Tolley®CPD

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Disclaimer

CONTENTS

Finance Act 2016

Corporation and business Tax (Lecture B976/ B977 – 11.52/ 17.10 minutes)

Corporation tax rates

The main rate of corporation tax will reduce still further in 2020; it was planned (and had been legislated for) that the rate would be 18% in financial year 2020, but section 44 reduces this to 17%. The rates will be as follows for the rest of the life of this government:

Financial year commencing 1 April	Main CT rate
2016	20%
2017	19%
2018	19%
2019	19%
2020	17%

Rate of tax on loans to participators

For advances made on or after 6 April 2016 the rate of tax on loans to participators is increased to 32.5% and is fixed to be the dividend upper rate for future years, so that if this rate changes, the rate in section 455 (and the related charge in s464A) CTA 2010 will change in line (change made by section 49).

For advances prior to 6 April 2016 the rate remains at 25%. For accounting periods that straddle that date different rates will be applied to separate loans made or benefits conferred before, and on or after, 6 April 2016.

It would be advisable to have two separate nominal codes in the company records with the aim of keeping the 25% and 32.5% advances separate. It should then be possible to choose which loan account the individual is repaying and this should be done with a view to minimising the 32.5% tax rate.

Loans to participators – charities

While the loans to participators legislation has technically applied to trustees of charities since introduction, this fact was not widely appreciated. Now that this is better understood, the legislation has been amended to include a conditional exemption for trustees of charities that use the funds for the purposes of the charitable trust. The change is made by section 49 and applies to loans or advances made on or after 25 November 2015.

Trading and property income

Where trading or property income is received in non-monetary form it is possible that it is not liable to tax – the rules are unclear. Section 72 sets this issue beyond doubt and ensures that non-monetary forms of consideration received through a trade are included as taxable income. The change applies to transactions entered into on or after 16 March 2016.

Fixed rate deductions

Where fixed rate deductions are used to calculate the taxable profits of a business one of the options is to use a fixed rate deduction for business use of a home. The legislation does not technically permit a deduction where the individual is a partner in a firm, so section 24 amends this.

It introduces a new entitlement for a deduction in respect of the use of a partner's home for the purpose of a trade where the person (trading entity) is a firm. It also restricts the use of fixed rate deductions to require that where more than one "home office" is claimed for by a partnership or any other person (i.e. a sole trader), they are all claimed on the same basis – if one is subject to a fixed deduction claim then no other form of deduction is available on any others.

The change also slightly extends the notion of work done at the premises by developing the term "qualifying work" to include work by a person, employee or partner of the firm, wholly and exclusively for the purposes of the trade.

Averaging for farmers – optional five year averaging

The original proposals for five year averaging intended that this would replace two year averaging, but following comments from the sector, it has been decided to introduce five year averaging alongside the existing rules, retaining the latter as an option. As a result, it is likely that most farmers will remain within the two year averaging rules, only using the five year rules in exceptional circumstances. The new rules are available for 2016/17 and subsequent years.

Section 25 sets out the new arrangements, inserting s 222A into ITTOIA 2005 as follows:

<u>Circumstances in which a claim may be made</u>

The claim will relate to five consecutive years, and the volatility condition must be met for a claim to be made. This condition is that:

- One of the following is less than 75% of the other:
    - The average of the relevant profits of the first four years to which the claim relates;
    - The relevant profits of the last tax year to which the claim relates, or
- The relevant profits of one or more (but not all) of the five tax years to which the claim relates are nil.

Restrictions

Any of the first four years in relation to a five year averaging claim may already have been averaged either under s 222 (two year averaging) or five year averaging. However, no claim (the subsequent claim) can be made under this section if any averaging claim has already been made in relation to a later tax year than the last year in relation to the subsequent claim.

No claim is possible in the first or final years of the trade.

Administration

The claim for five year averaging must be made by the anniversary of the submission date of the tax return for the last year affected by the claim.

Replacement of tools

The old relief for the alteration and replacement of tools is abolished by section 71. It is effectively redundant as relief is available to trading entities through capital allowances, and to landlords through the new replacement regime (see later). The change applies to expenditure incurred on or after 6 April 2016.

