third party"' a place in which neither the client nor the taxpayer has a property interest. As such, at present the decision is comparatively limited in scope, and will probably affect the medical profession more than most others.

There is, however, little in the reasoning that suggests the decision turns on this distinction. If it does not, and if HMRC take a case on it in future, all those who are self-employed and who work at the premises of their clients on a regular basis could have a problem.

Paradoxically, the answer may then be to incorporate and to come within the rules for employee travel. Even under the existing rules, any business with more than a few clients should be able to categorise such workplaces as temporary, and to make tax-exempt payments for travel expenses to the owner as an employee director. The current consultation on travel expenses looks as if it may make such an approach even easier. But something has gone radically wrong when it is easier to get expenses under ITEPA than under ITTOIA.

Contributed by Mike Truman

Tax and new UK GAAP – General principles (Lecture B927 – 12.46 minutes)

As you know, when preparing a tax computation for trading profits, we start with profit per the accounts and then make a number of adjustments to:

- Include income that is taxable as trading income but not included in the accounts (transfer pricing adjustment, balancing charges for capital allowances)
- Deduct Income included in the accounts that is not taxable as trading income (Interest receivable, capital gains)
- Reverse expenses charged in the accounts that are not deductible for tax (depreciation, client entertaining)
- Allow for expenses that are not in the accounts but which are allowable against trading income (capital allowances)

The general principle is that provided the accounts have been prepared in accordance with generally accepted accounting practice GAAP), and provided there is no alternative tax rule, then the accounts are acceptable for tax. When HMRC's compliance team look at a set of accounts, the first question that they

will ask is have the accounts been prepared in accordance with GAAP before moving on to consider whether the appropriate tax adjustments have been made.

What is GAAP?

In the taxes legislation, GAAP is defined as UK GAAP as outlined in Company law and relevant Accounting standards. New UK GAAP provides companies with a choice of how to prepare accounts:

	EU IFRS	FRS 101	FRS 102	FRS 102 rd	FRS 102 Small	FRS 105 Micros
Listed						
Group	Must	☒	☒	☒	☒	☒
Stand – alone	Option	☒	Option	☒	☒	☒
Large/ medium unlisted						
Group	Option	☒	Option	☒	☒	☒
Stand – alone	Option	☒	Option	☒	☒	☒
Qualifying entity						
In IFRS group	Option	Option	Option	Option	☒	☒
In non-IFRS group	Option	Option	Option	Option	☒	☒
Small group	Option	Option	Option	☒	Option	☒
Small entity	Option	☒	Option	☒	Option	☒
Micro-entity	Option	☒	Option	☒	Option	Option

Provided a valid option is adopted, HMRC are unable to make you pick a specific version of GAAP. For example, they are unable to prevent you early adopting in order to benefit from lower taxable profit sooner, nor can they insist that you early adopt if that would make you pay more tax.

Sole traders and partnerships

The principles for calculating the profit before tax are the same as for companies but with different tax law to consider. FRS 105 can be used for the self-assessment tax returns of both sole traders and partnerships and for very small unincorporated businesses, they can use the cash basis of accounting.

Choices with new UK GAAP

There are a number of choices to make which include:

- Which version of GAAP you wish to adopt?

- When you want to adopt new UK GAAP?
- Your preferred choice of accounting policies and transition date

Tax and new UK GAAP – Tax and transition to FRS (Lecture B92 – 32.28 minutes)

New Company law is effective for periods commencing on or after 1 January 2016 but can be adopted earlier for periods commencing on or after 1 January 2015.

New accounting standards are effective form a variety of dates as shown below:

Standard	**Effective date Periods commencing on or after**	**Early adoption**
FRS 101	1 January 2015	**Ending** on or after 31 December 2012
FRS 102		
FRSSE 2015		
FRS 102 small entities	1 January 2016	Commencing on or after 1 January 2015
FRS 105		On issue, for periods ending on or after 30 September 2013

Transition timetable

FRS 102 is mandatory for periods commencing on or after 1 January 2015, making the first mandatory reporting period the accounting year to 31 December 2015.

The date of transition is defined as "the beginning of the earliest period for which an entity presents full comparative information in a given standard in its first financial statements that comply with that standard."

As comparative figures must be prepared for the period to 31 December 2014, the transition date is therefore 1 January 2014.

Small companies adoption of FRS 102

Small companies may delay adopting FRS 102 for small entities until periods commencing 1 January 2016 pushing their transition date one year later to 1 January 2015 but is this the best thing to do?

For many businesses, the changes introduced by FRS 102 will be relatively simple. There will be less information to prepare, fewer notes, simpler related party disclosures and the rules may even be tax advantageous. Early adoption may well be good news.

However, where the company's activities are complex, delaying adoption may be better. If your client's company is involved in complex financial instruments, has issues with intangible fixed assets or deferred tax considerations, then the benefits of simplification may well be outweighed by the new regime introduced in Company Law.

Restating accounts

The accounts are restated as if they had always been prepared under the new UK GAAP except for:

- Exceptions – like change of accounting estimates – these must not be restated
- Exemptions – like the rules relating to ease incentives - you may choose to restate or not

When preparing 2015 accounts under the new FRS 102, the transition date is 1 January 2014 which means that:

- 2015: P&L/ Balance sheet are prepared under new FRS 102 with an explanation of the transition
- 2014: P&L/ Balance sheet are restated under new FRS 102 for inclusion in the 2015 accounts
- 2013: Balance sheet is restated to give opening balances for 2014 comparatives in the 2015 accounts

How does this affect the tax computations that are filed with HMRC?

Transitioning to new FRS 102 will not normally affect what has happened in previous years for tax. Both the 2013 and 2014 returns were based on UK GAAP in force at the time and so were correct at that time, meaning that there is no need to make any changes to these earlier tax returns. Any adjustments to tax that arise on transitioning across in 2015 will be included in the 2015 tax computation.

However, if during the work done on the 2015 accounts, errors are discovered that were made under the old rules in earlier years, then the earlier tax computation(s) would need to be revisited.

Example

Alastair Ltd prepares accounts to 31 December each year and for simplicity, let's assume that they pay tax at a rate of 20%. The company is preparing its first FRS 102 accounts in 2015 and has identified three items to consider:

1. The company has discovered that it has omitted £50,000 of finished goods held at an outside warehouse in both its December 2013 and 2014 accounts.
2. Shortly after the December 2013 financial statements had been approved, the directors decided to scrap a product line which was becoming increasingly difficult to sell due to a new product launched by a competitor three months before the year end. At the end of that year, the directors believed that their product was still viable in the market and so had decided that no stock write down was needed. The directors wrote off the stock in 2014.
3. The accounts in did not include a provision for holiday pay in any of the years concerned. Had an accrual been made the balances would have been £80,000 at the end of 2013, £100,000 at the end of 2014 and £110,000 by the end of 2015.

Errors

Under FRS 102 an error needs adjusting for in the accounts when it is a material error. Previously we would only have restated the accounts if the error was a fundamental error.

The standard defines errors as:

> "omissions from, and misstatements ……. arising from a failure to use, or misuse of, reliable information that:
>
> – was available when financial statements for those periods were authorised for issue; and
>
> – could reasonably be expected to have been obtained and taken into account in the preparation and presentation of those financial statements."

We can use this information decide the correct accounting treatment for our three items.

