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Personal Tax

Tax treatment of termination payment

Summary - The UT dismissed Mr Moorthy's appeal against the FTT decision finding that the FTT was correct to determine that a £200,000 ex-gratia payment made under a compromise agreement was taxable under s401 ITEPA and that s406 ITEPA 2003 did not relieve any part of the payment

Mr Moorthy was made redundant by his employer Jacobs Engineering (UK) Limited (Jacobs) and received statutory redundancy pay of £10,640 together with an ex-gratia sum of £200,000 compensation for loss of office and employment under a compromise agreement in settlement of proceedings brought by Mr Moorthy in the Employment Tribunal for unfair dismissal and age discrimination. Mr Moorthy completed his tax return on the basis that the settlement amount was tax free and HMRC issued a closure notice amending his return on the basis that the payment was a taxable termination payment under s401 ITEPA 2003, other than in respect of £30,000 which was specifically exempted under s403 ITEPA 2003, and a further £30,000 as representing compensation for injury to feelings.

Mr Moorthy had appealed to the FTT who had found that:

1. the payment of £200,000 fell within s401 ITEPA 2003;
2. the £30,000 exemption allowed by s403 ITEPA 2003 was reduced to £19,360 by virtue of the statutory redundancy payment of £10,640 made in the previous tax year; and
3. the Tribunal had no jurisdiction to allow the further relief of £30,000 deducted by HMRC.

Mr Moorthy appealed to the UT.

Decision:

The UT found that the effect of s403 ITEPA 2003 was that any payment which fell within s401 ITEPA 2003 and exceeded the £30,000 threshold, was treated as employment income and charged to income tax. In calculating the £30,000 threshold, all payments within Chapter 3 Part 6 ITEPA 2003 in respect of the same employment were to be aggregated even if they were received in different tax years. S406 ITEPA 2003, however, provided an exception for death or disability payments and benefits '*on account of injury to, or disability of, an employee*'.

Whether a payment in compensation for injury to feelings could fall within s406 ITEPA 2003 was a question on which different courts and tribunals had reached different conclusions. It had not been previously considered by the UT. As the Equality and Human Rights Commission (EHRC) had intervened in this appeal and provided detailed written submissions, the case, therefore, provided an opportunity for the UT to give some guidance on the meaning of 'injury' in s406 ITEPA 2003.

The UT found:

1. That the language of s401 ITEPA 2003 was clear and its scope was wide. There was nothing in s401 ITEPA 2003 which excluded non-pecuniary awards, such as damages for injury to feelings, from the scope of the section and the FTT in Oti-Obihara in 2011 was wrong on this point and should not be followed.

The settlement payment fell within s401 ITEPA 2003 and under s403 ITEPA 2003 counted as employment income subject to the £30,000 threshold and to the application of s406 ITEPA 2003.

2. S406 was not a general exemption from tax for payments on account of injury to an employee. The UT considered that the term 'injury' fell to be considered and interpreted together with 'death' and 'disability' and had to be something that led to the termination of employment or to a change in duties or level of earnings. Following Horner v Hasted (HMIT) it referred to a medical condition and did not include injury to feelings.

3. Finally, regarding the issue of HMRC's further £30,000 concession, the UT noted that the closure notice stated that the offer to treat the further £30,000 as not taxable was a concession made in order to try to reach agreement. Mr Moorthy had not accepted the offer and as agreement was not reached, the condition on which the offer was made was not met and HMRC's offer fell away. It followed that the concession was not rightly made on a correct view of the law and the FTT were right to disregard it and Mr Moorthy could not have had a legitimate expectation that the FTT would not apply the law as they interpreted it.

The appeal was dismissed.

Comments - This is useful case as it looks at a number of the provisions in respect of termination payment particularly with reference to payments for injury. The case also demonstrates the importance of knowing how each component of a termination payment is treated.

K Moorthy v HMRC [2016] UKUT 13

Payment on the transfer of an employee

Summary - The First-tier Tribunal allowed Mr Reid's appeal in part that a payment under a TUPE 2006 agreement was compensation for the loss of pension rights following the termination of his employment with BP.

Mr Reid was employed by BP for many years in the aviation department. In early 2010, BP announced that part of its business was going to be transferred to S & J D Robertson North Air Ltd (North Air). Part of this process involved the transfer of 20 employees (including Mr Reid) from BP to North Air under the TUPE Regulations. It was agreed that the employees would move to North Air reward and benefit scheme and relinquish their access to the BP scheme. In return the employees would receive a lump sum as a part of the 'buy-out' arrangement. The TUPE transfer took place on 1 April 2010 and Mr Reid received a sum on £25,396 on 21 May 2010. Mr Reid left North Air's employment in April 2011.

HMRC contended that the payment was taxable under s62 ITEPA 2003 as it was not a payment from the termination of employment but was a payment for relinquishing access to the BP reward and benefit scheme and moving to the North Air scheme. Mr Reid's argument was that the payment was a compensation payment for the loss of pension rights following the termination of his employment with BP and, as it was less than £30,000, was exempt under s401 ITEPA 2003.

HMRC stated that Mr Reid should be treated in the same way as the employees in Hamblett v Godfrey (HMIT).

Decision:

The FTT accepted that there were similarities between the cases as the payment was compensation for a change in contract terms. However, the reason why the payment in *Hamblett v Godfrey* was treated as earnings was because of the analysis of the lost rights which were being recognised by the payment.

Taking the same approach, the FTT found that the lost rights in this case that were being recognised by the payment were the scheme rights. The finding, that the loss of the scheme rights was the sole reason for the payment being made was not, however, the end. The payment was effectively a lump sum *in lieu* of contingent rights. The rights in question were the scheme rights and the contingency was that of continued employment with BP and the expectation of the continuation of those scheme rights. It followed that the replacement principle engaged, with the effect that the contingent rights compensated for by the scheme rights had to be treated the same way as the rights or expectations, which were being replaced. Thus the FTT did not accept that the loss of expectation of pension rights was determinative of the payment as a whole.

The FTT held that the element of the payment for the loss of pension expectations was a lump sum in respect of a contingent right to additional pension, and by virtue of the replacement principle, should have the same character. This part of the payment was therefore derived from expected additional pensions rather than from, or an emolument of, employment.

Following the decision of the FTT in Kuehne + Nagel Drinks Logistics Ltd v R & C Commrs this element of the lump sum payment was not taxable as earnings and the FTT therefore allowed the appeal relating to the compensation for the loss of expectation of pension rights.

The FTT considered Mr Reid had failed to establish that the elements of the payment relating to shares, bonus and lunch time allowance were not chargeable to tax and consequently the FTT dismissed the appeal in respect of these elements. As the payment had not been broken down the FTT could not find as to the precise amount of the payment chargeable to tax. However, the agreement provided that the sum attributable to pensions was equivalent to 42% of Mr Reid's base salary on 1 May 2010. The FTT decided the parties should proceed on this basis but if they were unable to agree then written submissions limited to this issue would be invited.

Comments - The character of a payment which is made in satisfaction of, or to replace, a contingent right to another payment is generally treated in the same way as that contingent right. The Judge in this case found the 'replacement principle' as referred to in *Kuehne* (FTT) compelling and, while that decision was not binding on the FTT, an accurate analysis of the law. However unlike *Kuehne*, in this case the payment had different components paid which were paid for different reasons. Thus the payment could be apportioned as the payment was in reality a number of different entitlements paid in one lump sum rather than separately.

A G Reid v HMRC TC 04872

Locum's travel, subsistence and training expenses incurred by an agency worker

Summary – The Tribunal found against the taxpayer as each venue was a permanent workplace and therefore the expenses were not allowable

The taxpayer was an agency nurse. His assignments were always temporary but the location of each engagement was a permanent workplace. The agency paid him an agreed rate of remuneration and mileage and expenses payments.

He claimed the cost of travel and accommodation, subsistence and training expenses in his tax returns for 2007/08 to 2009/10. HMRC refused the claim.

The taxpayer appointed an agent to appeal on his behalf.

Decision:

The First-tier Tribunal referred to s336 ITEPA 2003 that states expenses against earnings must be incurred wholly, exclusively and necessarily in the performance of the duties of employment.

The tribunal said the costs of education or training were not allowable because such events put the individual in the position to continue with their employment. This was the case even if non-participation could lead to the employee losing their professional qualifications or job. The exception would be if the training formed part of the employee's duties of employment.

In this instance, the taxpayer had not been obliged to undertake the training and, despite it enhancing his skills, this was not an allowable cost.

Turning to travel costs, the judge said, because the taxpayer accepted that each workplace was a permanent one, the travel constituted ordinary commuting. Although the taxpayer had withdrawn his claim for accommodation expenses, the tribunal confirmed that, where work is carried out at a permanent workplace, the cost of overnight accommodation near it was not allowable.

The taxpayer's appeal was dismissed.

Comments – The rules on expenses deduction for employment income are well known in that the expenses must be incurred *wholly, exclusively and necessarily in the performance of the duties of employment.* Although the taxpayer was working under the agency rules this is still regarded as employment income and so not surprisingly the Tribunal found against the taxpayer

A Kristian v HMRC TC4832

Sporting benefit or testimonial payments **(Lecture P941 – 21.41 minutes)**

On 9 December 2015, HMRC published the draft legislation relating to their proposal to charge income tax on receipts from sporting benefits or testimonials. An intention to bring such receipts into the charge to income tax was floated by the Chancellor last year and the new regime will take effect from 6 April 2017. The rules are of particular relevance to the tax treatment of a professional cricketer’s benefit season, but can of course apply to sportsmen in other fields.

Original idea

The original idea of a benefit match had its origins in the 19th century when professional county cricketers were poorly paid and could not usually continue playing beyond the age of 40. In those days, the benefit would typically comprise the gate receipts of a designated first-class match, together with the proceeds of one or more collections from members of the public who attended the game.

Benefit receipts

The taxability of a cricketer's benefit receipts was decided by the House of Lords in Reed v Seymour (1927). In that case, James Seymour, a batsman who played for Kent CCC for over 20 years, had received the net proceeds (gate money less expenses) of a match against Hampshire at Canterbury in 1920 amounting to £939. It was held that this payment was 'not remuneration for services, but a personal gift'. The benefit was an expression of gratitude from the public for the services that James Seymour had already rendered and was not intended to spur him on to further successes. Accordingly, it was tax-free. It should be noted that the player also received additional sums from various public subscriptions during his benefit year, but the tax authorities did not seek to assess these.

Modern testimonials

Over the years, the organisation of testimonials for both cricketers and others has become much more sophisticated compared to the arrangements enjoyed by James Seymour in the 1920s. Typically, a modern testimonial will consist of a series of benefit events spread over a period of one year with the aim of raising funds for the sportsman concerned. These events are invariably organised by an independent testimonial committee. They may include benefit matches, golf days, dinners, ladies' nights, the sale of testimonial merchandise and so on. Great care has to be taken to try and ensure that the receipts from these activities are not trading receipts (which would of course be taxable on general principles). If some of these receipts are liable to tax, the testimonial committee is accountable for the tax on such profits. The net proceeds are then available for payment to the sportsman beneficiary.

Where the right to a benefit or testimonial is written into a player's contract or where it is customary for such an event to take place (eg. after a set period of service), the proceeds will be taxable as earnings from the sportsman's employment under S62 ITEPA 2003. Where this is not the case, the proceeds are likely to fall outside the scope of the section. However, the principle established in Reed v Seymour (1927) that, where a benefit or testimonial is organised to demonstrate the affection and regard for the personal qualities of the sportsman, the proceeds therefrom are not from the employment and are not earnings does not, in HMRC's view, take into account changes to tax legislation which have taken place since the time of that case.

However, HMRC suggest that this rule was overturned by the introduction of the 'disguised remuneration' legislation in FA 2011 (see Ss554A – 554Z21 ITEPA 2003). Despite this, they have continued to treat benefit receipts as tax-free by concession. Furthermore, they argue that the benefit in kind code that started in 1948 could also have caused such receipts to become taxable, but this is a moot point. The decision in Reed v Seymour (1927) has withstood many challenges and HMRC have never succeeded in establishing that the House of Lords' judgment was incorrect. Indeed, the various challenges have merely reinforced the position that, unless the payments represent remuneration for services (eg. where the entitlement arises from the contract of employment), they are not earnings and are not taxable.

Over the last two or three decades, the amounts received by cricketers in these circumstances have grown exponentially. Graham Gooch's benefit season was 1985 and he netted the sum of £154,000 – interestingly, he was also awarded a testimonial 10 years later by Essex CCC towards the end of his playing career. Graeme Hick enjoyed a much larger sum at the culmination of his benefit year in 1999 (£345,000) and Andrew Flintoff's benefit in 2009 is reputed to have raised well over £1,000,000!

New rules

It is not therefore surprising that HMRC have decided to make tax-free receipts of this magnitude a thing of the past. Accordingly, a new S226E ITEPA 2003 has been introduced by clause 37(1) of the draft Finance Bill. S226E(1) ITEPA 2003 confirms that the provision will only apply to individuals who are employed (or were formerly employed) as professional sportsmen – the legislation has no relevance in the context of self-employment.

S226E(2) ITEPA 2003 defines the term 'sporting testimonial' for the purposes of these rules – such arrangements may relate to a single event or they may encompass a series of events stretching over the course of a testimonial year, the main purpose being to raise funds for the individual in his capacity as a professional sportsman. However, payments made to the sportsman will not be taxable where the person controlling the collection and disbursement of donations is someone unconnected with the sportsman or his employer (and certain other conditions are met) – see S226E(5) and (6) ITEPA 2003. This would seem to correspond to the established acknowledgement that money raised by collections from the general public is not taxable. Testimonial payments made to the sportsman or to members of his family or household will be treated as earnings from the employment to which the testimonial is most closely linked (S226E(7) and (8) ITEPA 2003).

In the event that a testimonial raises money for the family of a sportsman after he has died, the proceeds will not be brought into charge under this provision as long as the money is neither paid into the sportsman's estate nor handed over to his personal representatives (S226E(9) ITEPA 2003).

Clause 37(2) of the draft Finance Bill confirms that this legislation will not be retrospective. It will only come into effect where:

(i) the announcement of the testimonial is made on or after 25 November 2015; and

(ii) the relevant events and activities take place on or after 6 April 2017.

As a modest concession, there is to be an exemption from income tax on such payments by virtue of a new S306B ITEPA 2003 (as inserted by Clause 38 of the draft Finance Bill): the first £50,000 will be tax-free. Note that this is a lifetime limit. If a sportsman enjoys two or more benefits or testimonials during his playing career, the £50,000 exemption will only apply to the proceeds received from the first set of arrangements.