Property businesses: relief for replacement of domestic items

Section 72 includes a new deduction for property businesses in respect of the replacement of domestic items in a property which is let. Existing legislation precludes the claiming of capital allowances if the item is in a dwelling house which is let, and the first such expenditure will still be denied tax relief under these provisions, but replacement expenditure will incur full tax relief in the year in which it is incurred.

The conditions for relief are:

- A – a person P (or company C) carries on a property business in relation to a dwelling house
- B – P or C incurs expenditure on replacing a domestic item; the new item must be available solely to the lessee, and the old item must n longer be available
- C – The expenditure is not prohibited by the wholly and exclusively rules, but would be prohibited by the capital expenditure rule, and
- D – no capital allowances are available in respect of the expenditure.

There is no deduction for expenditure in relation to furnished holiday lets or where a rent a room relief claim is made. If the new item is “improved” then the deduction is restricted to the “replacement” element. A domestic item means any item for domestic use except fixtures.

The change relates to expenditure incurred on or after 1 April 2016 for companies and 6 April 2016 for those liable to income tax. (Introduces new s 311A into ITTOIA 2005 and new s 250A into CTSA 2009).

Wear and tear allowance for property businesses

This allowance has been abolished. Section 73 makes the relevant change in relation to 2016/17 for income tax and periods of account beginning on or after 1 April 2016 for corporation tax, but where periods spanning 1 April 2016 are split into two periods to exclude the relief on the part post 1 April 2016.

Apprenticeship levy

The levy was announced in 2015 and commences in 2017. It will cost 0.5% of the gross payroll of each employer, with an allowance of £15,000 meaning that many smaller businesses will not have to pay the levy. The levy will be available to the employer to spend on apprentice training but if not used will become available to other businesses. Part 6 of FA 2016 comprising ss 97 -120 set out the details of the new levy.

Basic structure

Apprenticeship levy is charged if:

(a) a person (an employer) has a pay bill for a tax year, and

(b) the relevant percentage of that pay bill exceeds the amount of the person's levy allowance (if any) for that tax year.

The amount charged for a tax year is N- A where:

N is the relevant percentage of the pay bill for the tax year, and
A is the amount of the levy allowance to which the person is entitled for that tax year.

The levy allowance is initially set at £15,000, and the relevant percentage is 0.5%.

Pay bill – definition

A person (employer) has a pay bill for a year if he is a secondary contributor (in NIC terms) in relation to one or more employees, an in consequence has a liability to secondary Class 1 contributions. The amount of a pay bill for a year is the total amount in respect of which the liabilities are due.

Connected companies and charities

Section 100 restricts the levy allowance where there are connected companies (at the start of the tax year). The connected companies are referred to collectively as a company unit, and each company is referred to as a member of the company unit.

The members of a company unit must determine the amount of apprenticeship allowance available to each of them for the tax year, and this determination cannot be varied later except to correct an error where more than £15,000 has been claimed across the company unit. The total amount available to the company unit must be £15,000.

If HMRC becomes aware that claims have been made in returns for in excess of the £15,000 across the company unit then an assessment can be issued to provide £15,000/T (the total value of apprenticeship allowances claimed across the company unit), member, thus spreading the overclaim evenly though the company unit. There are also powers for HMRC to determine that each member is entitled only to an allowance of £15,000/N where N is the number of companies in the company unit.

Section 101 sets out an identical provision in respect of connected charities.

Administration

The remainder of Part 6 sets out the administrative detail for the levy, including assessment and payment, time limits, record keeping, penalties and appeals. Most of this is to be determined by Regulations.

Abolition of requirement to deduct tax at source from interest payments.

Section 39 introduces Schedule 6 which abolishes the requirement for deposit takers and building societies to deduct basic rate income tax from payments of interest including yearly interest. The tax deduction will also end in relation to interest paid on national debt including gilts. The changes relate to interest paid or credited from 6 April 2016.

The requirement for a company to deduct tax from interest remains in place, and in particular, interest paid on a loan from an individual to a company must be accounted for using the quarterly accounting rules.

Anti-avoidance

Sections 40 to 43 insert new s 917A into ITA and modify existing ss 906 and 907, dealing with tax avoidance arrangements in relation to deduction of tax at source.