£50,000 Finished goods omitted:

This is clearly an error and assuming that £50,000 is material to the accounts, on transition we would need to restate the 2013 accounts by:

DR	Closing stock	£50,000	
CR	CT liability (see below)		£10,000
CR	Retained earnings		£40,000

Underprovision for slow moving stock:

The directors based their decision on information that was available to them at the time and so it is not considered to be an error. This will be treated as a revision of an accounting estimate and no adjustment would be made in 2013.

Holiday pay provision:

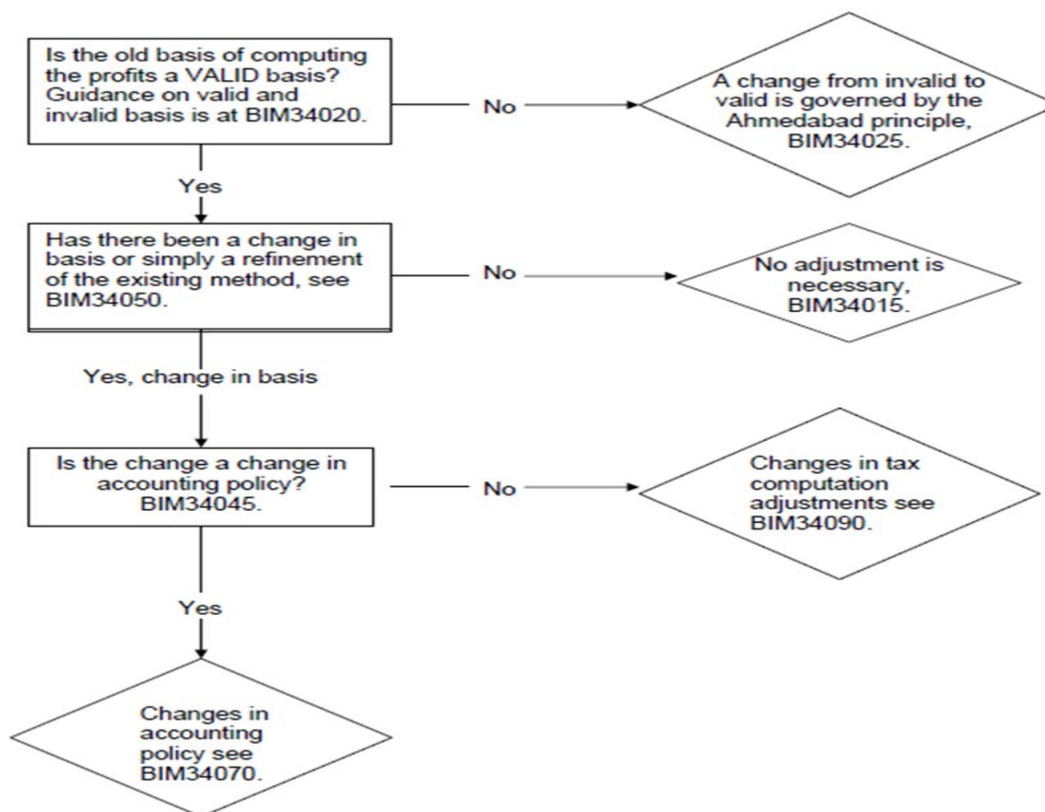
FRS 102 requires us to recognise the cost of providing benefits while staff are earning and by the balance sheet date staff have accrued an entitlement to holiday pay based on the work they have done. The standard requires that it is accrued where material.

This represents a change in accounting policy and how you treat a change in accounting policy has not changed under FRS 102. You prepare this year's accounts on the new basis with comparatives restated as if the new policy had always been applied. You must restate the opening equity.

This means that an £80,000 accrual will appear in the opening balance sheet at 1 April 2014, a provision of £20,000 will made in the 2014 P&L account giving a closing 2014 accrual of £100,000. Finally the provision will be increased to £110,000 in the 2015 balance sheet by including a further £10,000 provision in the 2015 P&L account.

HMRC flowchart: Errors, change in estimate and accounting policies

This flowchart shows the action that is required when last year's accounts were not valid or there has been a change in the basis since last year.



Errors

The first box is asking whether a valid basis was used in previous years so were they prepared in accordance with UK GAAP at the time and correctly adjusted for tax purposes.

In the case of our stock omission, the answer is no. This error must be dealt under the Ahmedabad principle (BIM34025) and that requires the error to be adjusted in the year that the error was made. This means that we go back to the 2013 accounts and provide for the additional £10,000 tax that was due.

Accounting estimates

The second box asks have you changed your basis of preparing your accounts? The answer is that stock is still included at the lower of cost or net realisable value, but that the estimate of that value has changed. Under BIM34015 no tax adjustment is needed in the 2013 tax computation.

Holiday pay accrual

This represents a change in accounting policy and under BIM34070, both the 2013 and 2014 tax computations are not adjusted. We will record an FRS 102 adjusted provision for 2015 of £10,000 as well

as a further adjustment expense in 2015 of the £100,000 relating to earlier years. Effectively £110.000 of tax relief is given in 2015.

Adjustment income: How is it calculated?

This is just one example of adjustment income that needs taking into account in 2015 when you transition. Obviously there will be more. There are 2 steps required to calculate the adjustment income:

Step 1 (protects HMRC)

Add together any amounts representing the extent to which, comparing the two bases, profits were understated (or losses overstated) on the old basis by:

- Not taxing income
- Giving tax relief on expenditure twice

Step 2 (protects the taxpayer)

Then deduct any amounts representing the extent to which, comparing the two bases, profits were overstated (or losses understated) on the old basis by:

- Being taxed n the same income twice
- Not getting a deduction for an allowable expenditure

Once you have worked out the net adjustment then:

- If adjustment is **positive** i.e. adjustment income (Ie HMRC losing out)
  - Treated as income and charged to income
  - Arising on the **first** day of the first period of the new accounting policy
- If adjustment is **negative** i.e. adjustment expense (ie taxpayer losing out)
  - Allowed as a deduction in computing profits of the trade arising on the **first** day of the first period of the new accounting policy

Tax and new UK GAAP – Availability of information to HMRC (Lecture B927 – 15.59 minutes)

Company law has not changed for large and medium sized companies which means that information that is disclosed to HMRC is also unchanged. By contrast there have been a number of changes relating to small companies, including the option to produce and file abridged accounts as well as the option for micro companies to produce micro accounts.

1981 balance sheet formats

Under the 1981 Companies Act format, the main headings are categorised as Alphabetic headings. These are sub-divided into Roman numeral headings and finally the Roman numeral headings are further sub-divided into Arabic numeral headings (See the extract below).

B	**Fixed Assets**
I	Intangible Assets
II	Tangible Assets
1	*Land and buildings*
2	*Plant and machinery*
3	*Fixtures, fittings and equipment*
4	*Payments on account and assets in course of construction*
III	Investments
C	**Current assets**
I	Stocks

Why is this relevant?