Finally, similar legislation will be introduced to bring such payments into charge for Class 1 NIC purposes. But who is going to be liable for the secondary NIC charge?

Contributed by Robert Jamieson

The new dividend regime and Gift Aid (Lecture P942 – 15.30 minutes)

There has been minimal publicity about what may turn out to be an unintended hit on charitable giving. This will take effect from 6 April 2016 onwards. Admittedly, it will be individual donors – and not the charity – who will pay the penalty for falling into this new trap, but it is important for professional advisers to ensure that their clients, whether they are charities or affected Gift Aid donors, are alerted to the problem.

The tax credits currently attaching to dividends can be used to discharge an individual donor's requirement to account for basic rate tax deducted from Gift Aid payments. However, from 6 April 2016 dividends will no longer carry a tax credit (see the Schedule to clause 3 of the draft Finance Bill).

While there has been considerable comment in the press and at tax conferences about the increase in the marginal income tax rates on dividends, there has been virtually no space given to the abolition of dividend tax credits, perhaps because Gordon Brown's 1999 withdrawal of the right to claim a repayment of tax credits has meant that, for the most part, they are nowadays something of an anachronism.

Typically, donors who rely on dividend tax credits to frank the basic rate tax withheld from their Gift Aid payments are at opposite ends of the income spectrum. The largest number (albeit small in terms of the amount of tax involved) are donors with modest incomes. Many of these will be pensioners whose personal allowance covers their state retirement pension and any other non-dividend income which they may have. Such individuals could have up to, say, £3,000 of dividend income in addition. At present, they will have no income tax liability and, for 2016/17 onwards, this will continue due to the new £5,000 dividend nil rate (see clause 2 of the draft Finance Bill).

However, a fundamental change is in the offing. With effect from 6 April 2016, these taxpayers will be exposed to an income tax assessment on the basic rate tax deemed to be deducted from their Gift Aid payments.

At the other extreme, wealthy benefactors may also be involved. Consider an entrepreneur who has handed over the running of his company and who now just takes dividends or, alternatively, an individual whose income is derived from a substantial equity investment portfolio. Some of these people can be very charity-minded.

Illustration 1

In 2015/16, William has dividend income of £500,000 from Gates plc and it can be assumed that his other income is negligible.

He makes charitable donations under Gift Aid totalling a net £320,000.

His income tax liability is:

Dividends (x 100/90)		£555,555
		£
431,785 @ 10%		43,178
118,215 @ 32.5%		38,420
5,555 @ 37.5%		2,083
		83,681
Less:	Tax credit	55,555
		£28,126

After tax, William is left with a net £151,874.

Taking the same figures for 2016/17 but using the provisional rates and limits for that year, William's income tax liability is estimated to be just over £54,000. However, this is insufficient to cover the basic rate tax withheld on his Gift Aid payments (£80,000) and so his total income tax becomes £80,000 when the shortfall is made up. This represents an increase of nearly three times the amount which was due for 2015/16. William is left with a post-tax income of only £100,000 in 2016/17.

Although the dividend tax shake-up starts on 6 April 2016, the entitlement offered by S426 ITA 2007 to make an election to carry Gift Aid payments back to the previous tax year will provide some extra breathing space. Taxpayers will be able to access unused dividend tax credits in these circumstances, but there is a caveat. Such an election can only be made as long as the individual's tax return relating to his income for 2015/16 has not yet been filed with HMRC – see the decision in *Cameron v HMRC (2010)*. If the tax return is filed earlier than necessary, e.g. in September 2016, the opportunity to make this carry-back election disappears. The election can of course be made at the same time as the filing of the tax return. The latest date for making this election, where a Gift Aid payment has been made in 2016/17, is 31 January 2017.

This is one situation where early filing of a tax return can come with a penalty.

Contributed by Robert Jamieson

Venture capital schemes – exclusion of energy generation activities (Lecture P943 – 8.44 minutes)

The various tax-advantaged venture capital schemes – EIS, SEIS and VCTs – have always sought to encourage investment in smaller higher-risk trading companies looking to grow and expand. The company's trade must of course be 'qualifying', that is to say, it must be carried on commercially with a view to profit and it must not consist, to a substantial extent, of 'excluded activities'. The legislation listing these 'excluded activities' is found in Ss192 – 199 ITA 2007 (for EIS and SEIS) and in Ss303 – 310 ITA 2007 (for VCTs) – these comprise, in the main, low-risk trading activities, investment in which does not, in the Government's view, warrant a special tax break.

Clause 6 of the draft Finance Bill removes all energy-generating activities from the approved trades carried on under these venture capital schemes. It replaces the existing subsidised renewable energy and reserve capacity exclusions with a new broader limit which covers any form of energy generating activity. This incorporates all electricity generating and storage activities, the generation of heat and the production of gas or other fuel. The new exclusions apply to both non-renewable and renewable sources of energy generation and are without exception to whether a subsidy is received or to the nature of the company itself.

In the context of the EIS, SEIS and VCT legislation, all these changes take effect in relation to shares and holdings issued on or after 6 April 2016.

It is intended that any permitted energy generation activities will also be withdrawn from SITR when that scheme is enlarged at a later date (expected to be some time in 2016).

Contributed by Robert Jamieson

Capital Taxes

Payment to a company by a shareholder – No Entrepreneurs' relief

Summary - The First-tier Tribunal found that a payment to compensate a company for no longer being able to trade from a property owned by the appellants was not enhancement expenditure on the property and that entrepreneurs' relief was not available on the disposal of a business asset where the appellants did not carry on the business

The Patel family (the appellants) traded in partnership as hoteliers until 1 January 2003 when the business (but not the business premises) was transferred to a limited company that they controlled. The company paid for the goodwill and continued to trade from the premises but without any formal or written agreement as to the terms of their occupation. Subsequently the hotel ceased to operate and was demolished, with flats constructed in its place (paid for by the company).

The appellants paid £395,000 to the company as compensation for the fact that it could no longer trade from the premises although it was not clear how this figure was arrived at and there was no written agreement. The flats were sold over a two year period, with the company receiving 50% of the proceeds and the remaining 50% being shared between the appellants. The appellants submitted tax returns for the two years concerned (2008–09 and 2009–10), including their respective shares of the proceeds and claiming a deduction for allowable costs (including a share of the £395,000 payment, although the tax returns did not make clear what the deduction related to), and entrepreneurs' relief.

An enquiry was raised into the 2009–10 returns and, later, a discovery assessment was issued for the earlier year.

Decision:

The FTT found that each appellant's share of the £395,000 was not an allowable cost under TCGA 1992, s. 38 – as it was neither a payment for acquisition of the asset nor an incidental cost, only s. 38(1)(b) (enhancement expenditure) was relevant, and in fact the payment neither enhanced the value of the asset nor was reflected in the state or nature of the asset at the time of disposal.

Entrepreneurs' relief under TCGA 1992, s. 169I(2)(a) was not available, as this required the disposal of a business or part of a business, and in fact the only business had been carried on by the company not the individuals and, on a similar basis, could not be available under s. 169I(c)(disposal of an asset used in a business that had now ceased) because, although the business had indeed ceased, s. 169I(4) also required the business to have been owned by the individual for at least one year before the cessation.

Finally, a discovery assessment had been validly raised because, although the appellants had made and delivered their tax returns, these only indicated that a deduction was being claimed for allowable costs and that an entrepreneurs' relief claim was being made, with no further detail provided, and therefore an officer of the Board could not have been reasonably expected, on the basis of the information provided, to be aware of any potential insufficiency in tax paid (TMA 1970, s. 29(5)).

Comments - The FTT's task was made considerably more difficult in this case by a lack of written evidence or formal agreement between the parties and even misunderstanding between the parties themselves as to the nature of informal agreements. Faced with contradictory evidence on the nature of certain arrangements they were obliged to draw their own conclusions in the light of what had actually occurred. This demonstrates the importance of proper records and this case becomes the seventh determining aspects of Entrepreneurs' relief.

Patel & Others v HMRC TC4871

Gift with reservation of benefit

Summary - The FTT found that there had been a gift with reservation of benefit for the donor when a sub-lease had been gifted.

Viscount Hood appealed against a notice of determination of IHT liability, relating to the grant of a sub-lease by Lady Hood to her three sons. HMRC argued that the gift had been made with reservation of benefit, because the sub-lease provided for an indemnity from the sub-lessees for the performance of Lady Hood's duties under the head lease.

Decision:

The FTT observed that, following the Buzzoni decision, the focus was not primarily on the question of whether the donor had obtained a benefit from the gifted property, but rather of whether the donees' enjoyment of that property remained exclusive. The FTT found that, to the extent that the benefit of the positive covenants in the sub-lease was derived from the donated property, the enjoyment of the sub-lessees was not to the exclusion of any benefit to Lady Hood.

The FTT added that there was no scope for the proposition that a proprietary interest gifted by way of a sub-lease should be dissected, and the donated property should be regarded as being what was left after carving out the burdens on the sub-lessee which were inherent in the sub-lease. The donated property had been the sub-lease and not a 'bundle of rights and obligations taken by the sub-lessees', as contended by Viscount Hood's counsel.

Comments - The FTT highlighted that the key principles involved following *Buzzoni* and *Ingram*. In particular, the need is to focus not just on whether the donor had obtained a benefit from the gifted property, but whether the donees' enjoyment of that property remained exclusive.

Viscount Hood, executor of the estate of Lady Diana Hood v HMRC TC4858

An excluded property dilemma (Lecture P944 – 13.08 minutes)

The recent High Court decision in Barclays Wealth Trustees (Jersey) Ltd v HMRC (2015) examined a long-standing area of uncertainty relating to excluded property held in a trust.

S48(3)(a) IHTA 1984 provides that, where settled property is situated outside the UK, it represents excluded property for IHT purposes unless the settlor was domiciled in the UK at the time when the settlement was made. Where a foreign-domiciled settlor establishes an excluded property settlement but subsequently becomes UK-domiciled (or deemed to be domiciled in the UK by virtue of S267 IHTA 1984) and then adds overseas assets to that settlement, are those added funds also excluded property?

The dilemma in this case was succinctly summarised by Mann J when he said at the start of his judgment:

'The facts are short, but it will help in understanding their significance if I distil the facts and issues to their simplest. Trust property in Trust No. 1 was "excluded property", settled by a non-domiciled settlor, and so would have been free from the 10-year charge had it stayed there. Some of it was transferred to Trust No. 2, which had the same settlor but who had by now become domiciled in the UK, and it became (at that point) not excluded property. It was then transferred back to Trust No. 1. The question, distilled to its simplest, is whether it has reacquired excluded status.'

The answer is that it all depends on what is meant by the words 'at the time the settlement was made'. It can be forcefully argued that a settlement is made at the time when it was originally established, in which case the added funds – if overseas – should qualify as excluded property. However, HMRC take the opposing view by suggesting that a new settlement comes into being whenever funds are added. Accordingly, if the addition takes place when the settlor has become UK-domiciled (as happened here – the settlor became deemed domiciled in the UK from the start of 2003/04, having set up the original trust some two years earlier), the new trust assets will not rank as excluded property.

There are some very real difficulties with the HMRC interpretation. For example, S44(2) IHTA 1984 provides that, where more than one person is a settlor in relation to a settlement, the settled property is treated as being comprised in separate settlements. One might reasonably conclude that the principle in S44(2) IHTA 1984 is not in point where the original settlor adds property to a settlement – the legislation could, after all, easily have said so and one assumption would be that this was therefore deliberate. This would seem to be consistent with the wording in S67 IHTA 1984 which provides a detailed procedure for the calculation of a 10-year anniversary charge where further assets have been added to a relevant property settlement by the settlor. On the HMRC interpretation, S67 IHTA 1984 could be seen to be redundant. Can Parliament be presumed to have passed legislation that has no effect? This was a difficult judgment, especially given the High Court's words that Parliament could not have intended additions of foreign property to a settlement after the settlor had acquired a UK domicile to have the character of excluded property – Mann J described this conclusion as 'striking'. His words were:

'This result is even more striking if one imagines a settlement which was seeded with a nominal sum (which frequently happens), with a massive subsequent contribution made when the settlor has become domiciled. Why should that subsequent contribution be able to acquire the characteristic of the original £100 in those circumstances?'

There can be no doubt (because S43(2) IHTA 1984 says so) that a settlement includes a disposition – and an addition is clearly a disposition – but that does not seem, in one commentator's mind, 'to get us past the express words of S48(3) IHTA 1984' as well as S67 IHTA 1984.

In a very careful and detailed judgment (which, interestingly, contains no reference to S67 IHTA 1984), the High Court concluded that the words 'at the time the settlement was made' are capable of describing both the making of the original settlement and the later addition of property to that settlement. Accordingly, the subsequent addition to the settlement by the settlor did not have the character of excluded property.

This argument is likely to be taken further.

Contributed by Robert Jamieson

IHT residence nil rate band and downsizing proposals (Lecture P945 – 21.24 minutes)

In his Summer Budget on 8 July 2015, the Chancellor announced that he was phasing in a further IHT nil rate band with effect from 6 April 2017 when all or part of a residence is passed on the owner's death to one or more of his direct descendants.

The maximum amount of this residence nil rate band has been set at:

£100,000 for 2017/18;

£125,000 for 2018/19;

£150,000 for 2019/20; and

£175,000 for 2020/21.

Thereafter, the threshold is expected to rise in line with the CPI for 2021/22 onwards. The relevant details can be found in S9 F(No2)A 2015.

The Government have now included legislation in a Schedule to clause 44 of the draft Finance Bill to ensure that those who wish to downsize to a less valuable property or who cease to own their own home (eg. because they are going into residential care) are not discouraged from doing so by fear that their IHT relief will be reduced.

Where all or part of a residence nil rate band might be lost because the deceased had downsized to a less valuable property or had ceased to own a home, the wasted residence nil rate band will still be available as long as a number of qualifying conditions are satisfied. However, this new relief will only apply where a residence is disposed of on or after 8 July 2015.

The three main situations when the relief will be available are where the deceased:

1. downsized to a less valuable residence and the sale proceeds (or other assets of an equivalent value) have been left to one or more of his direct descendants;
2. sold his only home and the sale proceeds (or other assets of an equivalent value) have been left to one or more of his direct descendants; or
3. otherwise ceased to own his only home (eg. because he gifted it) and assets of an equivalent value have been left to one or more of his direct descendants.

In the words of HM Treasury, 'the broad intention is that an estate would be eligible for the proportion of the residence nil rate band that is foregone as a result of downsizing or disposal of the property as an addition to the residence nil rate band that can be used on death'. For the purpose of these notes, this will be referred to as the 'additional residence nil rate band'.