Existing ss 906 and 907 are amended to focus on payments of royalties to an owner or assignor of intellectual property whose usual place of abode is outside the UK. Withholding tax will be deducted from royalty payments associated with that IP (IP is defined here for this purpose). This change applies to payments made on or after 28 June 2016.

New s 917A ITA 2007 is inserted by section 41; it applies to payments made on or after 17 March 2016. It applies when an intellectual property royalty payment is made to a connected person under double taxation agreement (DTA) tax avoidance arrangements. It retains the obligation to deduct tax from such payments, irrespective of any DTA arrangements. Tax avoidance arrangements in this context is defined as normal with a TAAR – as a motive based test, with the addition of a second leg, that obtaining the tax advantage sought is contrary to the object of the relevant double taxation provisions.

R & D: Vaccine research relief

The state aid clearance in respect of vaccine research relief expires on 31 March 2017; at this point it will be allowed to expire. Section 46 makes the relevant statutory changes to remove the relief from this date.

Small company R & D tax relief: cap

State aid rules impose an overall cap on the total relief a company can benefit from. In the R & D legislation, this cap is calculated by a formula which references the large company scheme which is not state aided.

As the large company scheme has been replaced by the new above the line relief from 1 April 2016, the legislation is amended by section 47 to amend the calculation. This change is therefore only of interest to anyone checking the state aid cap for a client for periods commencing on or after 1 April 2016.

Patent box changes

Section 63 and Schedule 9 make changes to the legislation conferring favourable treatment on profits from the exploitation of patents in Part 8A CTA 2010. The changes are made to meet the requirements of the OECD's Base Erosion Profit Shifting (BEPS) recommendations.

The changes in detail are only of relevance to those computing "relevant IP profits" and are to be introduced in phases. They commence on 1 July 2016 for "new entrants" – that is new claimants under the patent box regime, but will apply to all companies and all patents with effect from 1 July 2021. The July date aligns with the commencement of the BEPS rules.

Capital allowances in enterprise zones

Section 68 amends the definition in relation to designated assisted areas to provide that the capital allowances in enterprise zone (EZ) legislation will always have an 8 year life from the date that the designation of the assisted area was made. (Amends s 45K CAA 2001)

The EZ legislation requires, inter alia, that the location of the business is in a designated assisted area within an enterprise zone.

Transactions in UK land

Section 75 brings non-UK resident companies within the scope of UK corporation tax when:

- It carries on a trade of dealing in or developing UK land (as defined) or
- It carries on a trade in the UK (other than a trade of dealing in or developing land) through a permanent establishment in the UK.

This amendment to s 5 CTA 2009 therefore brings the activity of dealing in or developing UK land within the charge to tax in the UK even where the company carrying on that activity has no permanent establishment in the UK. A further amendment imposes UK corporation tax on the profits arising on that activity.

This is followed by new s 5A CTA 2009 which is entitled "Arrangements for avoiding tax", and provides for HMRC to counteract any arrangements seeking to obtain a tax advantage, including those which seek to exploit a double taxation agreement where the advantage is contrary to the object and purpose of those double taxation arrangements (referring specifically to the new tax charge imposed by the amendment to s5)

The definition of a non-UK company's trade dealing in or developing UK land is set out in new s 5B as follows:

- Any activities which the company carries on:
  - Dealing in UK land, or
  - Developing UK land for the purpose of disposing it.

Land includes buildings and structures, any estate interest or right in or over land, and land under the sea or otherwise covered by water.

The next step in the new legislation is to specify how this is treated for corporation tax. This amends CTA 2010 by inserting new Part 8ZB. This specifies that if a person within new s356OB(2) realises a gain or profit from a transaction in UK land that profit is treated as a profit arising from a trade subject to corporation tax if any of conditions A to D is met in relation to the land (new s356OC).

A person is within s356OB(2) if they are:

- A person acquiring, holding or developing the land
- A person associated with the above at the relevant time, or
- A person who is party to or concerned in the following arrangements:
  - An arrangement effected with respect to all or part of the land, which
  - Enables a profit or gain to be realised by any indirect method or by any series of transactions.