Under Company law, accounts preparation is now done under what is called a building block approach with accounts prepared on the following basis:

Micro company accounts prepared under FRS 105: Only include items on the face of the balance sheet which have Alphabetic headings, so Fixed assets, current assets etc. There is no requirement to include an accounting policy note or related parties note. In fact there are only two notes required:

1. Advances to directors so directors loan accounts that are in debit
2. Guarantees and commitments that are not on the balance sheet

Small company using abridged accounts: Only needs to include items with Alphabetic and Roman numeral headings but with no further analysis. Currently under Company law a company typically prepares two sets of accounts: Full accounts for shareholders/HMRC and abbreviated accounts to file at Companies House. Under the new Company law requirements Abbreviated accounts no longer exist. Instead, the company decides whether to produce Full accounts or Abridged accounts, but not both. Provided that the company has the unanimous agreement of its shareholders, it can produce and file Abridged accounts. This will reduce the information that goes to the shareholder but also the amount of information that is sent to HMRC. Whichever format you choose, Full or Abridged, you can choose not to file the P&L account and Directors' report with Companies House.

All other companies, including small companies who do not prepare and file Abridged accounts, must include Alphabetic, Roman and Arabic numeral headings.

Related parties

Under new Company Law there is no longer any need to disclose the name of the company's controlling party.

A company must disclose material transactions with related parties that are not conducted on market terms that fall into the following three categories only:

- Owners holding a participating interest (> 20%)
- Entities in which company holds > 20% interest
- Directors

There is no requirement to disclose transactions with close family or companies that are under common control.

Deadline Dates

1 December 2015

- The payment date for corporation tax liabilities for accounting periods ended 28 February 2015 for small and medium-sized companies not liable to pay by instalments.
- The date to check the HMRC website to ascertain whether advisory fuel rates have been increased.

7 December 2015

- The due date for VAT returns and payment for 31 October 2015 quarter (electronic payment).

14 December 2015

- The payment date for the quarterly corporation tax instalment for large companies (depending on accounting year-end).
- The due date for a monthly EC sales list if a paper return used.

19 December 2015

- Payment date for PAYE, NIC, construction industry scheme and student loan liabilities for month ended 5 December 2015 if not paying electronically.
- File monthly CIS return by this date.

21 December 2015

- File online monthly EC sales list by this date.
- Submit supplementary intrastat declarations for October 2015 by this date.

22 December 2015

- PAYE, NIC, CIS and student loan liabilities should have cleared into HMRC bank account by this date.

30 December 2015

- The deadline for submission of online self-assessment tax returns if underpayments are to be collected by a PAYE coding adjustment.

31 December 2015

- Companies House should have received accounts for private companies with 31 March 2015 year ends and public limited companies with 30 June 2015 year ends by this date.
- HMRC should have received CTSA returns for companies with accounting periods ended 31 December 2014 by this date.
- End of December CT61 quarterly reporting period.
- Year end for taxable distance supplies to UK for VAT registration.
- Non-EC traders claim recoverable UK VAT in year ended 30 June 2015 by this date.
- End of the relevant year for cross-border acquisitions of taxable goods in the UK for VAT registration purposes.

HMRC News

UK implementation of the G20 High Level Principles on Beneficial Ownership Transparency

The UK is fully committed to implementing the Financial Action Task Force (FATF) Recommendations, and in particular recognises the importance of transparency of beneficial ownership information. To deliver G20 Leaders' St Petersburg commitment to lead by example in meeting the FATF standards regarding beneficial ownership, and their Brisbane commitment to implement the G20 High Level Principles on Beneficial Ownership Transparency, the UK:

1) Has published a national risk assessment of money laundering and terrorist financing in full consultation with the private sector and civil society, as well as with UK law enforcement agencies, supervisors and policy makers across Government.

2) Will ensure Company Law and UK Money Laundering Regulations clearly define the criteria for ownership and control that identify a natural person as the 'beneficial owner' of a company. This legislation will oblige companies to know who owns and controls them, by requiring that companies obtain and hold adequate, accurate and current information on their beneficial ownership. Companies will also be required to make this information accessible to domestic competent authorities.

3) Will also require companies to report beneficial ownership information to a central register. This information will be adequate, accurate and current, and accessible to domestic competent authorities without alerting companies. Following a consultation, the UK has committed to make this register publicly accessible; the public register is expected to become operational in June 2016.

4) Will ensure trustees of express trusts obtain and hold adequate, accurate and current beneficial ownership information for their trusts, including the settlor(s), trustee(s) and beneficiaries. Mechanisms will be put in place to ensure that domestic competent authorities have access to this information.

5) Will hold in a central register the beneficial ownership information of trusts that generate tax consequences in the UK. Domestic competent authorities will be able to access this information.

6) Will ensure that financial institutions and designated non-financial businesses and professions (DNFBPs) undertaking customer due diligence are able to access information held on the central register of company beneficial ownership information. Trustees of express trusts will disclose their status, and provide beneficial ownership information of their trusts, when acting in their capacity as a trustee.

7) Will put in place effective mechanisms to share beneficial ownership information, in line with bilateral and multilateral agreements, and work to improve international cooperation–including the timely and effective exchange of information with foreign competent authorities.

8) Has committed to further action to improve company transparency, and following consultations has amended Company Law to:

- Prohibit UK companies from issuing bearer shares and require existing bearer shares to be surrendered and exchanged for registered shares, or cancelled and compensated.
- Prohibit use of corporate directors, with exceptions, and update how legal duties apply to shadow directors to align more closely with legal duties for individual directors.

9) Has committed to consult on extending beneficial ownership transparency to foreign companies investing in high value property or bidding on UK public contracts.

Unless otherwise stated, these commitments will be implemented in 2017 through new UK Money Laundering Regulations, which will transpose the requirements of the 4th EU Anti-Money Laundering Directive. This Directive reflects the 2012 revised FATF Recommendations.

Chancellor George Osborne and Bill Gates to join forces to end malaria
A new £1 billion fund will be used to support the global fight against malaria and other infectious diseases.

Chancellor George Osborne and Bill Gates have announced they are to join forces as part of the global effort to end malaria.

A new £1 billion Ross Fund – named after Sir Ronald Ross, the first ever British Nobel Laureate who was recognised for his discovery that mosquitoes transmit malaria – will be used to support the global fight against malaria and other infectious diseases.

The announcement is part of a fundamental restructuring of Britain's aid budget to be set out by the government this week as part of the Chancellor's Spending Review. Prosperity and security will be at the heart of the new strategy.

The mission to eliminate malaria builds on commitments George Osborne first made on a visit to Uganda, where he promised to meet the 0.7% ODA target and spend hundreds of millions of pounds to help the war against the disease.

After delivering those promises in the last parliament, this announcement will see Britain step up its role in working to end the disease – and others that threaten pandemics that could hit Britain.

The Bill and Melinda Gates Foundation have announced they will partner with the UK in this work, and have welcomed the Chancellor's announcement.

The £1 billion will include a £300 million package focused on malaria and other infectious diseases. This will include:

- a £90 million eradication of malaria implementation fund
- £100 million support for research and development into products for infectious diseases
- £115 million to develop new drugs, diagnostics and insecticides for malaria, TB and other infectious disease resistance

It will also fund work to target diseases with epidemic potential, neglected tropical diseases, and diseases with emerging resistance.

Good progress has been made to stop the spread of malaria – malaria deaths have fallen by a third since 2010. But there is still more to do.

Commenting on the announcement, the Chancellor said:

I have always believed that our commitment to overseas aid is important to promote our national security and interests and around the world.

That includes the fight against malaria – something I've been committed to since 1997.

A staggering one billion people are infected with malaria and 500,000 children die from the parasite each year.

Eradicating malaria would save 11 million lives so today's announcement of the £1 billion Ross Fund is an important step to help tackle this global disease.