The qualifying conditions for this additional residence nil rate band are as follows:

- the individual dies on or after 6 April 2017;
- the property disposed of must have been owned by the individual and it would have been eligible for the standard residence nil rate band had it been retained;
- a less valuable property (or other assets of an equivalent value) are included in the deceased's estate – this will cover property or assets which are deemed to be part of the estate (eg. because they are held in a life interest trust); and
- this less valuable property (or other assets of an equivalent value) are inherited by the deceased's direct descendants or the spouses of such direct descendants on the individual's death.

Other points to note

The downsizing or disposal of the property must take place on or after 8 July 2015 – subject to this, there is no limit to the length of time from the date of the downsizing or disposal to the date of death.

There can be more than one downsizing move between 8 July 2015 and the date of death.

Downsizing will cover the disposal of part of the property (including land occupied and used as a garden or grounds) or a share of it.

Where a property has been given away, assets of an equivalent value to the worth of the property at the date of the gift must be left to direct descendants – this will be taken as the net value of the property, ie. after deducting any mortgage or other debts charged on the property.

The additional residence nil rate band will be subject to taper in the same way as the standard residence nil rate band where the deceased's estate is worth more than £2,000,000.

The additional residence nil rate band has to be aggregated with the standard residence nil rate band – if the total of the two exceeds the relevant limit (eg. £175,000), the normal cap will apply.

Illustration 1

Michael, a widower, sold his family home for £440,000 in May 2020 and moved into a flat worth £210,000. At the time of the sale, the available residence nil rate band was £350,000, given that, if Michael had died at that time, his personal representatives would have been able to make a claim to transfer all the unused residence nil rate band from his late wife. By downsizing, Michael has lost the chance to use £140,000 (or 40% of the available residence nil rate band) which would have applied if the more valuable property had not been sold.

When Michael died in March 2021, his flat was worth £225,000 and was bequeathed to his son along with shares, chattels and other assets worth £830,000. Michael's estate can currently use a residence nil rate band of £225,000.

However, this estate would have been eligible for a residence nil rate band of £350,000 had he not downsized. Michael's personal representatives can therefore claim an additional residence nil rate band of 40% of the available limit, ie £140,000. This would produce a total residence nil rate band of £225,000 + £140,000 = £365,000. As this is greater than the maximum available limit, the additional residence nil rate band is restricted to £125,000 in order to ensure that the total amount does not exceed the permitted maximum of £350,000.

In addition, Michael's ordinary nil rate band, together with any transferable nil rate band from the estate of his late wife, can be applied to the remaining assets of his estate.

Illustration 2

Anna, a widow, gave her freehold house worth £580,000 to her son in April 2020 when she moved into sheltered accommodation. At the time of this gift, Anna's available residence nil rate band was £350,000, her late husband having bequeathed the family home (along with all his other assets) to Anna when he died. She has therefore potentially lost the chance to use 100% of the residence nil rate band which could have applied had she not given away the property.

When Anna died in August 2022 (ie. within seven years of the gift), her estate of £760,000 is split equally between her son and her grandson. As there is no qualifying residence in her estate, the residence nil rate band cannot be used directly. However, the estate is eligible for the additional residence nil rate band up to the maximum 100% of the available amount at the time of her death (assumed still to be £350,000).

The position in relation to the gift of the house has to be considered first. The residence nil rate band only applies to assets in the estate and so is not available to cover the lifetime gift. Nevertheless Anna's personal representatives can claim the full benefit of the transferable nil rate band (assumed still to be £650,000) and so there is no IHT to pay on the gift. The balance of £650,000 – £580,000 = £70,000 remains available to be set against the estate.

The additional residence nil rate band is applied first against Anna's estate of £760,000, leaving £410,000 in charge. The balance of the transferable nil rate band is then applied to this amount, leaving a figure of £340,000 liable to 40% IHT.

Contributed by Robert Jamieson

Administration

Forcing communications with clients on offshore matters

Accountants, tax advisers and all financial institutions in the UK will be required to write to clients before 30 April 2017, enclosing a letter from HMRC which warns about the dangers of not declaring offshore income and gains.

The requirement is outlined in F(No. 2)A 2015, s 50: *International agreements to improve compliance: client notification*.

The draft regulations and guidance notes that set-out exactly what the adviser will have to send to clients and when, are now out for consultation. However, the consultation period has been set at just 12 days - responses are required by 12 February 2016!

<u>Who must be contacted?</u>

Individual clients must be contacted, but the draft guidance is not clear whether this includes clients who act as trustees or executors. The potential recipients of the letter include current clients, and those individuals who were clients within the tax year 2015/16 and who were UK resident at any time in that period.

Not all clients have to be contacted. The adviser is supposed to write to those to whom it has given offshore advice or services within the three years to 5 April 2016. However, the definition of "offshore advice or services" is very wide; it includes completing the client's UK tax return to report interest received from an offshore account.

As it may be unduly onerous for the accountant to identify those clients whom it knows have offshore accounts, the accountant is permitted to write to all their clients.

<u>What must be sent?</u>

The client must be sent an individually addressed covering letter from the adviser's firm, using the firm's normal branding and in the form usually used to contact clients. A "Dear Sir/ Madam" addressed letter will not be acceptable.

This covering letter must include certain wording that HMRC will set out. It must also enclose a HMRC branded letter which will be available to download from gov.uk. The exact text of the HMRC letter has not been released yet.

<u>When and how?</u>

HMRC would prefer the letter, including the HMRC missive, to be sent in paper form by post, but the regulations allow email to be used if the firm is confident that the email will be read by the client. The communication must be sent between 6 April 2016 and 30 April 2017.

<u>Penalties</u>

The penalty for not complying with the regulations will be set at £300 per institution or firm, not per client.

Sch 36 notices are correct

Summary – The Court of appeal found that the 3rd party notices had been correctly issued.

The Australian Tax Office (ATO) asked HMRC to obtain documents from UK banks relating to UK companies that it considered may be resident in Australia. The ATO suspected that, as a result, Australian individuals were avoiding tax in Australia.

As requested, HMRC issued notices under FA 2008, Sch 36 to the 24 organisations concerned. It considered only three of them were taxpayers for the purpose of Sch 36 and therefore provided them a summary of reasons for issuing the notices. Judicial review proceedings were dismissed and the claimants appealed. They argued that the notices had not complied with Sch 36 because only three of the 24 claimants had received an explanation of why the information was required. Further, the notices breached article 6 of the European Convention on Human Rights.

Decision:

In the Court of Appeal, the Chancellor, Sir Terence Etherton, said the reason that third parties were told about the Sch 36 notice was to enable them to state any practical difficulties with compliance. The legislation did not require them to be given an explanation as to why HMRC required the information and documents. He said it was ‘equally clear’ that the reason the third party did not have to be given any explanation as to why the officer required the information was because it was not for the third party to argue the taxpayer’s case. Similarly, it was not for the non-taxpayer entity to argue any case for the taxpayer, so it did not need to know confidential information relating to the taxpayer. It was sufficient that the information specified in the third-party notice was reasonably required for the investigation of the named taxpayer.

HMRC had made a justifiable decision as to why only three claimants were to be regarded as taxpayers for the purposes of the third-party notices and not the rest of the claimants.

Sir Terence said the notices had satisfied the requirements of paras 2 and 3 of Sch 36 and the claimants’ rights under the ECHR had not been infringed.

The judge added that the judicial monitoring scheme in Sch 36 combined with judicial review was adequate. In this case, the taxpayers, the third parties and the 21 non-taxpayer claimants had had the opportunity, if not an express right except in the case of third parties, to make representations indirectly or directly to the First-tier Tribunal.

In the circumstances, the reality was that the claimants had been well placed to have known what factual basis there had been, if any, for opposing the third-party notices, but none had ever been put forward by them.

Sir Terence concluded: ‘If the issue is simply whether the Sch 36 powers have been applied in a proportionate way, then judicial review is a perfectly apt process for carrying out that judicial assessment.’

The claimants’ appeal was dismissed.

Comments - This case demonstrates the operation of (assistance in the collection of taxes) of the OECD Model Convention, art. 27 in this case, as included within the *UK/Australian Double Tax Convention* and used by the Australian Tax Office to request assistance from HMRC in obtaining information that HMRC could obtain by using their powers under Sch 36 FA 2008. In this respect, worth noting are the High Court comments that there is no right of appeal against notices such as those issued under Sch 36 and that Tribunal approval for the issue of such notices is Parliament's safeguard in this respect.

R (on the application of Derrin Brother Properties Ltd and others) v CRC EWCA

Which version of the Liechtenstein disclosure facility applied?

Summary - The High Court rejected an application for judicial review of HMRC's refusal to grant to a group of taxpayers the full benefits of the Liechtenstein disclosure facility (LDF), as it had existed at the time of their application.

This was an application for judicial review by nine claimants, all of whom operated employee benefit trust schemes (EBTs). They challenged HMRC's decision to limit the benefits of the LDF available to each of them in relation to their EBTs. They contended that the decisions were so unfair as to amount to an abuse of power. They articulated that unfairness in four different ways:

1. They had been led to believe that they could benefit from the LDF, but HMRC had withdrawn many of the benefits at the last minute and without warning.
2. The treatment imposed by HMRC was contrary to its own published policy.
3. The decisions had been backdated by six months.
4. The decisions were discriminatory because others in a materially identical situation to the claimants were not subject to it.

The claimants also argued that HMRC had failed to take all the relevant considerations into account.

Decision:

1. The High Court accepted that the claimants had been led up the garden path by HMRC. However, no guarantee or promise had been given that either the LDF would be available or that its terms would remain unaltered.
2. The High Court accepted that at the time the claimants had applied for registration, the LDF had been in different and more advantageous terms than post-August 2014. However, as the claimants were not, prior to the August 2014 changes, registered under the LDF, there was no unfairness in refusing to apply the full benefits of the LDF to them. This was precisely what the LDF envisaged by requiring registration.
3. The High Court reiterated the point that the benefits of the LDF only apply to those who are registered. Since the claimants were not registered prior to August 2014, there had been no backdating.
4. The High Court noted, however, that the claimants were comparing themselves to taxpayers whose applications had been accepted and who had therefore been registered. This difference meant that these taxpayers had had a legitimate expectation of receiving the full benefits of the LDF.

The court found, however, that HMRC had undertaken a careful review of the many public interest and private interest factors engaged.

Comment - Although not relevant to the judgment, even though HMRC decided in February 2014 that: tax liabilities of EBTs should not be settled under the LDF; no further EBT users should be permitted to register; and the implications for the claimants and others in their position had to be considered, there was no public announcement until August 2014. HMRC accepted that this could have been handled better. The judge agreed, saying that affected taxpayers should not have been left in the dark for so long, once these decisions to alter existing policy had been made. Hopefully HMRC will take note and be more transparent in the future when changing policy.

The High Court concluded that the decisions were not 'conspicuously unfair' and HMRC had taken account of all relevant considerations, and balanced the various public interest and private factors to arrive at the decisions. There had been no abuse of power or error of law.

As with many things in life timing is everything. A missed opportunity will be regretted as in this case but that does not stop it being a missed opportunity.

R (on the application of City Shoes Wholesale) v HMRC [2016] EWHC 107

Discovery assessments and the knowledge of the 'hypothetical officer'

Summary - The Court of Appeal found that a discovery assessment had been valid.

Mr Sanderson's tax return for the year 1998/99 had disclosed chargeable gains of £1.8m and capital losses of more than £2m. The losses had been attributed to a 'beneficial interest in the Castle Trust'. Castle Trust was the vehicle of a capital loss scheme implemented by many taxpayers. The appeal against the decision of the UT upholding a discovery assessment turned on whether, at the time the enquiry window had closed, the relevant HMRC officer 'could not have been reasonably expected, on the basis of the information made available to him before that time' to be aware of the underassessment of tax (s 29(5) TMA 1970).

The UT examined three scenarios, each of them assuming a different level of information, as the scope of the information which had been available to HMRC was not agreed.

- In the first scenario, the officer only had the tax return.
- In the second scenario, the officer also had knowledge of HMRC's views about the Castle Trust.
- In the third scenario, the officer knew the results of HMRC's investigation into the Castle Trust.

Decision:

The decision was as follows:

- In the first scenario, the officer only had the tax return.

  This was not enough, given the non-disclosure of the self-cancelling nature of the transactions. The fact that the information disclosed may have led the officer to ask questions was also not sufficient.

- In the second scenario, the officer also had knowledge of HMRC's views about the Castle Trust.

Again, this was not enough. The officer was only required to examine the information disclosed by the taxpayer by reference to the relevant legal principles; and not by reference to what some particular department or officer at HMRC may have thought about the efficacy of the Castle Trust scheme.

- In the third scenario, the officer knew the results of HMRC's investigation into the Castle Trust.

  The UT found that it would have been entirely speculative, rather than a matter of inference from the return, for the notional officer to conclude that another branch of HMRC might have relevant information on the effectiveness of the scheme.

Comments - This case considered what constitutes 'information made available' in the context of 'discovery' and what can and cannot be inferred from information provided in a tax return. The purpose of s 29(5) was 'to test the adequacy of the taxpayer's disclosure, not to prescribe the circumstances which would justify the real officer in exercising the s 29(1) power'. The knowledge threshold of s 29(5) was therefore not as low as suggested by the appellant.

D S Sanderson v HMRC [2016] EWCA Civ 19

Inaccuracy penalties quashed

Summary - The First-tier Tribunal allowed a taxpayer company's appeal against penalties charged in respect of apparent errors in its P35s, finding that as a preliminary issue there were no inaccuracies in the forms.

The appellant, Fab Cleaning Management Ltd ('Fab') accepted that it or its payroll agents had made errors in the operation of its PAYE scheme, resulting in too little tax and National Insurance contributions (NICs) being deducted and paid over to HMRC. Fab made no challenge against the determinations issued by HMRC to recover the underpayments, however it did dispute the penalties charged by HMRC under Sch 24 FA 2007 for apparent inaccuracies in its submitted P35s.

Decision:

The FTT noted that Fab submitted its P35s to meet its obligations under the reg 73 of the PAYE Regulations 2003 to provide details of the payments made by it to its employees during the year, and of 'the total net tax deducted in relation to those payments'. HMRC argued that the penalties were chargeable because the figures entered in the P35s disclosed deductions lower than those which should have been made, resulting in an inaccuracy which amounted to or led to an understatement of a liability to tax. The FTT found that this argument failed because it did not take into proper account the wording in reg 73, which did not say that the P35 was required to include 'the total net tax *which should* have been deducted in relation to those payments', but the amount actually deducted. Similarly, both the P35 and P14 forms asked for, respectively, 'Total Tax from P14s' and 'Tax deducted'.