The conditions are:

- A – the main purpose or one of the main purposes of acquiring the land was to realise a profit or gain from disposing of the land
- B – the main purpose or one of the main purposes of acquiring any property deriving value form the land was to make a profit or gain from disposing of the land
- C – the land is held as trading stock
- D – (in the case where the land has been developed) the main purpose or one of the main purposes in developing the land was to realise a profit or gain from disposing of the land when developed.

However, the new rules do not bite if the profits or gains would already be brought into account as income in calculating profits of any person for corporation tax or income tax purposes.

New s356OD then extends the rules to also apply to the disposal of property which derives at least 50% of its value from land in the UK.

Various other sections inserted into CTA 2010 set out the computation basis of the profit and some anti avoidance provisions. There are also provisions to remove disposals covered by these new rules for the non-resident CGT rules, meaning that this trading outcome takes precedence.

Section 77 then repeats this regime in relation to non-UK resident individuals, bring the profits and gains in charge to income tax as profits of a trade. However here there is another challenge. We again exclude the new tax charge on profits from applying if the transaction would be taken into account in arriving at a person's liability to income tax or corporation tax. This seems to imply that sales of UK land by UK resident individuals will be subject to income tax and not CGT if any of conditions A to D are met (expressed in exactly the same terms as above for corporation tax). This is borne out by the exemption provided in new s517M ITA 2007 which excludes gains which would be exempt under the private residence relief rules.

These two new regimes apply to disposals of UK land on or after 5 July 2016. Guidance is awaited.

Loan relationships and derivative contracts

Section 48 introduces Schedule 7 which makes some changes to the loan relationship and derivative contract tax regime. These have been necessitated by changes to the accounting rules in relation to these contracts, and other interactions with tax rules.

In brief the changes:

- In the case of interest free and other non-market term loans a restriction applies to ensure that the amounts allowable over the term of the loan as interest do not exceed the loan discount recognised at the commencement. So if the discount is only partially recognised, or not recognised at all, the interest charge in subsequent years will be adjusted to match the degree of recognition of the original income item (discount) (new s446A in CTA 2009).
- In the case of restrictions of an interest charge under transfer pricing regulations, a reversal of these entries will not be taxable to the extent the deduction was disallowed (amends s446 CTA 2009).
- In the case of exchange gains and losses on transactions which are not at arm's length, there is a restriction on amounts brought into tax. However, where these are matched to other loans at arm's length as part of a hedging arrangement, this tax restriction can create a currency exposure. Accordingly, the tax rules have been changed to allow the matched loans to be treated in the same way (new ss 447(4A) and 475Bin CTA 2009, and amending s 452).

Orchestra tax relief

Section 53 and Schedule 8 introduce the new tax relief for production of orchestral concerts, which commence in relation to accounting periods starting on or after 1 April 2016. No further detail is warranted here.

Anti-avoidance – taking over lease payments on plant and machinery

HMRC has received DOTAS notifications in relation to schemes under which a company takes over obligations under a lease agreement for plant and machinery as a result of which the payments under the lease are taken into account for the purposes of computing the profit of the company.

The scheme has contrived to ensure that a payment of consideration in respect of the company assuming the liabilities falls outside the scope of tax. Section 67 brings such a receipt into tax in the period in which the agreement is entered into. The change applies to all arrangements entered into on or after 25 November 2015.

Anti-avoidance – disposal of plant and machinery

Section 69 is designed to exclude various notified schemes which have a common theme of depressing the disposal value of plant and machinery, thus creating the benefit of additional capital allowances. The disposal value is inflated by the counteraction in this section, which introduces a new s 218ZB into CAA 2001 and amends existing s 215. The changes apply to transactions taking place on or after 25 November 2015.

Anti-avoidance- Intangible asset rules

It is widely recognised that pre 1 April 2002 assets are excluded from the intangible asset rules introduced in FA 2002. Sections 51 and 52 clarify that schemes to circumvent this using an LLP will not achieve their aim of converting a pre-2002 asset into a post 2002 asset. Section 49 requires the transfer to be recognised at market value. The changes apply to transfers on or after 25 November 2015.