Our commitment to spend 0.7% of national income on international aid means Britain can continue to play its part in the fight against malaria and working with the Bill and Melinda Gates Foundation will help us in our joint ambition to see an end this global disease in our lifetimes.

Speaking in Seattle, Bill Gates, Co-Chair of the Bill and Melinda Gates Foundation said:

We are proud to be partnering with the Chancellor, the British people, and leading research institutes and universities around the UK in this endeavour to end malaria and combat neglected tropical diseases and future pandemics.

Britain has long been a world leader in the fight against global disease – from life-saving health technologies developed through cutting edge science in British labs, to the brave volunteers who deliver the treatments to those who need it most.

At the Bill & Melinda Gates Foundation we have a relentless focus on measurable outcomes and results that transform the lives of the world's poorest people.

Together we invest in ways that keep all of us safe from the devastating effects of infectious diseases and epidemics.

Achieving the eradication of malaria and other poverty related infectious diseases will be one of humanity's greatest achievements.

With the combined skill and expertise of British scientists; leveraging the weight of both public and private financing; and the continued leadership of George Osborne and the UK, today's announcement of the Ross Fund will play a key role in reaching that goal.

International Development Secretary Justine Greening said:

Across the world we are making great strides in the battle against deadly diseases - whether it's Ebola, polio or malaria.

We can be proud of Britain's contribution to this fight, but our work does not stop here.

Malaria still causes one in ten child deaths in Africa and costs the continent's economies around £8 billion every year.

A healthy, prosperous world is in Britain's interest and the prevention of deadly diseases is a smart investment.

That is why, working with the Bill and Melinda Gates Foundation through the Ross Fund, the UK will tackle resistance and develop drugs or insecticides to help bring an end to this terrible disease.

HMRC announces next step in its ten-year modernisation programme to become a tax authority fit for the future

Fewer, more modern regional centres and highly skilled staff will provide customers with better services

HMRC has announced the next step in its ten-year modernisation programme to create a tax authority fit for the future, committing to high-quality jobs and the creation of 13 new regional centres over the next five years, serving every nation and region in the UK.

The modernisation programme, now at the halfway point, includes investment in new online services, data analytics, new compliance techniques, new skills and new ways of working, to make it easier for the honest majority of customers to pay their tax, including by improving customer service, and harder for the dishonest minority to cheat the system. The changes have already resulted in over 80% of people filing their Self Assessment returns online and given customers new, simple ways to check their payments, make changes or find answers to questions.

The tax authority, which raised a record £517 billion for public services last year, will open its first new regional centre in 2016-17, with others following between 2017 and 2021.

HMRC’s 58,000 full-time equivalent employees are currently spread across 170 offices around the country, many of which are a legacy of the 1960s and 1970s, which range in size from around 6,000 people to fewer than ten. HMRC will bring its employees together in 13 large, modern regional centres, equipped with the digital infrastructure and training facilities needed to build a more highly-skilled workforce to meet the challenges of bringing in more revenue from those evading tax and improving its customer service to the honest majority.

The transformation supports the Government’s commitment to locate jobs throughout the country. Bringing staff together in large centres will enable people to develop careers up to senior levels, with less need to move around the country, and will support the growth of specialist teams and links with universities and other sources of skilled recruits.

Lin Homer, HMRC’s Chief Executive, said:

HMRC is committed to modern, regional centres serving every region and nation in the UK, with skilled and varied jobs and development opportunities, while also ensuring jobs are spread throughout the UK and not concentrated in the capital.

HMRC has too many expensive, isolated and outdated offices. This makes it difficult for us to collaborate, modernise our ways of working, and make the changes we need to transform our service to customers and clamp down further on the minority who try to cheat the system.

The new regional centres will bring our staff together in more modern and cost-effective buildings in areas with lower rents. They will also make a big contribution to the cities where they are based, providing high-quality, skilled jobs and supporting the Government’s commitment for a national recovery that benefits all parts of the UK.

The changes will enable HMRC to give customers the modern services they now expect at a lower cost to the taxpayer, meeting the Government’s challenge for all departments to do more with less.

HMRC expects the majority of staff to be able to move from their current offices to a regional centre, and is phasing the moves over ten years in order to minimise redundancies. But HMRC will aim to have fewer staff in the future as it streamlines how it works and uses the best of modern technology to reduce costs.

Boost for small businesses as government launches R&D plan

In a major boost for pioneering small businesses, the Financial Secretary to the Treasury, David Gauke, today (Wednesday 28 October) launched a new plan outlining how government will make it easier for small businesses investing in research and development to claim tax relief.

The two-year plan, which is a response to an HMRC consultation, aims to increase take-up of research and development (R&D) tax relief through raising awareness of the relief amongst small businesses and making it easier for them to apply.

The tax relief, which encourages companies to invest in costly new product development, helps companies reduce the amount of corporation tax they pay on profits by offsetting them against any investment in research and development.

Latest statistics for 2013 to 2014 show more than 15,000 SMEs claimed the relief in 2013, an increase of around 19 per cent from the previous year, but the government wants to go further.

The Financial Secretary visited London-based footwear specialist Vivobarefoot to launch the plan and to see first-hand how the government's R&D tax relief has helped the small business invest in developing world-class products.

Financial Secretary to the Treasury David Gauke said:

R&D is crucial for the long-term growth of the UK economy. Over 15,000 SMEs claimed the relief in 2013, an increase of around 19 per cent from the previous year, but we need to go further to support pioneering small businesses.

That's why we've published a document setting out our plans to increase awareness and make it easier for people to apply.

Vivobarefoot CEO, Galahad Clark, said:

Innovation is at the heart of what we do. We are proving that the modern shoe industry, with its padding and support are doing more harm than good and the modern world has a movement crisis.

It's good to have the government support us against the biggest brands in the world on what we think is a very important social mission.

Vivobarefoot designs shoes to prevent common sports injuries caused by standard sports trainers. They have claimed R&D tax relief for five years and have since become a market innovation leader, working at the cutting edge of running shoe technology.

The plan, 'Making R&D Easier: HMRC's plan for small business R&D tax relief', was published today and sets out that:

- From November, small companies – with a turnover under £2 million and fewer than 50 employees – will be able to seek advance assurance on R&D tax relief. This will give them greater certainty and enable them to plan their finances effectively.

- HMRC will explore ways to improve its communication around R&D tax relief, including looking at ways to use data and work with other government agencies to identify companies that have carried out R&D but have not claimed relief.
- Interactive guidance will be developed with stakeholder involvement

HMRC evaluation shows that each £1 of tax foregone by R&D tax relief stimulates between £1.53 and £2.35 of additional R&D investment.

SME R&D relief works by way of super deduction, allowing companies to reduce profits liable to corporation tax by 230 per cent of their qualifying R&D expenditure.

In 2013/14, businesses received £1.75 billion in R&D tax relief, an increase of almost £750 million since 2009/10.

Business Taxation

Reasonable expectation of profit for loss relief

Summary – The FTT found that loss relief on farming activities was not available.

The taxpayer was an experienced sheep farmer and a partner in a farming partnership that owned a large sheep farm. He had also been in business outside farming and received a pension from it. He applied for trade loss relief under ITA 2007, s 64 against his other income on farming losses for the years 2008/09 and 2009/10.