The FTT could not see how an employer who had recorded the amounts actually deducted could be said to have submitted an inaccurate return; he had provided precisely what the forms asked for. The FTT accordingly found there was no inaccuracy in the returns which engaged Sch 24 para 1 FA 2007 and that consequently the penalties imposed had to be discharged.

Comments - The FTT found that as an employer's end of year return forms are required to show the amount of tax deducted from payments made to employees and not the amount of tax *which should* have been deducted, even though the PAYE deductions made by the taxpayer company were incorrect the end of year forms did not contain inaccuracies for which a penalty under FA 2007, Sch. 24 could be charged.

Fab Cleaning Management v HMRC TC 4824

Deadline Dates

1 March 2016

- Due date of payment of corporation tax liabilities for accounting periods ended 31 May 2015 for small and medium-sized companies not liable to pay by instalments.
- HMRC car mileage fuel rates scheduled for review.

2 March 2016

- Unpaid income tax/class 4 NIC liability for 2014/15 will attract an automatic 5% penalty after this date.

7 March 2016

- Due date for filing VAT returns and for payment for 31 January 2016 quarter (electronic payment).

14 March 2016

- Due date for quarterly corporation tax instalment for large companies depending on accounting year end.
- Filing date for EC sales list deadline for monthly paper return.

19 March 2016

- Due date to pay PAYE, National Insurance, construction industry scheme and student loan liabilities for month ended 5 March 2016 if not paying electronically.
- Due date for filing monthly CIS return.

21 March 2016

- File online monthly EC sales list by this date.
- Submit supplementary intrastat declarations for February 2016 by this date.

22 March 2016

- PAYE, NI and student loan liabilities should have cleared HMRC's bank account by this date.

31 March 2016

- Companies House should have received accounts of private companies with 30 June 2015 year ends and public limited companies with 30 September 2015 year ends by this date.
- Final date to reclaim tax paid by a close company on a loan to a participator under s455 CTA 2010 if loan was repaid during the year ended 31 March 2012.
- HMRC should have received corporation tax SA returns for companies with accounting periods ended 31 March 2015 by this date.
- Claims for VAT partial exemption special method must receive approval if to be backdated to 1 April 2015 (March year ends) by this date.
- End of CT61 reporting period.
- End of chargeable period for ATED.

HMRC News

Taxman seizes more than £2 billion from tax avoidance scheme users

New statistics reveal that HMRC has collected more than £2 billion in disputed tax from tax avoiders, under rules introduced by the government in 2014.

The new Accelerated Payments notices mean that users of tax avoidance schemes pay disputed tax up-front while their tax affairs are investigated, instead of waiting until they are concluded. Given HMRC wins 80% of cases that go to court, this eliminates the financial advantage that tax avoiders previously enjoyed.

The Financial Secretary to the Treasury, David Gauke, said:

> We will not tolerate tax avoidance and Accelerated Payments has been a real game changer.
>
> HMRC already wins the vast majority of cases that go to court and now HMRC has taken more than £2 billion from tax avoiders who would have otherwise benefitted from that cash while they were being investigated.
>
> It should be absolutely clear to anyone who is tempted by these schemes that tax avoidance does not pay.

Jennie Granger, Director General for Enforcement and Compliance, HMRC, said:

> Accelerated Payments continue to turn the tables on individuals looking to avoid paying their fair share of tax. Those who take part in tax avoidance now have to pay up-front and dispute later. It really is time to get out of avoidance – HMRC wins the vast majority of cases that people litigate, with many more settling before litigation.
>
> HMRC is now issuing over 3,000 Accelerated Payment Notices a month, and has issued over 41,000 notices since Accelerated Payments were introduced. By the end of 2016, HMRC expects to have completed issuing notices, bringing forward over £5 billion in payments for the Exchequer by March 2020.

Factsheet on HMRC and multinational corporations

There has been considerable media coverage of the tax affairs of multinational corporations, particularly on the conclusion of HMRC's enquiry into Google.

The Public Accounts Committee is taking evidence on this issue on Thursday 11 February in Parliament. Ahead of this hearing, HM Revenue and Customs (HMRC) is setting out some facts to help dispel myths which have arisen about how HMRC ensures compliance among multinationals.

Attention has focused on aggressive tax planning, by which some multinationals exploit the complexity of the international tax system to reduce their tax liabilities.

This is a global issue that requires a global solution.

The UK is actively engaged in the G2-OECD BEPS project and is pursuing the modernisation of international tax rules. The UK is also at the forefront in encouraging tax authorities across the world to share intelligence about multinationals' tax affairs.

Recent successes

Since April 2010, through an intense focus on compliance, HMRC has:

- secured more than £100 billion of compliance revenues from all sources – money that would have been lost without HMRC's intervention; £38 billion of this was from large business compliance work
- reduced the Corporation Tax 'gap' – the tax which is due but is not paid – from 9.3% (2010 to 2011) to 6.7% (2013 to 2014) of tax liabilities
- won more than 80% of tax avoidance cases in tax tribunals
- secured almost £3.2 billion in additional tax from challenging transfer pricing arrangements of multinational companies

Recent changes

The government has strongly supported HMRC's approach to tackling tax avoidance by increasing investment in HMRC's enforcement capacity and strengthening HMRC's powers, while introducing new, tough tax legislation. The government has:

- introduced the Diverted Profits Tax (DPT). This measure came into effect in April 2015 to address the contrived diversion of profits out of the country, so that multinationals pay tax on profits that would otherwise escape UK tax. DPT is designed to change companies' behaviour so they pay more introduced the Diverted Profits Tax (DPT). This measure came into effect in April 2015 to address corporation tax on their UK profits rather than risk paying a higher rate of DPT. It is anticipated to yield £1.35 billion between 2015 and 2019
- played a leading role in the OECD-G20 project to reform the international corporate tax system, to address aggressive tax planning and close loopholes
- reinvested £800 million in HMRC for additional work to tackle non-compliance in the tax system
- introduced the General Anti-Abuse Rule (GAAR) to tackle abusive tax avoidance schemes that might otherwise succeed under existing legislation. The GAAR is expected to protect £235 million in revenues before the year 2017 to 2018
- given HMRC the power to collect disputed tax upfront through Accelerated Payment Notices, removing the benefit of dragging out disputes. HMRC has collected more than £2 billion from avoidance scheme users using this power

In 2016, the government has continued to toughen its approach to big business tax compliance, including proposals in Finance Bill 2016 to:

- introduce a legal requirement for large businesses to publish an annual tax strategy relating to UK activities
- introduce a new Special Measures approach, targeted at the very small number of large businesses with an ongoing history of aggressive tax planning, which present a significant and continuing risk to the Exchequer

HMRC's approach to multinational corporations

The largest companies often pose big tax risks, which is why we closely manage their compliance. Because of the tax at stake, their size and complexity, and the significant risk these businesses present to the Exchequer, this resource-intensive approach is the most cost-effective way of ensuring they pay the right amount of tax. At any given time we have about two-thirds of the UK's 800 largest businesses under investigation.

If we conclude that a business should have paid more tax, we dispute what has been paid. There are only two ways out of a dispute: for the business to agree to pay the tax, interest and penalties owed; or to have the matter resolved in a tribunal or court.

We do take on multinational corporations in tribunal, and usually win, but the quickest and most cost-effective result for the Exchequer is to end the dispute by getting the company to agree to pay all the tax, interest and penalties owed. Settling disputes by agreement is provided for in tax law and is the same approach that we take for all tax disputes, from the smallest businesses to global enterprises.

Our approach to resolving disputes is published online. In these guidelines we make clear we will only accept the full amount of tax, interest and penalties and will not accept a lower payment than we could win in court. We do not apply any rate of tax other than the statutory rate set by Parliament.

HMRC treats all taxpayers impartially. We apply the same approach to resolving all disputes, regardless of business size.

Transparency

HMRC is bound by a strict statutory duty of confidentiality (in the Commissioners for Revenue and Customs Act) which governs all information that we hold. This confidentiality is a long-established feature of the UK tax system, and one that many taxpayers see as important, because they trust us to keep their information and details of their tax affairs confidential.

The law permits us to disclose information about identified taxpayers for the purpose of our functions (collecting tax, administering national minimum wage, etc). We only exceptionally disclose identifying information on this basis and in those cases we do not give specific details such as tax paid. We may also disclose information in other circumstances where the law expressly permits, such as with the consent of the taxpayer or because another legal provision allows for specific disclosure (for example, with other government departments to help combat crime or fraud, or with other tax authorities internationally under tax treaties).

Nevertheless, HMRC is transparent about how we conduct enquiries and resolve disputes. In 2012 a Tax Assurance Commissioner was appointed to challenge the decision making on cases. The Tax Assurance Commissioner plays no part in HMRC's engagement with taxpayers about their tax affairs or line management responsibility for HMRC case-workers. This ensures there is a clear separation between the Tax Assurance Commissioner in his assurance and decision-making role and those who engage in discussions with taxpayers about their liabilities.

We will be working with the Public Accounts Committee to assure them of the robustness of our process.

Myths

'Sweetheart deal'

HMRC does not do "sweetheart deals".

The National Audit Office has full access to our papers and has in the past scrutinised the way that we resolve disputes in large and complex enquiries. In 2012, it appointed a retired High Court Judge to examine our largest settlements and concluded that HMRC had obtained good settlements for the country in all cases The NAO also made recommendations, which we implemented. In large, complex cases, three HMRC Commissioners have to approve any proposal for resolving disputes, including one Commissioner from an area of the business which is not directly responsible for the enquiry and the Tax Assurance Commissioner, who oversees the process and publishes an annual report on his work.

This process is subject to routine scrutiny by the NAO.

The Google enquiry

On 22 January 2016, Google announced that it had reached agreement with HMRC to pay an additional amount of £130 million in corporation tax and interest, as a result of HMRC's investigation which started in 2010. This sum is over and above the tax that they have paid for past years (or would pay for the current period were it not for HMRC's enquiry). The current tax charge that Google took in its accounts increased significantly from 2012, when the company first disclosed that it was under enquiry and made a provision for additional tax.

Some commentators have applied Google's group profit margin to its sales to UK customers and estimated that Google's UK corporation tax is equivalent to an effective tax rate of around 3% on the group's profit's arising in the UK.

This calculation does not reflect how tax law works.

Under international tax rules, Corporation Tax applies to profits created from economic activities carried on in the UK, not to profits from sales to customers in the UK. Many elements contribute to a multinational business's economic activity and thus generate the profits, including the work that staff do, the technology driving and used by the business, intellectual property and other assets as well as where those assets are developed and actively managed.

Example

Imagine that a UK car manufacturer builds its vehicles in the UK, but half of its profits come from sales in the United States. Under Corporation Tax rules, the manufacturing profits would be taxed in the UK, the place of the economic activity, not the USA, where the consumers are.

In accordance with our published guidelines on resolving disputes, HMRC has taxed all of Google's profits chargeable to tax in the UK for the period in question, at the full statutory rate of tax.

There has been media speculation about what other European tax authorities are doing regarding Google. We can't comment on enquiries carried out in other countries, or on media speculation about them. So far, there has been no public confirmation that other countries have concluded enquiries with Google, either by agreement or by litigation. HMRC is satisfied that our enquiry has secured all the tax that is due in the UK.

Ministerial involvement

HMRC is responsible for the conduct of enquiries. Government Ministers are not informed of the progress of enquiries and play no part in agreeing the amount of tax to be paid by any taxpayer. This is an important separation between policy, for which Ministers are accountable, and the administration of that policy, which is the responsibility of the Commissioners of Revenue and Customs.

We only informed Ministers of the outcome of the Google enquiry after it was concluded, and we only told them information that was in the public domain or that Google intended to make public.

Permanent establishment

The definition of a permanent establishment is set by international treaty law. These rules are complex, but they set out the level and type of activity that a company resident in Country A would need to undertake in Country B in order for Country B to have taxing rights over profits arising from that activity.

Some media reports have suggested that HMRC did not look into Google's assertion that its Irish company did not have a permanent establishment in the UK.

Although we cannot go into details of the enquiry into Google (see the Transparency section for the legislative reasons), it is wrong to suggest that HMRC does not take into account all relevant factors when making sure multinationals pay the tax due under the law.

The conclusion of HMRC's enquiries means that Google is paying the full tax due in law on profits that are chargeable to tax in the UK.

Business Taxation

Shop Direct – The Final Part of the Saga in the Supreme Court

Summary - The Supreme Court dismissed the appeal by the Shop Direct Group against decisions that it was liable to corporation tax on the receipt of the repayment of VAT overpaid by companies which had discontinued trade within its corporate group.

In June 1991, the trade of the taxpayer company was transferred to another company (RGL). In November 2000, the trade of RGL was transferred to the taxpayer. In May 2003, after another company had acquired various companies, including the taxpayer and RGL, the trade of the taxpayer was transferred to a further company (SDHSL). Over many years, companies within a corporate group had paid the Revenue and Customs Commissioners (the Revenue) substantial sums as VAT on an incorrect understanding of the law. In 2006, a fifth company (Argos) became the representative member of the VAT group. Argos gave an irrevocable instruction to the Revenue to pay all VAT repayments to a solicitors' firm (WGM). The Revenue repaid the sums that had been incorrectly paid to Argos, together with interest on those sums, including one repayment of £124,963,600 (VRP2). By the time VRP2 was paid, each of the companies that had made the relevant supplies had permanently discontinued its trade. WGM paid an amount equal to VRP2 to the taxpayer's parent company. Amounts equal to those sums were recognised as an exceptional item in the profit and loss account of the taxpayer, and as an inter-company receivable due on its balance sheet. After the Revenue amended the corporation tax self-assessments of the companies, including the taxpayer, that received the various VAT repayments, the recipient companies appealed those assessments.

The First-tier Tribunal, the Upper Tribunal and the Court of Appeal held that the taxpayer was liable to corporation tax on the receipt of the repayment of overpaid VAT of £124,963,600, namely VRP2, as beneficial owner. The taxpayer appealed.

The issue for determination was whether s103 of the Income and Corporation Taxes Act 1988 (s 103) contained an implicit restriction so that the charge to tax on post-cessation receipts fell only on the former trader, whose trade had been the source of the income. Consideration was given to the Case I and VI listed in Sch D to the Act (pursuant to s 18 of that Act) and s 106 of the Act.