Personal income tax (Lecture P976/ P977 – 14.24/ 18.55 minutes)

Personal allowances & main tax rates

The personal allowance and higher rate threshold for 2017/18 are legislated in ss 1 – 3 as:

	2016/17	**2017/18**
Personal allowance	£11,000	£11,500
Higher rate threshold	£43,000	£45,000
Basic rate	20%	20%
Higher rate	40%	40%
Additional rate threshold	£150,000	£150,000
Additional rate	45%	45%
Threshold for personal allowance withdrawal	£100,000	£100,000

Rates of tax on dividends and abolition of tax credit

Section 5 sets out the legislative changes necessary to give effect to the changes to the taxation of dividends described in 2015 and commencing in relation to dividends paid on or after 6 April 2016.

A dividend nil rate is created which sits below the existing "dividend ordinary rate". It is set at 0% (rather unsurprisingly). The dividend nil rate applies to the first £5,000 of taxable dividend income, irrespective of the total income of the individual. The remaining dividend income is charged at the dividend ordinary, higher and additional rates. The new dividend rates are set as follows:

- The dividend ordinary rate is 7.5%
- The dividend higher rate is 32.5% (unchanged)
- The dividend additional rate is 38.1%.

There is a consequential change in relation to the transfer of allowances (the marriage allowance) to prevent dividends within the nil rate band (but in excess of the higher rate limit) from permitting transfer of the marriage allowance. TMA 1970 is amended to allow those in receipt of dividend income with no tax liability on it not to notify HMRC of that income, replicating the previous equivalent provision.

Schedule 1 deals with the abolition of tax credits and the consequent need to gross up dividends received to arrive at the total income. It also deals with non UK taxpayers, removing the tax credit but treating those recipients as if they have paid the dividend ordinary rate (now 7.5%) on the distribution. Their tax liability continues to be capped at the dividend ordinary rate, so there is no additional tax paid by non-UK resident individuals on dividends, as under the previous regime.

There are a number of consequential amendments to other statutes to take account t of the abolition of the tax credit and to remove the terms franked investment income and tax credit from the legislation.

Planning point - Low salary, high dividend

Every OMB client drawing a salary of £8,000 will experience an increase in tax liability when drawing dividends in excess of £8,000 in 2016/17.

Example 1

			2015/16			2016/17
			£			£
Salary			8,000			8,000
Dividend income			60,000			60,000
Plus tax credit			6,667			
			74,667			68,000
Personal allowance			10,600			11,000
Taxable income			64,067			57,000
Tax at	10% on	31,785	3,178	0% on	5,000	0
	32.5% on	32,282	10,492	7.5% on	27,000	2,025
				BRB	32,000	
Tax credit			(6,407)	32.5% on	25,000	8,125
Tax due			7,263			10,150

The increase amounts to £2,887.

Dividends will still be the optimum means of extraction but they will be marginally more expensive in 2016/17.

The combined corporation tax and dividend tax rates of extracting £100 of corporate profit will be:

- Basic rate taxpayer – 26.0% (2015/16 - 20%)
- Higher rate taxpayer – 46% (2015/16 - 40%)
- Additional rate taxpayer 50.5% (2015/16 - 45%)

In 2016/17 we could aim to maximise the £5,000 allowance for family members generally.

If you have a child going to university, then a £5,000 dividend to your child should cover the accommodation costs. Note that a higher rate parent would have to have a dividend of £7,400 to net £5,000. Consider moving some shares into your child's hands so that they receive the dividends.

You could gift a proportion of your shareholding to your child to facilitate the £5,000 dividend. Gift relief would cover the CGT or if the shareholding was minimal – say 5% - the value is likely to be quite low so the annual exemption might cover the value of the gift. If the taxpayer has capital losses these could also be utilised.

The settlements legislation will not apply as your child is over 18 and using the dividend for their own purposes e.g. university accommodation.

Alternatively new shares could be issued. The employment related security legislation will not be in point as the gift is by way of a family relationship rather than employment. Alphabet shares with no capital rights are likely to prompt HMRC attention but that is not to say they will not work.

Parents looking to pay tuition fees could push this concept a little further. A high rate taxpayer would have to take a dividend of £13,333 to net £9,000. Generous parents could shift some of their shareholdings so as to ensure a £15,000 dividend went to the child. The dividend allowance means that £5,000 of the dividend is tax free. If the child was not using all their personal allowance via part time work then part of the remaining £10,000 dividend would be covered by the personal allowance. Any excess would be taxed at 7.5%. Quite a saving. Post tax, the dividend would be enough to cover accommodation costs and tuition fees with a little bit spare for trips home!