HMRC refused the claim, saying that s 67 applied because the farming activities did not meet the reasonable expectation of profit test in s 68.

The taxpayer appealed, saying that s 67 applied to hobby farming and he was not a hobby farmer.

Decision:

The First-tier Tribunal said s 67 applied an objective test: was a loss made in the trade in each of the previous five years? It made no reference to whether a trade was carried on commercially or whether the person carrying it on had a view to making a profit. Therefore it was not restricted to hobby farming but applied to all farming activities carried on commercially on which losses have occurred in the previous five years.

On the reasonable expectation of profit test, the tribunal said this turned on the condition in s 68(3)(b) — in this case whether a competent farmer carrying on the activities at the beginning of the period of losses could not reasonably have expected the activities to become profitable until after the end of the 2008/09 and 2009/10 tax years. It was clear that the competent farmer would not have expected it to take so long before the business become profitable.

The taxpayer, given his commercial background, could not have expected in 2000 that sheep farming would not be profitable until 2009/10. He would have had to predict unforeseeable events such as the foot and mouth outbreak, lamb rustling and land destruction by wild boars.

Had he known that business would be loss-making for so long, the tribunal had “no doubt that he would have changed the business model”.

He did not therefore meet the reasonable expectation of profit test.

The taxpayer's appeal was dismissed.

Comments – The test was an objective test - the FTT asked itself what expectations of profits a competent farmer would have had. Mr Silvester was clearly a highly competent sheep farmer and would have been able to apply the objective test.

P Silvester v HMRC TC4682

Corporation tax deduction of pension fund management fees

R&C Brief 17 (2015) follows on from R&C Brief 43 (2014) and R&C Brief 8 (2015) These briefs set out HMRC's position following the decision of the CJEU in Fiscale Eenheid PPG Holdings BV cs te Hoogezand (C-26/12) (PPG). This case concerned an employer's entitlement to deduct VAT paid on services relating to the administration of defined benefit pension schemes and the management of their assets.

R&C Brief 17 (2015) announces a 12 month extension to the transitional period, which was due to end on 31 December 2015. It also provides an update on HMRCs position on possible arrangements for employers to achieve VAT deduction for the costs of administering occupational pension schemes and managing their assets going forward.

Details of the PPG case can be found in R&C Brief 43 (2014). That brief also outlines the VAT treatment that applied prior to the decision, how VAT treatment has changed as a result of the decision and, in conjunction with R&C Brief 08 (2015), the transitional arrangements that are currently in place. In particular, the brief makes it clear that it is necessary for an employer to both contract and pay for services in order to be the recipient of the services for VAT purposes.

R&C Brief 08 (2015) followed on from this. It considered whether tripartite contracts between employers, service providers and pension scheme trustees could be accepted as evidence that an employer was the recipient of a supply for VAT purposes, enabling them to deduct VAT charged on administration and asset management costs going forward.

Tripartite contracts and corporation tax

Although HMRCs position on the use of tripartite contracts to obtain a VAT deduction has not changed, concerns were raised recently about the implications this arrangement may have for an employer's Corporation Tax deduction.

In this context, only costs recognised in the Profit and Loss Account and contributions to pension schemes may attract a deduction for Corporation Tax purposes. Direct payment by an employer of asset management costs do not clearly fall into either of these categories.

Therefore, where an employer pays directly for asset management costs under a tripartite contract our view is that the employer is not entitled to a Corporation Tax deduction.

Latest position on other options

Options other than tripartite contracts have been put forward by advisers and representative bodies.

Supply of scheme administration services by pension trustees to an employer

This arrangement could be used where a pension scheme trustee contracts and pays third party pension service providers. In these circumstances, a pension scheme trustee could contract with an employer to supply them with the service of running the pension scheme on the employer's behalf. Where the

supply to an employer is a taxable supply, then the VAT charged by a trustee to an employer will be deductible by the employer to the extent that it relates to the taxable supplies of the employer. Any VAT a trustee incurs on administration and other general pension scheme related services (including legal, audit or actuarial services) used by it in order to make the onward taxable supply to the employer will be deductible by it in full.

However, where a trustee incurs VAT on asset management services this will have a direct and immediate link to the trustee's ongoing investment activities. This VAT may also have a direct and immediate link to the supplies made by a trustee to the employer, provided part of the trustee's supply to the employer of running the pension scheme on their behalf includes asset management services and the services on which the trustee incurs VAT are used for that purpose. If asset management services are put to dual use any deduction by a trustee in respect of the VAT incurred by it on these services will need to reflect this.

VAT grouping

A corporate trustee of a pension scheme can, as the legal representative of that pension scheme, VAT group with an employer provided they meet the eligibility criteria set out in section 43A of the Value Added Tax Act 1994, see chapter 2 of VAT Notice 700/2: group and divisional registration for further guidance. In those circumstances, any supplies made by a trustee acting in that capacity including dealing in the assets of a scheme's fund(s), are treated as being made by the representative member of the VAT group.

The cost of administration and other general scheme related services that do not have a direct and immediate link to the management of a pension scheme's assets and therefore the scheme's investment activity, will be overhead costs of the VAT group and will be deductible in accordance with the activities of the group as a whole.

However, where a VAT group incurs VAT on asset management services this will have a direct and immediate link to the trustee's investment activity. This VAT may also have a direct and immediate link to the supplies made by the employer provided it is used by the employer to make these supplies. If asset management services are put to dual use any VAT deduction in respect of the VAT incurred on these services will need to reflect this.

Representatives have raised concerns that the effect of the joint and several liability provisions relating to VAT grouping mean that where a corporate trustee is VAT grouped, HM Revenue and Customs would be entitled to recover a VAT debt of the VAT group from the pension scheme assets. Our position is, and remains, that we are unable to recover VAT from the scheme assets except to the extent that the relevant VAT debt is attributable to the administration and operations of the pension scheme. This is set out in paragraph 4.3 of VAT Notice 700/17: Funded Pension Schemes.

Other options

HMRC are still considering representations which have been made more recently, in particular in relation to asset management services and whether there are alternative tripartite structures that would enable a Corporation Tax deduction. Further guidance will be published later this year.

Transitional period extended until 31 December 2016

In the light of recent developments, and in particular the Corporation Tax deduction issues associated with the use of the tripartite arrangements outlined in Revenue and Customs Brief 08(2015), the transitional period will be extended. The period during which taxpayers may continue to use the VAT treatment outlined in VAT Notice 700/17: Funded Pension Schemes (provided the employer and pension scheme trustees agree the same treatment) will be extended until 31 December 2016. Taxpayers may switch to the new arrangements at any time during this period. From 1 January 2017, the VAT treatment outlined in Revenue and Customs Brief 43 (2014) must be applied.

R&C Brief 17 (2015)

VAT

Taxable person?

Summary – "Taxable person" included a business that was registered for VAT or should be registered.

The taxpayer began his business of selling security locks online in 2013, but did not become VAT-registered until 4 January 2014. He claimed input tax on his first VAT return for goods bought and sold between March 2013 and December 2013 on the basis that he was a "taxable person" within EU law because he was carrying on an economic activity.

HMRC allowed part of the claim on the basis that some goods had been bought but not sold before 4 January and could be treated as stock in hand at the time of registration. They did not allow the input VAT on the goods that had been bought and sold. They said article 289 of the EU Principle Directive applied to UK traders below the registration threshold: such traders were exempt from VAT and were not entitled to deduct input tax under article 168 because they were not making taxable supplies. On that basis, before the taxpayer was registered, he was making exempt supplies and therefore could not claim input tax on those supplies.