Decision:

The appeal would be dismissed.

The basic rule in s 103 was that sums arising from the carrying on of the trade before discontinuance were, if received after discontinuance, charged to tax under Case VI of Sch D. There was no restriction in s 103 itself on who the recipient of those fruits of the trade might be. Section 106(1) quantified the s 103 charge at the amount of the consideration or the market value of the rights to such sums when the former trader transferred its rights to those future recipients for value and the sub-section imposed the charge on the former trader. Section 106(2) disapplied s 103 and substituted Case I of Sch D only if the transferee company was carrying on the continuing business when it received the fruits of the trade, which was deemed to have been discontinued.

VRP2 was subject to a charge to corporation tax in the hands of its recipient, the taxpayer. The taxpayer had received VRP2 as its beneficial owner. It had received sums having arisen from the carrying on of the trade of the companies involved during periods before the discontinuance and the sums had not otherwise been chargeable to tax.

Section 106(1) was of no relevance to the transactions and no tax fell to be charged on the various transferors. Further, there had been no evidence and no findings that any of the intra-group transfers which might have occurred in order to transfer the right to receive VRP2 to the taxpayer had involved transfers for value. Section 106(2) was also of no relevance because, while the trade of the taxpayer had been transferred to SDHSL, none of the repayments of VAT had been made to that company.

The decision of the Court of Appeal, Civil Division, in 2014 is affirmed.

Comments – The decision is not surprising as it has gone the same way through all the levels of the courts. The Supreme Court dismissed the appeal by the Shop Direct Group against decisions that it was liable to corporation tax on the receipt of the repayment of VAT overpaid by companies which had discontinued trade within its corporate group. The basic rule in s 103 of the Income and Corporation Taxes Act 1988 was that sums arising from the carrying on of the trade before discontinuance were, if received after discontinuance, charged to tax under Case VI of Sch D to that Act. There was no restriction in s 103 of the Act itself on who the recipient of those fruits of the trade might be.

Shop Direct Group v Revenue and Customs Commissioners (2016) UKSC 7

Are losses from buying and selling shares allowable against other income?

Summary – The Tribunal found in favour of a taxpayer that based on the facts the buying and selling of shares was a trade

The taxpayer used the profits of his pharmacy business to buy and sell publicly listed shares. He said the losses from his share dealings were losses of a commercial trade, and claimed to set them off against the profits of the pharmacy business (ITA 2007, s 64 and s 66).

Decision:

The First-tier Tribunal said it had to decide if the taxpayer's share activities constituted a trade. The judge said it sat in the '"no man's land of fact and degree" (to use the phrase coined by Lord Simon of Glaisdale in *Ransom v Higgs* 50 TC 1)'. It would be necessary to evaluate whether the activities were a trade.

The tribunal said the activities bore classic hallmarks of trading. The taxpayer had bought his stock over an extended period with the intention of selling it at a profit. Four other badges of trade — length of the period of ownership, frequency of similar transactions, circumstances responsible for the realisation, and motive — were also satisfied.

This was only a starting point because a look at other cases showed the courts were 'wary' about agreeing that an individual's share dealing was a trade. It may look like trading, but not constitute it because it is, in effect, gambling. The tribunal noted that the taxpayer's business plan, while 'unsophisticated', and the fact that he operated in 'a sufficiently organised manner' were indications that he was not gambling and concluded that he had been trading.

On commerciality, the tribunal said transactions had taken place at market prices and the business plan followed. The fact that the taxpayer was self-taught, perhaps over-confident and took risks did make the trade uncommercial. His lack of success was due to lack of skill but he had a view to realising profits.

The taxpayer's appeal was allowed.

Comments – This represents a very unusual decision as the Tribunal would not normally venture into this territory. If the decision stands which would seem pretty unlikely as HMRC must surely take it to the Upper Tribunal then many taxpayers are likely to seek to take advantage of it. Let's see what happens.

A Ali v HMRC TC4816

Expense not incurred wholly and exclusively (Lecture B941 – 5.18 minutes)

Summary - The Upper Tribunal allowed HMRC's appeal against the decision of the FTT decision in Vaines v HMRC TC02965 finding that the expense claimed by Mr Vaines was not incurred wholly and exclusively for the purposes of the partnership trade but was a personal expense and, as such, fell to be disallowed.

Mr Vaines was a partner in the law firm of Squire Sanders & Dempsey (SSD). Previously, he had worked for the law firm Haarmann Hemmelrath which had ceased to trade owing some €17m to a number of banks. Under a compromise agreement with one of the banks, Mr Vaines had made a payment of €300,000 (£215,455) to release him from all claims. Mr Vaines had deducted the payment against his professional income from SSD in his 2007–08 tax return.

The FTT in Vaines [2013] TC 02965 had allowed the claim on the basis that the payment was incurred wholly and exclusively for the purposes of the profession or trade that Mr Vaines was carrying on and because the payment was revenue and not capital expenditure.

HMRC appealed the decision to the UT on three grounds:

1. the FTT were wrong to conclude that each partner was carrying on a trade as an individual, albeit collectively with others; there was but one trade being the partnership (or LLP) trade;
2. even if that were not the case, the FTT had been wrong to conclude that the payment was made wholly and exclusively for the purposes of Mr Vaine's trade; and
3. the FTT were further wrong to conclude the payment was not capital in nature.

Decision:

The UT noted that SSD was a limited liability partnership and that s849 ITTOIA 2005 provided that where an LLP was carrying on a trade and a member of the LLP was a UK resident individual, the profits of the LLP were to be calculated as if the LLP were a UK resident individual. The legislation specifically envisaged that it was the LLP that was carrying on the trade and although its activities were to be treated as carried on in partnership by its members rather than by the LLP itself there was nothing in that to indicate that Mr Vaines was carrying on a trade alone. The profits of that one trade were computed and charged and s850 ITTOIA 2005 stated the natural link to the partners who were chargeable in respect of them according to the LLP's profit sharing arrangements for the period.

Although s852 ITTOIA 2005 introduced the concept of a 'notional trade' and that each partner's share of the firm's trading profits or losses was treated as profits or losses of a trade carried on by the partner alone, that concept was designed for the purposes of the applying the basis period rules only so as to enable Mr Vaines to self-assess tax on his share of the profits of the partnership trade by reference to the correct basis period.

Therefore the trade that was being carried on was SSD's trade as carried on in common by all the members and not by Mr Vaines alone and as such, his payment fell to be deducted, if at all, in the context of SSD's trade and not as the FTT supposed by reference to Mr Vaines' circumstances alone.

Dealing with the second point, the UT noted that their conclusion on the first issue inevitably led to a conclusion adverse to Mr Vaines on the second. S34(1) ITTOIA 2005 specifically provided that in calculating the profits of a trade, no deduction was allowed for expenses not wholly and exclusively incurred for the purposes of the trade.

The payment in question was not borne by SSD and the FTT's conclusion that Mr Vaines' purpose in making the payment was 'to preserve and protect his professional career or trade' indicated that this was a personal expense, directed at resolving Mr Vaines' situation, and not one that was related to the professional activities of SSD. Additionally it had nothing to do with the business of SSD.

The payment was therefore not made wholly and exclusively for the purposes of the trade of SSD but to enable Mr Vaines to be secure in the knowledge that he could continue as a member of SSD. The UT found that the FTT's conclusion was wrong and that no deduction could be claimed. The UT commented that this would remain the case even if it were wrong on the first issue.

Finally, the UT decided that, given their conclusions on the first two issues, it was unnecessary to deal with the question of whether the payment was a capital or a revenue expense. However, the UT noted that had it been able to conclude in Mr Vaines' favour on the first two issues, it might well also have concluded that he was entitled to succeed on the third issue.

HMRC's appeal was allowed.

Comment - The UT has overturned the previous FTT decision finding that a partnership's (or LLP's) trade is a single trade carried on by the partners (or members) in common and not individually and, therefore, it is by reference to the partnership trade that deduction for expenses must be justified. As the expense was not wholly and exclusively incurred for the purposes of that trade but was a personal expense of Mr Vaines, it was disallowed. In light of these findings, the UT did not need to consider whether the expense was capital or revenue.

RCC v Vaines (2016) UKUT 0002

Was the boat trade carried on with a view to making profits?

Summary – The tribunal found that the trade was not commercial and the losses could not be set against the taxpayers' other income.

The taxpayers were directors of T J Charters, which was a boat chartering business. They claimed to offset the losses made by the business against their other income. HMRC refused on the ground that the business was not commercial (s66 ITA 2007). The taxpayers appealed.

Decision:

The First-tier Tribunal said the question of whether someone was a serious trader was objective. In the case of T J Charters, the projected profit and loss account did not represent a business plan because it showed a lack of serious research and did not correspond to the way the enterprise was conducted.

Its projection of the number of charters that could be obtained and the fees that could be charged was unrealistic.

The tribunal accepted that the financial downturn in 2008 would have had a depressing effect on the business but said this was 'too vague' an explanation of the difference between the projected figures and actual ones. The fact that the coding of the vessel had been delayed because the taxpayers were about to go on holiday was another indication that the trade was not a commercial one.

The tribunal concluded that the trade was not commercial and the losses could not be set against the taxpayers' other income.

The taxpayers' appeal was dismissed.

Comments – This is one of those cases that makes one wonder why it progressed to the Tribunal as the facts clearly indicated that there was very little chance of it succeeding. However if you don't try you don't succeed.

A and J Rowbottom v HMRC TC4817

Fluctuating milk price - Restrictions to claiming sideways loss relief

Summary – The Tribunal found against the taxpayer so that the loss relief was not allowed.

The taxpayers had a dairy farm. In 2007, as a result of the business making losses, they sold some of their land and herd and decided to invest the proceeds in a robotic milking shed. They estimated this would bring a 25% increase in production. During 2008 they re-constituted the dairy herd to make up for the losses and, in 2009, the robotic milking shed was built. However, its construction suffered from delay and financial problems so that milk production did not increase as quickly as hoped.

By 2011, although the outlook was better, the farm was still running at a loss, so the taxpayers decided to sell the business. They claimed the losses against their other income for 2010/11. The taxpayers said that s 68(3)(b) ITA 2007 was satisfied – they were 'competent' farmers and had a reasonable basis for expecting that no profits could be made from the business as it was in 2005.

HMRC refused the claim, saying the correct approach to s 68(3)(b) was to ask whether the 2010 activities, if carried on by a competent farmer in 2005 could reasonably have been expected to make a profit within five years. It said the answer was yes.

Decision:

The First-tier Tribunal said applying s 68(3)(b) to the activities as carried out by the taxpayers in 2005, the question was whether a competent farmer in their position, would reasonably not have expected to make a profit before 2010. The tribunal decided a notional competent farmer would not have reasonably expected no profits until 2010.

The taxpayers' profits in the period 2000 to 2005 had been uncertain because of the milk price fluctuations. However, that did not make it a reasonable assumption to expect losses for the next five years. The price could have risen. At best the taxpayers were 'vulnerable to changes in the farm gate price of milk along with their fixed feed and labour costs and their financing charges'.

The taxpayers' appeal was dismissed.

Comments – This is another in a line of recent cases focusing on whether a farmer is able to get relief for losses and the likelihood of whether the relevant business is likely to make a profit within the five year time frame. The tribunal decided a notional competent farmer would not have reasonably expected no profits until 2010.

B and R Scambler v HMRC TC4842

Film partnerships and partners' losses

Summary - The Court of Appeal upheld the Upper Tribunal decision of R (on the application of De Silva) v R & C Commrs dismissing an application for judicial review of an HMRC decision to reduce two taxpayers' carry back claims for film partnership trading loss relief.

Mr De Silva and Mr Dokelman (together 'the appellants') applied for judicial review of HMRC's decision to reduce their claims for relief for film partnership losses pursuant to a settlement agreement entered into between the film partnerships and HMRC that considerably reduced the film partnership's claims for relief for film expenditure. The appellants were limited partners in a number of film partnerships. The partnerships had entered into a compromise agreement with HMRC (under TMA 1970 s 54), which provided that the partnerships would be allowed losses at a considerably lower level than claimed in their tax returns. HMRC had then written to the partners, explaining that their individual tax returns would be amended to only allow claims to carry-back partnership trading losses to reflect the losses agreed in the partnership settlement agreement. The partners had applied for judicial review of this decision, as there was no right of appeal.

The partners contended that their claims for relief were stand-alone claims made in year 01, which could only be the subject of enquiry under Sch 1A para 5(1) TMA 1970; and that because no such enquiry had been initiated by HMRC within the relevant time period, any further enquiry (and subsequent amendment of tax returns) had been precluded.

Decision:

The court rejected the argument, noting, inter alia, that no matter how a claim for relief has initially been 'made', the claim for relief was nonetheless required to be included in the return of the individual taxpayer for the year in which the losses were actually made by the partnership (here, the later year, year 02) (ss 8(1B) and 9 TMA 1970). The claims could therefore not be characterised as simple stand-alone claims made outside a return. The court added that even if the claims had been stand-alone claims, HMRC would have been entitled to wait for the submission of the required partnership and individual returns for year 02 (by which time the relevant losses would have purportedly been incurred and a claim for relief would be required to be included in the return) before deciding to initiate an enquiry under s 9A TMA 1970.

Comment - The Court of Appeal agreed with the UT that the carry back claims were not 'stand-alone' claims only to be dealt with under, Sch. 1A and 1B TMA 1970 and the taxpayers' submissions were not supported by the Supreme Court judgment in R & C Commrs v Cotter in 2013. The Court of Appeal also decided, contrary to the UT decision, that the settlement agreement concluded between the film partnerships and HMRC precluded the taxpayers from contending that they were entitled to partnership losses greater than those set out in the agreement.

This case considered the operation of the *Taxes Management Act* 1970 in terms of enquiries into partnership returns and the consequential effect on the returns and claims of the individual partners in respect of partnership losses

The Queen on the application of Mr De Silva and another v HMRC [2016] EWCA Civ 40

Partnerships and intangible fixed assets (Lecture B942 – 11.39 minutes)

Legislation originally published on 25 November 2015, which is now found in clause 29 of the draft Finance Bill, is intended to counteract certain arrangements involving intangible fixed assets and partnerships (or LLPs). These new rules seek to clarify when intangible fixed assets held by a partnership come within the intangibles regime.