Going forward I can also see company pension contributions being more popular. Those taxpayers drawing an annual salary in the region of £11,000 can only contribute up to £11,000 into their pension fund personally but the company is not subject to such a restriction. With the generous pension freedom rules it might be prudent to reduce dividends so as to allow corporate pension contributions. There is however an annual allowance which limits total contributions to an individual's pension fund to £40,000 per annum. Any unused relief can be carried forward for three years.

Owner managers might also start using overdrawn loan accounts as a means of extraction. The company would pay the s455 tax but remember that this is repayable when the loan is repaid. The effective tax rate each year is 1.2%. This is calculated as the official rate of interest, currently 3%, times the higher rate of tax (40%). Where clients are looking to retire in four or five years' time, building up a loan account which they can then extract as capital on a formal liquidation would be attractive. The 10% entrepreneurs' rate is currently due on capital extractions from a trading company.

HMRC have introduced a TAAR from 6 April 2016 which is aimed at individuals trying to convert income into capital. In essence this is aimed at "phoenix" type situations where a company is wound up for capital extraction and then the beneficiaries of the capital extraction get involved in a similar trade within the next two years. True retirements should not be caught by the new TAAR.

Overview of the application of tax rates

Section 6 sets out a Table showing how the various rates, including the devolved tax rates will apply to income in the future: (however, there are some exceptions to the Table which are in sections 10 to 15 of ITA 2007)

Type of taxpayer	*Rates payable on savings income*	*Rates payable on dividend income*	**Rates payable on other income**
UK resident individual who is neither a Scottish taxpayer nor a Welsh taxpayer	*Savings rates*	*Dividend rates*	Main rates
Scottish taxpayer	*Savings rates*	*Dividend rates*	Scottish rates
Welsh taxpayer	*Savings rates*	*Dividend rates*	Main rates while Section 11B is not in force, Welsh rates if that section is in force
Non UK-resident individual	*Savings rates*	*Dividend rates*	Default rates
Non-individual, except that some trustees in some circumstances are subject instead to the trust rate or the dividend trust rate	*Default basic rate*	*Dividend ordinary rate*	Default basic rate

The default rates are set out in the new section 11C of ITA 2007, which describe these rates as set by Parliament for a year. The charge on non-UK resident individuals is imposed at these rates in the same manner as for UK resident individuals.

New Section 11D introduces savings basic, higher and additional rates to allow for a variation of these at some point.

The marriage allowance legislation is again revisited here to ensure that it operates as intended with the new terminology.

Benefits in kind – fair bargain rules

Section 7 deals with a number of benefits in kind which will remain taxable under the relevant statutory provisions, even where a "fair bargain" applies to the provision of the particular benefit. For this purpose, fair bargain means the employee has received the goods or services from the employer at exactly the same cost, terms and conditions as a member of the public or other independent third party dealing with the employer on an arms-length basis.

The affected benefits are:

- Living accommodation
- Cars, vans and related benefits
- Employment related loans

There is an exclusion for those employed by car hire companies hiring a car on the same terms and conditions and at the same price as available to members of the public. Such a provision would not trigger a benefit in kind charge.

Car benefit table

The rates of benefit for the 2019 to 2020 tax year have been set by Ss 8 - 10, giving the following rates of benefit.

Table 1 – main car benefit table based on list price*

Emissions (g/km)	2016/17	2017/18	2018/19	2019/20
Zero 1 – 50	7%	9%	13%	16%
51 - 75	11%	13%	16%	19%
76 - 94	15%	17%	19%	22%
95	16%	18%	20%	23%
100	17%	19%	21%	24%
105	18%	20%	22%	25%
110	19%	21%	23%	26%
115	20%	22%	24%	27%
120	21%	23%	25%	28%
125	22%	24%	26%	29%
And then in increments of 5g = 1% until				
175	32%	34%	36%	36%
180	33%	35%	37%	37%
185	34%	36%	37%	37%
190	35%	37%	37%	37%
195	36%	37%	37%	37%