The taxpayer appealed.

Decision:

The First-tier Tribunal agreed with HMRC that the UK definition of a "taxable person" included a business that was registered for VAT or should be registered. It excluded one that was trading below the threshold.

The taxpayer's appeal was dismissed.

Comments – This was a clear cut case of the trader not making supplies above the threshold and therefore he was making exempt supplies.

Redway trading as Loktonic v HMRC TC4595

Aware of the connection with mobile phones

Summary – The FTT was entitled to conclude that the director of the taxpayer knew the transactions were connected with the fraudulent evasion of VAT.

The taxpayer imported and exported mobile phones. HMRC said some of the transactions involved VAT fraud and the taxpayer's managing director knew or should have known about it.

The First-tier Tribunal concluded that the relevant transactions were connected with the fraudulent evasion of VAT and the taxpayer knew about the connection.

The taxpayer appealed.

Decision:

In the Upper Tribunal, the Hon Mr Justice Barling found the First-tier Tribunal had been correct to approach the case on the basis that HMRC must establish knowledge on the balance of probabilities. He said EU law made no provision for a specific EU standard of proof, other than objective evidence was necessary. The First-tier Tribunal had not erred in law.

Further, the decision was not perverse. The First-tier Tribunal had been presented with objective evidence from which it was entitled to conclude that the director of the taxpayer knew the transactions were connected with the fraudulent evasion of VAT.

The taxpayer's appeal was dismissed.

Comments - This is another case where the taxpayer should have been aware on the connection with fraud so the decision was not really surprising.

Excel RTI Solutions Ltd v CRC, Upper Tribunal

Errors in law

Summary – The incorrect decision by the FTT was overturned at the Upper Tribunal

The taxpayer reclaimed input tax on the purchase of large quantities of mobile telephones. HMRC rejected the claims on the basis that the transactions were connected to missing trader intra-community fraud.

The First-tier Tribunal accepted the taxpayer's argument that it did not know, and could not reasonably be expected to have known, that the transactions had been connected with fraud.HMRC appealed.

Decision:

The Upper Tribunal concluded that the First-tier Tribunal had made errors in law in reaching its decision. It had taken into account an irrelevant consideration relating to one of the company's owners not being the subject of a criminal investigation. It had not assessed the circumstantial evidence as a whole and had not given proper reasons for rejecting HMRC's alternative arguments.

The First-tier Tribunal decision was set aside and the case remitted to a differently constituted tribunal for determination.

HMRC's appeal was allowed.

Comments - The Upper Tribunal concluded that the First-tier Tribunal had made errors in law in reaching its decision. It had taken into account an irrelevant consideration relating to one of the company's owners not being the subject of a criminal investigation. It had not assessed the circumstantial evidence as a whole and had not given proper reasons for rejecting HMRC's alternative arguments. Consequently it was remitted back to the FTT.

CRC v CCA Distribution Ltd, Upper Tribunal

Status of stock and assets sale

Summary – The transfer of a going concern rules are intended to ensure that HMRC should not be out of pocket and that objective was achieved by the court's decision

The taxpayer purchased fixed assets and stock from an associated company, OMF, between March and May 2011 in 16 transactions. The invoices included the consideration and VAT. The taxpayer claimed the input tax on its VAT returns. However, OMF went into liquidation in October 2011 and did not pay HMRC the output VAT charged on the invoices.

HMRC disallowed the input tax claim on the basis that the transactions constituted a transfer of a going concern. They argued in support that the two companies carried on the same kind of business and that the taxpayer also took on five employees from OMF. The taxpayer appealed.

Decision:

The First-tier Tribunal said there was no "credible explanation" of how OMF could have continued trading after the transfers to the taxpayer. The factors pointed towards the transactions forming a transfer of a going concern and the conditions of VAT (Special Provisions) Order 1995, Art 5 were satisfied. The taxpayer received all the assets required to carry on the same kind of trade as OMF, including five members of staff.

The taxpayer's appeal was dismissed.

Comments - Neil Warren, independent VAT consultant, stated: "In transfer of a going concern cases where the seller has charged VAT incorrectly, HMRC will allow an incorrect input tax claim to be made by the buyer as long as they are satisfied that the seller has accounted for and paid output tax on its own VAT returns. However, that was not the case here because OMF went into liquidation without paying the VAT on the 16 invoices. The transfer of a going concern rules are intended to ensure that HMRC should not be out of pocket and that objective was achieved by the court's decision."

Amor Interiors Ltd v HMRC TC4542

Tax due on repayment

Summary – The FTT rejected an appeal against a CT assessment on a VAT repayment.

The taxpayer made a voluntary disclosure under VATA 1994, s 80 for repayment of output VAT on supplies of hot drinks to May 1984. HMRC made the repayment with simple interest. The taxpayer later claimed compound interest on the repayment but this has been stayed pending the final outcome of the *Littlewoods* litigation.

HMRC imposed corporation tax on the VAT repayment and interest payment. The taxpayer appealed

Decision:

The First-tier Tribunal noted that the Court of Appeal's decision in *Shop Direct Group v CRC* [2014] STC 1383 confirmed that HMRC were entitled to tax such sums, but had considered only the domestic law arguments. The instant appeal was based entirely on EU law.

The taxpayer's argument was: "It is a basic of the law of restitution that the party unjustly enriched should disgorge all the benefits which he has received. Where the enrichee is the state, the state cannot give back 100 and then recover 25 through taxation."

The issues before the tribunal were the character under domestic law of the repayments and, if they amounted to mistake-based restitution, whether HMRC should be precluded from recovering corporation tax.

The tribunal determined that the VAT repayment had been made solely under the statutory provisions of VATA 1994, s 80 and could not be characterised as a claim in mistake-based restitution. The decision in *Shop Direct* therefore applied, irrespective of EU law.

On the interest payment, the tribunal said, if the function of interest was to compensate for the loss of use of overpaid VAT, when considering the issue of unjust enrichment, the interest paid in effect replaced the amount that would have been earned on the overpayments if they had not been wrongly paid to HMRC. It would then "indisputably have been taxable".

HMRC were entitled to tax both the repayment and interest.

The taxpayer's appeal was dismissed.

Comments - Under EU law principles, even if a VAT repayment is made under a mistake-based restitution claim, corporation tax should be due on the repayment.

Coin-a-drink Ltd v HMRC TC4657

Roaring success

Summary - The tribunal concluded that no override should be applied to reduce the input tax claimed by the zoo

Chester Zoo, which is operated by the North of England Zoological Society, received income from admission fees, catering and merchandise sales, and special events and promotions linked to the animals.

A dispute arose about the extent to which the society could recover input tax. It argued that the standard method of input tax recovery was appropriate because the animal-related costs were a cost component of taxable supplies, including catering and retail supplies, as well as the exempt admission income.

HMRC said the animal-related costs were a cost component of the admission charges, but only some of the taxable supplies. They did not relate to supplies of catering and merchandise. As a result, the standard method did not give a fair and reasonable apportionment and the standard method override should apply. The taxpayer appealed.