The intangible fixed asset provisions are found in Ss711 – 906 CTA 2009. As is well known, they only apply to companies. CTA 2009 allows the gains or losses relating to qualifying intangibles to be taxed or relieved as they are recognised in the accounts. In order to fall within these rules, it is a requirement that the intangible fixed asset has to be acquired from a 'non-related' person on or after 1 April 2002 (or else be created by the company on or after the same date). The definition of the term 'related party' is set out in S835 CTA 2009. This section refers to connections between a company and its participators, but it does not spell out precisely how a partnership is to be treated. If a company is a partner in a partnership, it pays corporation tax (currently at 20%) on its share of the partnership profits. The partnership must, first of all, calculate its profit on corporation tax lines before any allocation is made to the corporate partner – see S1259 CTA 2009. Therefore, although a partnership is not a company, it is possible for the partnership – if it holds intangible fixed assets – to use the intangibles regime in order to calculate the company's share of the partnership profits.

Prior to the changes announced on 25 November 2015, it was possible for a corporate partner to be able to circumvent the time rules referred to above in order to obtain a deduction under the intangibles regime when, strictly speaking, this should not have been available. The related party definition has therefore been expanded to include any person who meets a 'participation condition'. This condition has been drawn from the transfer pricing legislation and applies where a person directly or indirectly participates in the management, control or capital of another person. Its effect is to confirm that a partnership is capable of being a related party for the purposes of the intangibles commencement provisions so that, if, say, goodwill was acquired before 1 April 2002, no amortisation relief will be available.

These new proposals apply to transactions involving intangible fixed assets which take place on or after 25 November 2015, but they also apply to accounting debits (or credits) accruing on or after 25 November 2015 on a time-apportionment basis where the transaction had taken place prior to that date. It seems clear that HMRC are keen to put a stop to any future benefit where this form of planning had previously been implemented.

Contributed by Robert Jamieson

Close company loans to charity participators (Lecture B943 -5.29 minutes)

The introduction of anti-avoidance legislation in FA 2013 to strengthen the effectiveness of S455 CTA 2010, following which there was consultation on whether a more widespread reform was needed, raised awareness of the application of these rules in relation to charities. Having discussed the matter further, the Government concluded that a number of the transactions being caught which involved charities and charitable trusts did not tie in with the policy rationale of the provision. In addition, the particular way in which some charities have to structure their finances can give rise to a S455 CTA 2010 charge in circumstances that would not have been caught in a non-charity corporate group. This was seen as creating an uneven playing field.

Accordingly, a new partial exemption has been proposed to prevent a S455 CTA 2010 charge arising in certain circumstances. This will apply to loans and advances made by close companies to the trustees of charitable trusts who currently fall within the section because they are participators in a close company (or associates of such participators). By virtue of clause 26 of the draft Finance Bill, where a loan or advance is made to the trustees of charitable trusts on or after 25 November 2015, the trustees will be exempted from the charge as long as the loan or advance is applied wholly for the purposes of the charitable trust.

Contributed by Robert Jamieson

Making Tax Digital (Lectures B944/ B945 – 19.51/12.35 minutes)

The government has embarked on a digital strategy that will transform the tax system and this will have a fundamental effect on the work undertaken by general practitioners.

The new digital system spells the end of the annual self-assessment return and quite possibly the 31 January, 31 July payments on account system. In time it may even spell the end of annual accounts preparation. Whilst accountants will see a reduction in certain areas of their current workload new opportunities will arise in the digital age.

It is fair to say that accountants will need to embrace the changes to prosper.

More than two million small businesses are already using HMRC digital accounts, and digital accounts for individual taxpayers have been introduced in 2015. By 2016, every individual and small business will have access to their own secure digital tax account, like an online bank account, that enables them to interact with HMRC digitally.

By 2020, businesses and individual taxpayers will be able to register, file, pay and update their information at any time of the day or night, and at any point in the year, to suit them. For the vast majority, there will be no need to fill in an annual tax return.

It is important that we appreciate that this is not just about expanding online filing. This will be a complete transformation of the UK tax system. HMRC will collect and process information affecting tax in as close to real time as possible. As part of HMRCs real time objectives, taxpayers will be required to upload information on a quarterly basis.

Individual and business taxpayers will be offered the opportunity to pay their taxes through the year based on the real time information at HMRC's disposal.

The digital account will show a complete financial picture of the taxpayers affairs which will enable the taxpayer to see and manage all of their liabilities and entitlements together for the first time.

Four foundations

HMRC believe the transformed tax system of 2020 has four foundations.

1. Tax simplified

Taxpayers should not have to give HMRC information that it already has, or should be able to get from elsewhere — for instance, from employers, banks, building societies and other government departments. Taxpayers will see the information that HMRC holds through their digital tax accounts, and be able to check at any time that their details are complete and correct. HMRC will use this information to tailor the service it provides, according to each taxpayer’s individual circumstances. In 2016, HMRC will consult on how information from more third parties might reduce the reporting burden on taxpayers.

2. Making tax digital for businesses

HMRC believe that businesses should not have to wait until the end of the tax year or even longer before knowing how much tax they should pay. HMRC aim to collect and process information affecting tax in as close to real time as possible, to stop tax due or repayments owed from building-up. This objective may well result in regular payments of tax throughout the year.

From April 2018, businesses, including everyone who is self-employed and those letting out property, will update HMRC at least quarterly where it is their main source of income (or a secondary source of income above £10,000 and their main income is from employment or a pension).

3. Making tax digital for individual taxpayers

Individual taxpayers will interact with HMRC digitally, and at any time to suit them.

By April 2016, every individual and small business will have access to a digital tax account. The digital account will present individual taxpayers with a personalised picture of their tax affairs, along with prompts, advice and support through webchat and secure messaging.

4. Tax in one place

By 2020, taxpayers will be able to see all their liabilities and entitlements in their digital account, just like they do in their online banking. Taxpayers will be able to set an over-payment of one tax against the under-payment of another. HMRC want it to feel like paying a single tax.

Tax simplified

At the moment, the information that HMRC receives from a range of sources is held on separate, stand-alone IT systems. Taxpayers are therefore asked to report information via their Self Assessment tax return that HMRC already hold on another of it’s IT systems.

HMRC are in the process of joining up their internal IT systems and as a result will be able to populate the taxpayer’s digital tax account with the information it holds. The aim is to improve efficiency, reduce mistakes and collect the right amount of tax on a more timely basis. This work will take a while to take full effect but taxpayers should see the start of the process from 2016 with earnings, tax and P11d details being pre-populated.

HMRC receives information from other third parties too — for example, banks and building societies reporting the interest they pay on their customers' savings. From 2016, information on bank and building society interest will start to be included in tax codes, removing the need for many taxpayers to report this income separately in a tax return. It should also be noted that base rate taxpayers will not have a tax liability on the first £1,000 of their savings income from 6 April 2016 which will take a significant proportion of taxpayers out of the tax net in respect of savings income. For high rate taxpayers the tax free amount is reduced to £500, whilst additional rate payers will not have a tax free savings allowance.

Subject to consultation, HMRC will also consider other measures to collect information on other streams of investment income with a view to pre-populating the taxpayer's digital account.

HMRC are also aiming to make it easier for taxpayers to pay their tax!

A new system of online billing will mean that anyone who owes tax will be able to see a calculation and pay what they owe, without the need to complete a Self Assessment tax return.

Such a significant transformation of the tax system will require significant investment by HMRC. As part of this investment HMRC aim to provide a full support service to taxpayers and agents.

Digitalisation will also allow HMRC to analyse the information it holds to identify those looking to bend or break the rules. They will be spotted earlier, and tackled earlier, to avoid non-compliance and reduce the need for expensive compliance interventions later on.

Making tax digital for businesses

By April 2016, all of the UK's five million small businesses will have access to their own digital account.

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. These changes will be introduced for some businesses from April 2018, and will be phased-in by 2020, giving businesses time to adapt.

These businesses will be required to use digital tools, such as software or apps, to keep records of their income and expenditure. HMRC will ensure that free apps and software products are available, but many businesses and their advisers will choose to use commercially-available tax software packages.

Businesses will use software that compiles their tax data as part of their ordinary day-to-day activity, highlighting any possible errors (for instance, arithmetical mistakes or figures which look out of place) and offering prompts for information that might otherwise be overlooked. Once the software has compiled the relevant data, businesses or their agents will feed it directly into HMRC systems via their computers or smartphones.

Those taxpayers who currently operate manual records will need to switch to one of these new apps but the switch should be reasonably straightforward. The popular apps will be those that require no accounting knowledge at all. Simple entry of income and costs into a smartphone app should be within most taxpayer's capability. When filling their van with diesel the taxpayer will simply enter the diesel receipt into their Smartphone app. The app should do the accounting for the taxpayer. The app would then have the ability to upload the information to HMRC as and when required e.g. quarterly.

Those taxpayers who currently operate a computerised records system such as Quickbooks should see little change. The software will have to have an HMRC upload facility to remain viable under digitalisation.

HMRC want to move away from businesses reporting information on tax returns and paying liabilities long after the end of the tax year. The tax system will be focusing on real time information coupled with the payment of tax through the year.

In the **HMRC hosting events**, HMRC have made it clear that quarterly uploading of information will definitely happen but they have not made a final decision regarding the requirement to pay tax through the year e.g. quarterly.

Consultation will be required on the regular paying of tax and in particular the cash flow impact of moving from a 31 January and 31 July payment system to a more regular payment system.

Example

George is a self-employed electrician with a consistent annual tax liability of £12,000. This is currently paid in two tranches of £6,000 on 31 January and 31 July each year.

His tax liability for the year ended 31 March 2018 is paid on 31 January 2018 and 31 July 2018.

If digitalisation required him to pay his tax for the year to 31 March 2019 monthly, George is going to be paying £1,000 per month from April 2018. This will undoubtedly create cash flow issues from April 2018 as most taxpayers would be saving towards their 31 July 2018 liability rather than settling current liabilities. In time things will be easier but the transition will need careful managing.

Businesses will also have other practical considerations such as keeping their debtors days under control to accommodate more regular tax payments.

HMRC will also be consulting on whether the new rules should apply to charities, sports clubs and their trading subsidiaries. The government has already announced that these measures will not apply to individuals in employment or pensioners, unless they have secondary incomes of more than £10,000 per year from self- employment or property.

The government is also consulting on options to simplify the payment of taxes. With all your taxes shown in your digital account it would be reasonable to make a payment towards your overall liability rather than paying VAT, income tax, national insurance separately.

Making tax digital for individual taxpayers

The future tax system for individual taxpayers will be built on the same core principles as those for businesses — a digital tax system operating in as close to real time as possible.

By April 2016, every individual taxpayer will have access to their own digital account. Initially this will contain basic information, but by 2020 HMRC aims to be interacting digitally with all taxpayers. By that time, the full range of tax and Child Benefit services will be available for all taxpayers to use.

Accessibility will be from a wide range of devices and protected by the very latest technology to encrypt data and keep it safe. HMRC will automatically target prompts and advice through secure messaging in the accounts, tailored to taxpayers' specific needs and circumstances — such as when someone has a baby, or approaches retirement.

Just like businesses, individual taxpayers currently give information on tax returns and pay liabilities up to ten months after the tax year to which the information relates. Even with the vast majority of employers now operating PAYE in real time, the final tax position for the employee is typically only reconciled after the end of the tax year. Many taxpayers find they have paid too much or too little which takes time and effort to resolve.

HMRC has already started using real-time PAYE data to reduce end- of-year under and overpayments, by changing tax codes in-year. From 2017, HMRC will further develop its use of real-time data — checking income, benefits-in-kind and personal allowances each month to make tax code adjustments that will help avoid under and overpayments altogether.

In the future, taxpayers will be able to see these adjustments clearly through their digital tax account and choose how their personal allowances are allocated. This sounds more like a job for agents and they will also have access to their client's digital tax accounts.

HMRC aim to use its PAYE information together with real- time information from third parties to ensure that any tax due from other sources of income does not build up. Tax arising on additional income that is small or regular will be collected through in-year adjustments to tax codes, while those with tax due on larger or less predictable sources of income will be able to pay it online.

The government announced at Autumn Statement 2015 that Capital Gains Tax would be brought more closely into line with income tax — paid within 30 days of completion of any disposal of residential property. This requirement will be introduced from April 2019, with further options to align payment arrangements covered in the government's consultation on payment.

Tax in one place

At the moment, many taxpayers have to contact different parts of HMRC to find out their financial position relating to different taxes. A business may pay income tax, VAT, National Insurance or Corporation Tax; an individual may pay income tax, National Insurance contributions or student loan repayments and receive Child Benefit; some people run a business as well as being an employee or having a pension. The modern, digital tax system will give all of these taxpayers a single, personalised view of their overall tax position across all of their liabilities. This overview will make it much easier for taxpayers, and their tax agent if they have one, to see the payments they have made to HMRC. Those who need to pay HMRC will be able to do so through their digital tax account. Where they need to pay more than one liability, they will be able to make a single payment — off-setting any tax owed on one liability against an overpayment on another. HMRC want it to feel like you are paying a single tax.

There will be rules governing when money can be reallocated between different liabilities.

Those with more than one source of income collected through PAYE will see an up-to-date picture of their tax affairs, showing all of the information received by HMRC from their employer, and how each income source affects their tax calculation. For example, someone with two part-time jobs will be able to take control of how their personal allowance is split between each of them, in order to pay the right tax in-year.

To deliver these changes, HMRC needs to reconfigure its internal systems significantly and this work will be a gradual process before the full extent of digitalisation becomes a reality.

The end of the tax return

Over the next five years, HMRC's changes will bring about the end of the tax return for 10.2 million taxpayers.

This will be a gradual process but the aim is for the digital account to replace the need for a tax return.