200	37%	37%	37%	37%
205	37%	37%	37%	37%
210 and above	37%	37%	37%	37%

***In all cases, cars running on diesel fuel suffer an addition of 3% up to a maximum of 37%.**

Table 2 – cars with no emissions rating

Engine size	2016-17	2017-18	2018-19	2019-20
1400cc or less	16%	18%	20%	23%
1400 cc to 2000 cc	27%	29%	31%	34%
Over 2000 cc	37%	37%	37%	37%

Table 3 – cars registered before 1 January 1998

Engine size	2016-17	2017-18	2018-19	2019-20
1400cc or less	16%	18%	20%	23%
1400 cc to 2000 cc	27%	29%	31%	34%
Over 2000 cc	37%	37%	37%	37%

The removal of the diesel supplement has been re-timetabled for the 2020-21 tax year, to be included in subsequent legislation.

Van benefits

Finance Act 2016, s 10 deals with the changes to the benefit in kind rates for zero emission vans, announced in 2014, but amended in the 2016 Budget.

	2016-17	2017-18	2018-19	2019-20	2020-21	2021-22
% of van benefit chargeable	20	20	40	60	80	90

In 2022/23 the benefit on zero emission vans will be the same as for all other vans. The current van benefit is £3,170. The actual amount of the standard van benefit charge will increase for 2017/18 based on CPI inflation in September 2016.

Taxation of sporting testimonial income

Section 12 and Schedule 2 set out a new structure for the treatment of income from sporting testimonials, received by employed earners. There will be a new exemption of a maximum of £100,000 (which might apply in more than one tax year, but to an overall maximum of £100,000). Schedule 2 sets out definitions and conditions for the exemption to apply.

Trivial benefits provided by an employer

Section 13 sets out the exemption from tax as a benefit in kind which applies to trivial benefits provided from 6 April 2016. This was originally intended to apply from 2015 but was delayed.

No tax is due on a benefit provided to an employee or a member of his household if certain conditions are met. There are four basic conditions (A to D) with a fifth condition, E applying if the employer is a close company and the employee is a director or officeholder of the company or a member of the family or household of such a person.

Conditions

- Condition A – the benefit is not cash or a cash voucher (as defined by s 75, ITEPA 2003)
- Condition B – the benefit cost (either the cost of providing the benefit, or the average cost where provided to multiple recipients and it is impractical to calculate the individual cost) does not exceed £50
- Condition C – the benefit is not provided pursuant to relevant salary sacrifice arrangements or any other contractual obligation
- Condition D – The benefit is not provided in recognition of particular services performed by the employee as part of his duties, nor in anticipation of such.
- Condition E – the benefit cost does not exceed the recipient's available exempt amount – the annual amount being £300, and the available exempt amount is the amount so far unused.

Travel expenses – workers working through intermediaries

Section 14 implements changes to the allowable travelling expenses rules to limit the application of the temporary workplace rules where an individual provides his services through an employment intermediary (usually an umbrella company).

The desired result is achieved by terming each engagement with an end user client as a separate employment for the purposes of the travelling expenses rules: this prevents the temporary workplace rules from applying as the workplace becomes the permanent workplace for each of these separate employments. However, the provision is not triggered if the manner in which the worker provides his services is not subject to (or to the right of) supervision, direction or control by any person, unless the intermediary is subject to the IR35 rules, in which case the amended provisions always apply, whether or not there is a right of supervision, direction or control.

If services are provided through an intermediary on terms under which the IR35 legislation is not triggered because the IR35 conditions are not met, then the amended rules set out above do not apply and the worker can benefit from the temporary workplace rules as before.

There are anti avoidance provisions to deal with false information in this connection, placing liability on the intermediary and potentially also personally on directors of the company.

PAYE on benefits

Section 15 allows modifications to be made to the PAYE regulations to allow vouchers and credit tokens to be included within the voluntary payrolling of benefits arrangements. They are currently excluded.

Employee share schemes

Section 16 and Schedule 3 make some changes to simplify the rules and administration of employee shares schemes. With one exception, the changes are minor.

The important change is to permit late notification of share schemes where the taxpayer had reasonable excuse for the late notification.

Securities options

Where employment related securities options are held outside the four types of tax advantaged employee share schemes these will, from 6 April 2016 be taxed under rules that deal with securities options rather than the rules that deal with earnings. Section 17 and Schedule 3 make the relevant changes.