Decision:

The First-tier Tribunal noted the fact that many of the catering outlets and shops were positioned next to the animals to increase the dwelling time, and that many of the items sold in the shops directly

related to animals. Further, improvements to the animal facilities in recent years had increased the number of visitors to the zoo and the average time they spent there. The judge said "everything the society does, including operating the zoo, is geared towards promoting the society's charitable objects". It did this in two ways: educating those who attended it and providing income used to fund the zoo and the society's wider charitable activities.

The tribunal concluded that no override should be applied to reduce the input tax claimed by the zoo.

The taxpayer's appeal was allowed.

Comments – The judge's comments are self-explanatory.

North of England Zoological Society v HMRC TC4479

Unjust enrichment update for golf clubs

R&C Brief 19 (2015) provides an update on HMRC's work on unjust enrichment as announced in R&C Brief 25 (2014):VAT - supplies of sporting services by non profit making bodies and explains what action members' golf clubs which submitted claims need to take now.

Following the judgment by the Court of Justice of the European Union in Bridport & West Dorset Golf Club, HMRC announced that it was considering whether clubs would be unjustly enriched if claims were refunded in full. R&C Brief 19 (2015) reports the conclusion of that work.

HMRC's review found that if claims were credited in full some clubs would be unjustly enriched by 50% and others by 67%. Some clubs disagreed with the conclusions of the review and with HMRC's position that corporate days and supplies to tour operators are standard rated, as outlined in VAT Information Sheet 01/15: claims by non-profit making members' sports clubs for overpaid VAT on supplies of sporting services made to non-members. These issues have recently been heard by the First Tier Tribunal (FTT).

Although the question of unjust enrichment is still before the courts, HMRC has decided to pay or credit, subject to conditions (see below), 50% or 33% (depending on the golf club) of the value of valid claims ahead of any court decision. HMRC will credit a claimant's VAT account if there is an outstanding debt.

The amount repaid or credited to each claimant will depend on the level of green fee charges. Where a golf club charges any green fee now or during the claim period, of over £100 per person for a round of golf, at any time of the year, HMRC will repay or credit 33% of its VAT Information Sheet 01/15 compliant claim. All other claimants will receive 50% of their VAT Information Sheet 01/15 compliant claim. HMRC considers the level of green fees is representative of a club's ability to pass on the VAT cost to its customers.

So that HMRC may pay or credit the appropriate amount to each club, members clubs should:

1. notify HMRC that you have checked and where necessary adjusted your claims in line with VAT Information Sheet 01/15 - this helps minimise any errors and we have found a high level of error in claims checked
2. confirm if your green fees are less than, or over, £100 per person per round
3. confirm whether or not you would like an interim payment or credit on your account - if you have not checked or adjusted your claim because you disagree with the policy detailed in VAT Information Sheet 01/15, HMRC will not consider your claim until the FTT issues a decision

The information for points 1 to 3 above and any new or adjusted claims should be sent to:

VAT Bridport Claims SO483
PO Box 200
BOOTLE
L69 9AH

If a club does not pass on to the affected customers the repaid or credited amounts of output tax there may be direct tax implications. For example, trading income from non-members is taxable. Any surplus of non-member income that remains after deduction of relevant expenses is liable to Corporation Tax.

All new claims will be subject to the 4 year time limit in section 80(4) of the VAT Act 1994.

Members' clubs with over declarations of output tax within certain monetary limits may wish to correct any errors on their VAT returns rather than submit a formal claim under section 80 VATA 94 to HMRC. However in doing so they would not receive any interest. Further information on the monetary limits and which returns may be adjusted is available in VAT Notice 700/45: How to correct VAT errors and make adjustments and claims.

In circumstances where members' clubs have not taken due care in submitting valid claims, they may be charged a penalty in relation to prescribed accounting periods starting on or after 1 April 2008, where the return due date is 1 April 2009 or later.

R&C Brief 19 (2015)

Clubhouse is not zero rated

Summary – The Tribunal held that the supply must be made to a charity for zero rating to apply and a CASC was not a charity.

A bowls club was registered as a community amateur sports club (CASC) but not as a charity under the Charities Act 2011. Membership was open to anyone as a playing or social member (20% of all members were social members). It was run entirely by volunteers and supported by the local town council, which owned the land on which the clubhouse was built. The club leased the land for a nominal rent.

In 2014, work began on a new clubhouse and the club issued a certificate for zero-rated building work VATA 1994, Sch 8 group 5 note (12). The certificate confirmed that the clubhouse was to be used for a relevant charitable purpose by a charity “as a village hall or similarly in providing social or recreational facilities for a local community” (note (6)).

The new clubhouse was used mainly by the club, but the facilities were also used by other groups for a charge. HMRC disagreed that the building should be zero rated on the basis that the club had to be a charity for this to apply. Further, it did not meet the charitable purpose condition in FA 2010, Sch 6 para 1 (definition of a charity). The taxpayer appealed.

Decision:

The First-tier Tribunal noted that the parties agreed the disputed supplies were made during construction of a building for the purpose of VATA 1994, Sch 8 group 5 item 2 (social or recreational facilities for a local community). But it held that the supply must be made to a charity for zero rating to apply and a CASC was not a charity.

In any event, the tribunal said the club did not meet the charitable purpose condition. To meet this, a charity must have a purpose that falls within Charities Act 2011, s 3 and is for the public benefit.

Although it accepted that the club was established to advance amateur sport, the tribunal doubted that it could be said to be established for charitable purposes only, given the proportion of social members. Social functions of the club were not part of a charitable purpose.

Irrespective of the charitable status argument, the tribunal said the appeal would have failed because the club provided facilities to members who paid a subscription. As a result, it was classed as carrying on a business under VATA 1994, s 94(2).

The fact that the subscriptions were in effect subsidised by the town council and that the club did not seek to make a profit did not affect this outcome. The clubhouse was used for the purpose of that deemed business, so the construction services were not zero rated under note (6)(a) to group 5.

Finally, on whether the clubhouse was intended for use as a village hall to serve the local community, the tribunal concluded it was not:

“The project for the construction of the clubhouse was driven by the club. The clubhouse is managed by the club's management committee on behalf of the club and for the benefit of the club. There is no involvement in the management from other representatives of the local community. The clubhouse is used by some other local groups, but it is primarily used for the purposes of the club. The income from the hiring of the venue to other groups and users accrues for the benefit of the club.”

The taxpayer's appeal was dismissed.

Comments - Neil Warren, independent VAT consultant, stated that the decision seemed to contradict the First-tier Tribunal's decision in *Caithness Rugby Club* (TC4560), which ruled that zero rating could apply to construction services on its new clubhouse. He said: “The facts in the two cases are not identical but both clubs were managed by their own committees rather than community committees and appeared to encourage non-club use to generate additional income for their own activities rather

than being a club with wider community aspirations. It is worrying when two cases give contradictory outcomes when the facts are so similar."

Witney Bowls Club v HMRC TC4598

Skandia update

R&C Brief 18 (2015) follows on from R&C Brief 2 (2015) which set out the position of HMRC following the CJEU decision in Skandia America Corp. (USA), filial Sverige (C-7/13).

R&C Brief 18 (2015) confirms the UK VAT changes resulting from the Skandia judgement and provides details of which other member states operate 'establishment only' VAT grouping.

Details of the Skandia America Corporation decision can be found in Revenue and Customs Brief 2 (2015). This outlines the VAT treatment that applied before the Skandia decision, how VAT treatment will change as a result of the judgment and the date when the change will take effect.