Timeline

<u>January – June 2016</u>

1. Initial consultation on options to simplify the payment of taxes
2. Public consultation on the scope and operation of more frequent reporting of information by businesses to HMRC using digital tools
3. Taxpayers can see how their National Insurance contributions affect their State Pension through their digital account
4. Public consultation on third party information
5. All of the UK's 5 million small businesses and every individual taxpayer will have access to their own digital tax account, seeing information HMRC holds about them
6. Testing starts for secure messaging between taxpayers and HMRC in their digital tax account
7. Webchat introduced to support PAYE taxpayers in their digital tax account
8. Public consultation on simplifying HMRC's tax administration

<u>July – December 2016</u>

1. Testing starts for digital reporting of accounts by small businesses
2. Authorised **agents** able to manage their clients' digital tax accounts
3. Bank and building society interest above the personal savings allowance included in tax codes for employees and pensioners
4. Testing starts on using real-time information to show taxpayers how their personal allowances are shared between jobs and pensions

<u>January – June 2017</u>

1. Testing starts for digital reporting of income from letting property
2. New online billing system begins
3. Taxpayers able to report additional sources of income through their digital tax account

<u>July – December 2017</u>

1. Digital tax accounts show taxpayers an overview of their tax liabilities in one place
2. Automatic tax code adjustments prevent PAYE under and overpayments

<u>January – June 2018</u>

1. Interest paid by banks and building societies starts to be shown in digital tax accounts

July – December 2018

1. Most businesses, self-employed and landlords start updating HMRC quarterly for **income tax and National Insurance obligations** through their accounting software
2. Taxpayers who currently report their Child Benefit to HMRC no longer need to do so

2019

1. Most businesses, self-employed and landlords start updating HMRC quarterly for **VAT** obligations through their accounting software
2. Capital Gains Tax on the disposal of residential properties needs to be paid within 30 days

2020

1. Most businesses, self-employed and landlords start updating HMRC quarterly for **Corporation Tax** obligations through their accounting software
2. The full range of HMRC services are available through digital tax accounts

Rebecca Cave attended one of the HMRC hosting events in February 2016 and summarised the event in AccountingWeb on 10 February 2016. Rebecca reported that the timetable for bringing taxpayers into quarterly reporting is now expected to be:

For accounting periods or tax years starting after:	*Type of business:*
5 April 2018	Businesses under VAT registration threshold and individuals with secondary income of more than £10,000
5 April 2019	VAT registered businesses
1 April 2020	Companies

HMRC Discussion paper on simpler payments

Introduction

By 2020, most businesses, to include companies, partnerships and individual taxpayers who are self-employed and those letting out property, will be required to keep track of their tax affairs digitally and update HMRC at least quarterly.

From 2017, HMRC will make much better use of the real-time data received from employers operating PAYE – and other information from third parties – to reduce over and underpayments.

As part of digitalisation, the government will consult on the issue of payment – on options to simplify the payment of taxes, align payment arrangements and bring payment dates closer to the time of the activity or transactions generating the tax liability.

HMRC will be running a series of consultation events in 2016 to discuss these payment issues with stakeholders. These events will not consider Corporation Tax arrangements in respect of the largest companies (broadly those who have more than £20m profits in a 12 month accounting period) since the government has already announced reforms to Quarterly Instalment Payment for this group. However, they will consider payment arrangements for the remainder of the corporate population, Income Tax Self Assessment, Value Added Tax, Class 4 National Insurance Contributions and other taxes collected through the Self Assessment process.

Simplifying payment

Making Tax Digital provides an opportunity to consider how HMRC can simplify payment arrangements for taxpayers.

HMRC believe that Making Tax Digital presents an opportunity to align payment arrangements across different taxes and to provide a more joined-up service for taxpayers. The government has already brought the collection of Class 2 National Insurance Contributions (NICs) for the self-employed into the arrangements for self-assessment, which means that from April 2015, Class 2 NICs are now collected alongside Class 4 NICs for most. The government is also consulting on the abolition of Class 2 NICs and reform of Class 4 to further simplify the system.

HMRC envisage that, for the self-employed, the payment arrangements for NICs will continue to align with those for Income Tax, wherever possible. But HMRC also want to consider opportunities for alignment beyond NICs and Income Tax to reduce the burden on taxpayers, and make payment arrangements that are more like paying a single tax, for example being able to offset Construction Industry Scheme deductions against other liabilities.

Smaller, more regular payments

For businesses and individuals, there are variable periods of time between the activity generating the tax liability and the payment date. These lags made sense in a paper-based world where it took time to gather the information to calculate liabilities. But in an increasingly digital world, taxpayers should not have to wait until after the end of their tax year or accounting period to understand how much tax is likely to be due, or to receive any repayments.

HMRC believe that many taxpayers see advantages from paying smaller amounts of tax more regularly. Research conducted for HMRC in 2015, for example, concluded that many small businesses saw that this could enable them to better plan their finances and avoid shocks, especially for taxes currently paid annually.

HMRC proposals also envisage companies moving to a more regular payment system.

Employees & Pensioners

The majority of employees and pensioners pay the correct amount of tax through their employer's operation of PAYE, but those with secondary income sources currently need to tell HMRC about this other income through the Self Assessment process.

Those employees and pensioners with secondary income of £10,000 or more a year from self-employment or property will be required to keep track of their affairs digitally and update HMRC at least quarterly through their digital account. Making Tax Digital will enable them to have a more up to date view of their overall tax position across all sources of income. The digital tax accounts will provide a view of how their personal allowances have been allocated against employments and pensions, the impact that has on the tax they pay each week or month and the tax owed on any income not covered by PAYE.

Employees and pensioners with secondary income of less than £10,000 will not be subject to the same requirements as business. But, they will be able to report income regularly through their digital tax account and HMRC will be able provide these taxpayers with the information they need to budget for tax on their income from self-employment and any other income they receive. In practice, digital accounts will mean these taxpayers, too, will be better able to keep their tax position up to date creating a straightforward bill (or repayment) closer to real time, removing the necessity of filling in a tax return or the worry of a surprise tax bill building up over the year.

Consultation Events

HMRC wants to explore the issues raised in this document with stakeholders at an early stage and to invite their ideas. In particular, whether the principles that we have set out here of a simpler and more aligned payment system, operating in closer to real time are the right ones for a transformed tax system. HMRC are also interested in views on the practical steps involved in transitioning to any new payment arrangements, and the impacts on taxpayers.

HMRC Case Studies

Case Study – Geeta

Geeta is in full-time employment as a teacher. Tax is deducted from her wages by her employer. She also has income from private tuition and from a flat she rents out. Her private tuition and rental income add up to more than £10,000pa. She's required to report to HMRC by sending a Self Assessment tax return.

How will Making Tax Digital help Geeta?

As her secondary income is greater than £10,000pa, Geeta should record her income and expenses digitally and update HMRC quarterly as a minimum. Geeta chooses to use a third party App on her smartphone to help her incorporate record keeping into her routine. Geeta chooses to send HMRC information monthly from her App. HMRC already has information about her teacher's salary so this is pre-populated into her tax account. Geeta's tax account shows her up-to-date tax position, including how much tax would be due each quarter on her secondary income. Geeta chooses to make regular payments to HMRC by direct debit to make budgeting easier.

Geeta's smartphone App signposts her to specific, personalised guidance offering her certainty around what she needs to do. Geeta can also use Ask Ruth, HMRC's 24hr virtual assistant, to find the right guidance on any queries or seek help from an HMRC adviser through webchat.

Case Study – Richard

Richard is a self-employed landscape gardener. His business is growing and he has recently crossed the VAT threshold. He has taken on two employees. He has also appointed an agent to help him with his tax.

How will Making Tax Digital help Richard?

Richard's record keeping software helps him keep on top of his business finances, including payroll, on the move. Richard's digital tax account uses information from his record keeping software. In his digital tax account, Richard can see all of his taxes information together in real time. Richard's agent can see the same information. Both Richard and his agent can set up new employees and register for new services from his digital tax account. HMRC signposts Richard to interactive guidance and sends him relevant personalised messages. Richard chooses to make a single payment quarterly to cover his Self Assessment and VAT liabilities, simplifying his finances.

<u>Case Study – Helen</u>

Helen is 65, lives alone, is retired and receives a small occupational pension as well as her State Retirement Pension. She has always been in paid employment and has had very little contact with HMRC before throughout her working life. She's digitally confident and uses a tablet for online shopping and banking.

How will Making Tax Digital help Helen?

HMRC receives Helen's State Pension details from DWP, and the NHS submits real time information about her pension. All of Helen's income details are brought together in her Personal Tax Account. Helen can see her tax position in real time - exactly what she's paid and what's due. HMRC prompts Helen to visit her Personal Tax Account online if anything changes or if there's something she needs to be aware of. Helen can easily keep track of the tax being deducted from her NHS state pension. All she needs to do is check the details are correct. If Helen does still have a question,she can use HMRC's 24hr virtual assistant (Ask Ruth) for advice.

<u>Case Study – Dave</u>

Dave and his wife are directors of a small supply and fit plumbing company. It's busiest during the winter months and steady throughout the rest of the year. They have recently registered the company for VAT. Dave and his wife are the only employees.

How will Making Tax Digital help Dave?

Dave chooses a third party recordkeeping App to help him stay up-to-date throughout the year. The App supplies Dave's accountant with the company's records throughout the year. It also prompts Dave in real time to check potential errors. Updating HMRC quarterly gives Dave more up-to-date information on the company's cash flow and greater certainty about the company's tax bill. He also links his company bank account to the App so that income and expenditure automatically populates the company's quarterly update.

All of Dave's tax information is together in a single place. All he needs to do is review it and update the company's digital tax account with HMRC. Dave has also authorised his accountant to view his digital tax account. Through the App, HMRC can also signpost Dave to relevant help and support such as webinars. The support feels tailored to the company and helps Dave to make the right decisions for the company.

HMRC Myth-Busters

Myth: Making tax digital does not consider those who are digitally excluded

There is no question of forcing those who cannot go digital to do so. Help will be available for businesses who struggle to use digital tools. People who genuinely can't use digital tools will be offered alternatives, like nominating someone else to update their information for them, or giving information by phone.

Myth: Businesses don’t want to do tax digitally

Millions of firms already manage their tax online. 99% of VAT returns are done online, 98% of Corporation Tax and 86% of Self-Assessment returns are done online. Many taxpayers want more certainty over their tax bill and access to an in-year picture of their tax position, which their new digital accounts will provide.

Myth: businesses will need to do four tax returns a year

No. Businesses will not need to file four tax returns a year. The new digital accounts will integrate all the different information businesses already provide to HMRC into a simple, streamlined system. Instead of one big, onerous tax return each year once a quarter businesses can check that the information they are collecting digitally is correct, and simply click "send" to update HMRC.

Myth: Businesses will need to keep extra records and the digitisation will cost a fortune

No additional records are needed for increased digitisation. These changes will contribute to our target to reduce business burdens by £400m. For those who aren't already keeping records digitally, there will be free software and clear, simple advice on how it can be used.

Myth: The new plans will increase errors and hinder compliance

Not true. The scope for error will be greatly reduced - meaning fewer businesses face the shock of a bigger tax bill than they expected at the end of the year. Annually £6.5bn is lost through error. These reforms will improve the quality of record keeping and reduce mistakes.

Summarised from HMRC publications

VAT

Single or multiple supply

Summary – The Tribunal found that there was no single package and there were two supplies

The taxpayer charged fees to members to enable them to participate in a game of bingo and added an extra 10p to the charge if the member also wanted to buy a proper bingo marker pen. The pens were available at the same price in the club buffet.

The taxpayer said the supply formed part of a single exempt supply of the provision of facilities to play bingo. HMRC disagreed, saying there was a single charge to play bingo that was exempt from VAT. The pen was a way of enhancing the enjoyment of the main supply and was not an aim in its own right.

Decision:

The First-tier Tribunal agreed with HMRC. The judge said the supply consisted of two elements: the service of bingo and the pen. There was no single package of bingo including a pen; customers had to buy the pens separately. The elements were not integral to one overall supply and the purchase of the pen was not compulsory. It would be artificial to treat the supplies as a single one.

The taxpayer’s appeal was dismissed.

Comments - Neil Warren, independent VAT consultant, commented: ‘The issue of mixed supplies will always be a grey area in VAT but in this situation the main problem for the company was that customers had the choice of whether they bought a marker pen, so there was no single package of goods and services subject to different rates of VAT that would create a potential mixed supply outcome.’

Cavenbridge Ltd v HMRC TC4690

Exemption for tuition when the subject is “ordinarily taught”

Summary – The Tribunal found that the topic was too specialised to be ordinarily taught in a school or university.

The taxpayer offered lessons to children in motocross riding, motor cycle repair and maintenance. He claimed these were exempt from VAT on the basis that he was providing private tuition in a subject ordinarily taught in a school or university (Sch 9 group 6 item 2 VATA 1994). He provided evidence that the lessons were relevant to a GCSE course in motor vehicle and road user studies and also physical education.

HMRC refused the claim. The taxpayer appealed.

Decision:

The First-tier Tribunal accepted that, although motocross and motor cycle maintenance were taught in schools and universities, not enough institutions taught them. They were, in effect, specialist courses.

The taxpayer's appeal was dismissed.

Comments - Neil Warren noted: 'Recent appeals have confirmed that pilates, belly dancing and now motor cycle lessons are not classed as subjects that are commonly taught in a school or university. The key challenge is to consider whether a subject, such as music, maths and computer studies, is "ordinarily" taught in a school or university. It is not sufficient for a taxpayer to claim exemption based on the fact that a course is taught in a limited number of UK schools.'

Simon Newell trading as Chiltern Young Riders v HMRC TC4689

Could a property be used separately for the purposes of the VAT DIY builders' scheme?

Summary – The UT found that a planning consent contained a condition that imposed a prohibition of separate use and therefore the conditions for a refund were not met

In 2003, the taxpayer and his wife bought ten acres of land in Nottinghamshire. The site, which was outside the local boundary, included a lake. The taxpayer dredged, improved and stocked the lake, and in 2004 opened it to anglers on a day permit basis.

In May 2008, the taxpayer applied for planning permission to build a dwelling on the site and received permission. Condition 4 of the planning consent stated: 'The occupation of the dwelling shall be limited to a person solely or mainly employed or last employed in [the] fishery or a widow or widower of such a person, or any resident dependants.' The house was built and then occupied from the end of August 2010.

In September 2011, the taxpayer claimed a refund of VAT under the DIY scheme (s35 VATA 1994 'refund of VAT to persons constructing certain buildings'). HMRC refused the claim on the ground that it did not satisfy the condition in Sch 8 group 5 note (2)(c), because the taxpayer could not use the property 'separately' from another property — it could be used only by someone connected with the fishery.

The First-tier Tribunal said the planning consent did not forbid the separate use or disposal of the building and therefore satisfied note 2(c). HMRC appealed.

Decision:

The Upper Tribunal was concerned only with the meaning and application of note 2(c) and whether 'the separate use or disposal of the building was not prohibited by the term of any covenant, statutory planning consent or similar provision'.

Mr Justice Barling concluded there was 'no question but that the limitation in the condition [of the planning consent] was in sufficiently mandatory and clearly defined terms to be capable of amounting to a "prohibition" within note 2(c)'. It forbade the separate use from the fishery to ensure, through the occupancy restriction, that the accommodation was retained for the fishery business. That was confirmed by the planning consent as a whole, which explained how certain important requirements of the fishery business were to be met through the occupation of the building.

The link between the occupancy of the building and the fishery was 'close, specific, clear and unequivocal'. The separate use of the building was prohibited by the planning consent. As a result, it was not 'designed as a dwelling' for the purposes of s 35(1A)(a) and note 2(c).