UK VAT changes with effect from 1 January 2016

The following changes are for UK VAT purposes, covering supplies treated as made in the UK under place of supply rules and input tax recovery by UK VAT registrations.

The implication of the Skandia judgment is that an overseas establishment of a UK-established entity is part of a separate taxable person - if the overseas establishment is VAT-grouped in a member state that operates similar 'establishment only' grouping provisions to Sweden. This will be the case whether or not the entity in the UK is part of a UK VAT group.

Therefore businesses must treat intra-entity services provided to or by such overseas establishments as supplies made to or by another taxable person and account for VAT accordingly:

- services provided by the overseas VAT-grouped establishment to the UK establishment will normally be treated as supplies made in the UK under place of supply rules, and subject to the reverse charge if taxable
- services provided by the UK establishment to the overseas VAT-grouped establishment will normally be treated as supplies made outside the UK under place of supply rules. Therefore they will need to be taken into account in ascertaining input tax credit for the UK establishment. If the supplies are reverse charge services, they should be reported on the trader's European Sales Listing of such supplies

If the UK entity is in a UK VAT group, the same applies to supplies between the overseas establishment and other UK VAT group members in the UK. Under these circumstances the anti-avoidance legislation in VATA s43(2A)-(2E) does not also apply, as the overseas establishment is not seen as part of the UK VAT group.

These changes of treatment do not require any change to UK law, they follow automatically in circumstances where the overseas establishment is recognised as part of a separate taxable person

As announced in February 2015 in Revenue and Customs Brief 2 (2015), these changes in treatment must be applied to services performed on or after 1 January 2016. Businesses may choose to apply the changes to services performed earlier than this date, provided they do so consistently for all services and establishments affected.

The above changes are only required where the member state of the VAT-grouped overseas establishment has implemented the Skandia decision and is requiring intra-entity transactions between this establishment and the UK establishment to be treated as supplies for VAT purposes. The overseas establishment should take steps to establish with its member state tax authorities if this is the case.

In particular, in the UK's view the UK VAT changes are not required if the only VAT grouping is of the UK establishment. UK VAT grouping is 'whole entity' and does not split the UK establishment off into a separate taxable person. The UK has informed other member states of the UK's view on this matter.

Information on other member states's VAT grouping

The following table outlines how the UK expects member states to operate VAT grouping in the light of the Skandia decision. This information is provided as a guide only. It is the responsibility of individual businesses to check with the relevant member state tax authority to confirm the situation and agree how it applies to their own particular circumstances.

Member state	**Latest position**
Cyprus, Finland, Germany, the Netherlands	At the time of publication the intention of these member states is uncertain
Austria, Ireland, UK	HMRC does not expect these member states to apply 'establishment only' VAT grouping to create intra-establishment supplies
Italy, Romania, Spain (basic method)	Italian, Romanian and basic Spanish 'VAT grouping' is purely administrative, treating each member as a separate taxable person and just amalgamating their VAT figures on a single return. Such 'grouping' does not trigger the UK VAT changes above
Belgium, the Czech Republic, Denmark, Estonia, Hungary, Latvia, Slovakia, Spain (advanced method), Sweden	HMRC expects these member states to apply 'establishment only' VAT grouping to create intra-establishment supplies
Bulgaria, Croatia, France, Greece, Lithuania, Luxembourg, Malta, Poland, Portugal, Slovenia	HMRC understands these member states do not have VAT grouping

VAT issues for families (Lecture B930 – 14.37 minutes)

Property case study

A mother owns a commercial property which she is renting out to tenants (she is VAT registered and an option to tax was in place on the property). She has decided to gift the property to her two daughters. What are the VAT issues?

The daughters are taking over a 'property rental business' from their mother - they are effectively trading as a partnership.

The daughters must register for VAT by the time of the transfer and also make their own option to tax election on the unit (complete form VAT1614A and submit it to HMRC's option to tax unit in Glasgow).

The daughters continue to charge VAT on the rent to the tenants – and the conditions of a TOGC (transfer of a going concern) involving property have now been met (see HMRC Notice 700/9, section 6). So there is no output tax liability on the value of the property when it is transferred from mother to daughters.

Possible planning tips

Did mother make her election more than 20 years ago? If so, possible revocation of election before transfer of property to daughters (VAT1614J) – transfer is then exempt from VAT so no output tax issues and therefore no need for daughters to register for VAT and charge rent to the tenants.

Daughters will take over any remaining intervals of the mother for the capital goods scheme (if appropriate). This will not create a problem in most cases unless exempt income is generated before end of 10-year period.

Note – if conditions of TOGC are not met, then output tax will be due on the market value of the property transfer – if the daughters have not opted to tax/VAT register by the date of the transfer, this will create an input tax problem if the property is within the capital goods scheme ie value exceeding £250,000 excluding VAT. In such cases, the input tax claim will be over a period of 10 years with the annual capital goods scheme adjustments.

Business splitting case study

John is a second hand car dealer (sole trader and VAT registered) and is keen to involve his 21 year old son Mitchell in his business. He wants Mitchell to learn all about the challenges of running a business, instead of being an employee on his payroll. It is possible that John could make Mitchell a partner in the business but as another suggestion, how about if we encourage Mitchell to set up a separate business on the premises of the dealership to provide vehicle hire and car valeting services to customers? And because it is a new business, he will not need to VAT register until he gets to the usual £82,000 annual threshold. Is there a problem with this arrangement?

HMRC are always a bit suspicious of business splitting arrangements when family members are involved and it can sometimes be a high risk strategy because normal commercial procedures sometimes go out of the window when family links are involved ie there is not the usual financial motive to keep things separate. If HMRC are not satisfied that there is a genuine separation, they have the power to issue a direction to treat the separated entities as a partnership (see Business splitting – the legislation).

So the best approach for Mitchell and John is to create an arms length arrangement on normal commercial terms and think very carefully about eg recharging of shared overheads, a rental charge if Mitchell will use a specific part of the premises for his trading and a clear agreement that all stock items transferred between the two entities will be properly charged at market rates. The key word in the legislation is "and" ie HMRC need to prove the two entities have financial, economic and organisational links before they can issue a direction ie all three links rather than one or two. A useful reference point is HMRC guidance note VATDSAG02000.

And as a final reference, see Case law example a useful tribunal case on this subject.

Business splitting – the legislation (VATA1994, Sch 1)

'1A(1) Paragraph 2 below is for the purpose of preventing the maintenance or creation of any artificial separation of business activities carried on by two or more persons from resulting in an avoidance of VAT.

'(2) In determining for the purposes of subparagraph 1A above whether any separation of business activities is artificial, regard shall be had to the extent to which the different persons carrying on those activities are closely bound to one another by financial, economic and organisational links.

Case law example

In the case of Skelton Waste Disposal (VTD17351), a father and son (Maurice and Dean Langton) operated a waste disposal business as a partnership, dealing in large skips, but then Dean identified a growing market in hiring out small skips to private householders and formed a separate business that was not VAT registered. HMRC ruled there was a single business of 'skip hire' but the tribunal disagreed and allowed the appeal. The key point was that Dean was very ambitious and wanted to run a successful enterprise without the involvement of his father. Avoidance of VAT was not the main motive for the split – and he was clearly trading in a very different market to the main business.

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