HMRC's appeal was allowed.

Comments - 'The decision by the First-tier Tribunal was controversial because of the clear link between the new dwelling and the fishery business,' stated Neil Warren, independent VAT consultant.

He added: 'The Upper Tribunal has reaffirmed the important principle that DIY claims are only appropriate where dwellings can be built, lived in and sold without restrictions in the planning conditions.'

CRC v Burton, Upper Tribunal

Were HMRC entitled to cancel a company's VAT registration compulsorily?

Summary – The Tribunal found that the taxpayer was entitled to be 'registrable until at least 6 October 2011' long after the last taxable supplies and consequently HMRC was not entitled to cancel the registration before that date.

The taxpayer was in business selling new and used yachts, parts and equipment, designing and building yachts and as a broker in relation to the sale of used yachts. It had been VAT registered since 1973.

Between 2007 and 2010, it sold the brokerage business and entered the holiday villa market in Florida but left in 2013.

HMRC cancelled the company's VAT registration on 23 June 2010, on the basis that it had not made taxable supplies since October 2007. It issued an assessment for £2,305 to disallow input tax claimed in the periods October 2010 to April 2013. The deregistration date was fixed at one day after the company's last receipt of taxable income.

The taxpayer argued that the business had intended to make future sales after June 2010 and provided correspondence linked to attempted deals. The company appealed against the assessment. HMRC said there had been a 'possibility' of future sales rather than a 'firm intention' and that there was no documentary evidence to show that it had been pursuing the business.

Decision:

The First-tier Tribunal agreed that there was enough evidence to show the taxpayer had continued to trade with a view to making taxable supplies until October 2011. For example, he had written to *Yachting Monthly* in 2011 to garner publicity. On that basis, the taxpayer was entitled to be 'registrable until at least 6 October 2011'. HMRC was not entitled to cancel the registration before that date.

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

Comments - Neil Warren, independent VAT consultant, noted: 'In cases of this nature, it has always been HMRC's policy to choose a date of deregistration that is linked to the last taxable sale made by a business on its VAT returns. This is a dangerous policy because a business might have had intentions to make sales after that date but been unable to secure any orders. The legislation allows a business to remain registered if it has an “intention” to make taxable sales. So the deregistration date of 23 June 2010 was premature according to the court.'

David Love Marketing Ltd v HMRC TC4664

The education exemption and EU principles

Summary - The Court of Appeal dismissed the appeal by Finance & Business Training Ltd against the decision of the Upper Tribunal and held that FBT, which provided postgraduate courses to a university, was not a college of that university. EU law did not mean that a provider of university courses is entitled to the education exemption in the same way as a university.

The University of Wales had accredited the taxpayer, a commercial organisation, as a provider of education to prepare and examine candidates for some of its courses. It claimed that its services were exempt from VAT on the basis that it was an eligible body. HMRC disagreed.

The First-tier Tribunal and the Upper Tribunal held that the taxpayer was not entitled to the VAT education exemption because it was not an integrated part of the university.

The taxpayer appealed, saying the UK had failed to implement EU law correctly.

The EU legislation requires member states to exempt university education from VAT but the service has to be provided either by bodies governed by public law 'or by other organisations recognised by the member state concerned as having similar objects'. In the UK, the exemption applies to education provided by universities and 'any college, institution, school or hall of such a university.'

Decision:

In the Court of Appeal, Lady Justice Arden said the main issue was whether a course provider was entitled to the education exemption in the same way as a university under EU law, even if not so entitled under UK law.

The judge said the Court of Justice of EU had found in *Minister Finansow v MDDP sp zoo Akademia Biznesu sp Komandytowa* (Case C-319/12) that a member state could and should set the conditions for bodies which were not governed by public law but which were to be entitled to the education exemption (non-public bodies).

She concluded that, even though the taxpayer was supplying educational services, it failed to meet the EU law-compliant supplier condition for the exemption because it was a commercial provider and was not sufficiently integrated with the university.

Lady Justice Arden said the taxpayer had 'fundamentally misunderstood the statutory scheme which, in brief, is that, in the case of university education, the UK has exercised a member state option to recognise non-public law bodies carrying on qualifying educational activities to a small group consisting of college and halls of universities which are integrated into the university's activities.'

The taxpayer's appeal was dismissed.

Comments - The outcome of this appeal was always likely to be in HMRC's favour. Any exemption must be construed strictly and comply with the doctrine of neutrality. FBT had not shown that UK law was in breach of the principles of fiscal neutrality and legal certainty.

Finance and Business Training v HMRC [2016] EWCA Civ 7

TOMS and supplies to businesses

Summary - The FTT found that supplies of travel services to businesses could fall within the scope of TOMS (the Tour Operators' Margin Scheme).

The appellant company, which was in liquidation at the time of the hearing and was not represented, appealed assessments for underdeclared VAT in the sum of £667,481 covering the period 2011 to 2013. There were three grounds of appeal: firstly, that the assessments were made out of time; secondly, that the supply in question should be treated as a mixed supply and not as a single supply; and, thirdly, that there was an inconsistency between the treatment of the supply made by the appellant and the onward supply made by its customers.

The appellant's activities included the arranging of conferences for other businesses. Its customers sold on the conferences to the end users. From 2011, the place of supply rules changed so that the wholesale supply of conference packages became subject to the business to business general rule and were, therefore, liable to VAT where the customer belonged. It was HMRC's view that the appellant's customers, but not the appellant, were required to operate the TOMS, which would result in the disallowance of input tax credit on conference services. Consequently, because of the change in legislation, the use of an intermediary such as the appellant created a large amount of irrecoverable VAT compared to the direct sourcing of the elements of the conference by the end users**.**

Travel Incentives appealed against an assessment on three grounds:

1. It was raised out of time.
2. The supply was a mixed supply.
3. There was an inconsistency between the treatment of supplies by Travel Incentives and the treatment of onward supplies by its customers..

Decision:

1. It was raised out of time.

   The FTT rejected the contention that the company had provided HMRC with all the relevant information in May 2012, so that the August 2013 assessment had been out of time. The burden of proof was on Travel Incentives and it had not provided sufficient evidence to the tribunal. The assessment was therefore not out of time.

2. The supply was a mixed supply.

   Agreeing with Travel Incentives and referring to *Card Protection Plan* (C-349/96), the FTT found that the 'essential features of the transaction' were that a conference was organised, and businesses were paying for delegates to attend it. The travel was ancillary, as 'it was not an aim in itself, but a better means of enjoying the principal service supplied'. Furthermore, the fact that other separate services of travel could be supplied, for example to accompanying spouses, did not mean that the services supplied to businesses were separate travel supplies.

3. There was an inconsistency between the treatment of supplies by Travel Incentives and the treatment of onward supplies by its customers.

   The FTT explained that the inconsistency stemmed from the fact that, under UK policy, providers of wholesale supplies like Travel Incentives were not covered by TOMS.

This was inconsistent not only with the way TOMS was meant to operate but also with *EC Commission v Spain* (C-189/11), which had direct effect. The assessments should therefore have been limited to the margin applicable under TOMS.

Comments - The unusual aspect of this case is that HMRC issued a Revenue and Customs Brief in January 2014 (R&CB 05/14) following the infraction decisions of the ECJ in which it was held that the TOMS should extend to wholesale supplies. HMRC acknowledged in the publication that it was open to any business to apply direct effect and operate TOMS in accordance with the ECJ decision. However, they both refused to allow the appellant to use the scheme and failed to mention the ECJ decision to the FTT. Judge Allatt was critical of HMRC, whose actions in incorrectly raising the assessments directly resulted in the appellant company's liquidation

Travel Incentives Meetings Exhibitions v HMRC TC4833

Zero-rating claim on the construction of a building for a charity

Summary – The UT determined that some of the college's supplies of education were made in the course or furtherance of a business and therefore the construction of a new building was not zero-rated.

The taxpayer, a charity, provided higher and further education. It had a new building constructed and claimed it should be zero rated (VATA 1994, Sch 8 group 5). HMRC refused on the basis that some of the college's supplies were made in the course of a business.

The appeal was dismissed by the First-tier Tribunal, but remitted by the Upper Tribunal in December 2011 for it to consider whether there was a de minimis business use. However, when the case returned to the First-tier Tribunal, the college did not ask for a determination on that issue. Instead it said that the provision of education was not a supply in the course of business because the link between the tuition fees and the courses was insufficiently direct for the fees to amount to consideration. The First-tier Tribunal accepted the college's contention. HMRC appealed.

Decision:

The Upper Tribunal noted that some students received full grant funding while others received none, and another group qualified for a reduced grant but had to pay part of the fee themselves. The fact that the fees charged to the third group was less than the cost of the supply did not mean that the fees were not consideration for the supply. There was a direct link between the payment and the supply. It followed that such supplies to the students were made in the course or furtherance of a business.

HMRC's appeal was allowed.

Comments - The judge expressed 'some disquiet' that the case should have reached the Upper Tribunal, given that the college was a charity and depended on public funding. He said: 'If, by careful management … it … can keep the extent of the income earned in particular ways below an arbitrary threshold, it can escape a tax burden on the construction of a building intended for its charitable purpose. If it is unable to do so, even to a trivial extent, it is compelled to suffer not some but all of that tax burden.' He described the system as 'capricious' and suggested the legislation should be reconsidered.

CRC v Wakefield College, Upper Tribunal

R&C Brief 7/2016: VAT registration following changes in HMRC policy

From 1 August 2016, HMRC will no longer routinely consider requests not to pursue any tax due where businesses choose to register for VAT following a change in policy on the VAT liability of their supplies. The concession which gave rise to this practice was withdrawn in 2009, although businesses continue to submit applications for registration which contain requests framed under the terms of the concession.

Purpose

This brief is issued as a reminder that the misdirection class concession no longer exists. It also gives notice that with effect from 1 August 2016 HM Revenue and Customs (HMRC) will no longer routinely consider requests not to pursue the tax due.

Background

Revenue and Customs Brief 24/11 withdrew Business Brief 28/04 item 2 with effect from 1 August 2011. Business Brief 28/04 explained the then HM Customs and Excise (HMCE) policy regarding the correction of VAT accounting errors arising from a change in HMCE's interpretation of VAT law.

Business Brief 28/04 contained now outdated references to what was known as "the misdirection class concession" and examples of the application of that concession. The brief stated that where a business chose to register for VAT belatedly in respect of supplies that had previously been treated as exempt but should have been treated as taxable, HMCE would not pursue tax under the misdirection class concession to the extent that it had not been passed on to the customers (net of input tax).

Issue

HMRC continues to receive registrations for VAT in which businesses specifically request HMRC not to pursue net tax due on supplies where VAT has not been passed on to customers.

From 1 August 2016 HMRC will no longer routinely consider requests not to pursue the tax due.

Any request not to pursue net VAT due, where VAT has not been charged on to customers, must be received by HMRC VAT registration service on or before 31 July 2016. HMRC will only consider requests that include complete and accurate calculations of both output tax not charged on and the associated input tax and where the VAT return (covering all supplies whether or not VAT has been charged on) has been submitted.

This applies to all customers regardless of whether they are, have been, or intend to apply to be registered for VAT.

Claims should be sent to:

Liable no Longer Liable Team
HM Revenues and Customs
Imperial House
77 Victoria Street
Grimsby
DN31 1DB

If your claim or registration relates to a specific Court decision, please make that clear on the application.

Further information

For current guidance on the principles to be applied in cases where a person believes that HMRC is bound by advice which it has given, please refer to the notice When you can rely on information or advice provided by HM Revenue & Customs (HMRC)

Revenue and Customs Brief 8/2016: Release by HMRC of exporter information

From 8 April 2016, HMRC will start to publish certain information relating to exporters and the goods they export. This Brief is intended to help exporters find new markets and explains how businesses can 'opt-out' from having their information published. It should be read by those involved in the export of goods to non-EU countries and those supplying services to such exporters.

Purpose of this brief

The purpose of this brief is to explain that, from 8 April 2016, HM Revenue and Customs (HMRC) will start to publish certain information relating to exporters and the goods they export. This is intended to facilitate trade, boost UK growth and help exporters to find new markets. It also explains how businesses can 'opt-out' from having their information published. This opt-out will also now extend to the importer information already published.

Who should read this brief

You should read this brief if you are involved in the export of goods to non-EU countries or if you supply services to exporters. If you are an importer of goods from non-EU countries you may also find this brief useful.

Background

In line with the government's open data initiative and to provide better services to businesses, HMRC is to publish a limited amount of information regarding exporters of goods from the UK to non-EU countries. This is part of HMRC's commitment to publish more information where this can generate public benefits without compromising the core principle of taxpayer confidentiality.

The law that requires HMRC to publish this information is section 10 of the Small Business Employment and Enterprise Act 2015 and Statutory Instrument No. 2060 The Disclosure of Exporter Information Regulations 2015.

What information will be published?

The information to be released comprises the following information of individual exporters and the goods they export:

- exporter's name and address
- commodity code (for product identification)
- description of the commodity code covering the goods
- month and year of export

This information will be available on HMRC's stand-alone trade statistics website from 8 April 2016 onwards.

This mirrors the importer information that HMRC has been publishing since the 1980s and has proved very popular, generating approximately 60,000 hits per month.

What are the benefits of publishing this information?

The release of this exporter information will:

- provide greater visibility of UK exporters to new customers in the global market place
- assist developers to create exporter registers and online shop fronts to advertise and showcase UK exporters and their products
- enable those who provide export services to more easily identify their customers
- help overseas importers to locate alternative UK suppliers

What confidentiality safeguards are in place?

HMRC will not publish:

- national strategic and sensitive information, such as armaments exporters and their products
- commercially sensitive information, for example where there are a few exporters of a given product where actual levels of trade could be identified or deduced

Details of markets, customers and market share are never made available.

Can I 'opt-out' from having my exporter information published, and does this apply to importer information?

If you want your exporter information excluded from publication, for whatever reason and at any time, you should contact HMRC at uktradeinfo@hmrc.gsi.gov.uk.

You can also choose to apply this opt-out to the importer information HMRC already publishes, from 8 April.

Please note a request to exclude your business from the exporter and importer information sent to us by day 18 of the month will mean removal from the information published the following month. For example, if you send in your request by 18 March HMRC will make sure your information is not published in April.

However this cannot apply retrospectively so HMRC will not be able to remove information on importers or, in future, exporter information already published.

Further information and what to do if you have any questions

Further information including guidance on confidentiality regarding the exporter and importer database and opting out can be found on HMRC's stand-alone trade statistics website.