Employment income provided through third parties

Section 18 makes some changes to this legislation which was introduced in Finance Act 2011 and forms Part 7A of ITEPA 2003. The legislation closed down various employment related avoidance schemes involving (generally speaking) employee benefit trusts. The arrangements have been referred to as “disguised remuneration schemes”

The first change ensures that when an event produces a tax charge under these rules (referred to by the legislation as a “relevant step”) which applies to more than one person, the resulting amount can be apportioned between them on a just and reasonable basis.

The second change is to suspend relief where consideration is given for a relevant step if there is any connection between the payment of consideration and a tax avoidance arrangement.

There are some other technical amendments which are of interest only to the specialist.

Finance Bill 2017 will include measures to tax loans outstanding at December 2019 which have been exempt so far provided the loans were advanced prior to the introduction of these rules.

Interest in relation to let residential property

Section 26 makes further changes to the relief for interest incurred in relation to let residential property.

Multiple property businesses, including estate income

New section 274A of ITTOIA 2005 recognises that an individual's "relievable amount" (the amount of interest for which basic rate relief is sought) might have more than one component. The individual may have more than one property business – including an overseas property business – and may also be in receipt of estate property income. Accordingly, the legislation already included in Finance Act 2015 is revisited to reflect this, allowing for current year amounts and brought forward amounts. The current year estate amount is kept separate from the relievable amounts for the current year in respect of one or more property businesses. The structure is therefore:

- Current year amount, comprising
  - A relievable amount in respect of a property business, ort
  - Two or more relievable amounts each in respect of a different property business (note that furnished holiday lettings are not subject to this restriction and so will not be a separate business producing a relievable amount)
- Current year estate amount
- Brought forward amount

The relievable amount is the total of these three elements. There is a finer definition of the amounts where the individual is taxed on only part of the property business or estate income.

Relief is available on L, the lower of the amount for which relief is sought and the total profits of the property businesses (or share of those profits) plus the relievable amount of the current year estate amounts.

Where part of the property business profits fall within the personal allowance, the relief is further restricted to taxable property business profits; for this purpose, personal allowances must be set against income other than savings and dividend income. The balance of the relief not given is carried forward and becomes the brought forward amount in the following year. This restriction relies on the definition of adjusted total income, which is the total net income excluding savings income and dividends less any personal allowances.

Trustees

New section 274B sets out the detail of the rules as they apply to trustees. These rules follow the protocol set out above in relation to individuals.

Simple assessment

HMRC will have the power to assess the tax due by an individual without that person completing a tax return where it has sufficient information to make that assessment. The taxpayer will have 60 days to object. The power will come into force with effect from Royal Assent. The measures are set out in Section 166 and Schedule 23 to the Act.

Company distributions – transactions in securities

Section 33 applies the transactions in securities legislation (in Chapter 1 Part 13 of ITA 2007) to new types of transaction, namely:

- The repayment of share capital or share premium, and
- A distribution in respect of securities on a winding up

The net effect of this is that if these sections are in point, both types of payment would be regarded as a payment of income, liable to tax as a distribution (dividend rates) rather than a capital receipt which would otherwise be subject to capital gains tax (and against which Entrepreneurs' relief might be available).

Exclusion – fundamental change of ownership

The new rules also provide for the counteraction to be excluded where there is a fundamental change of ownership of a close company. This will happen where, as a result of a transaction in securities:

The original shareholder(s) and their associates:

- Do not directly or indirectly hold more than 25% of the ordinary share capital of the close company
- Do not directly or indirectly hold shares which entitle them to more than 25% of the distributions which may be made by the close company, and
- Do not directly or indirectly hold shares in the close company carrying more than 25% of the voting rights

Counteraction

Counteraction will commence with an enquiry notice under these provisions, which must be issued no later than six years after the tax year in which the income tax advantage was secured. Once the enquiry has concluded the officer may issue a counteraction notice if that is appropriate. This is then followed by an assessment to tax (ignoring the usual time limits for assessment).

If the officer believes that no counteraction is necessary, he must issue a no-counteraction notice. The taxpayer can appeal to the Tribunal, once an enquiry is started, to require the issue of a notice (one way or the other) within a specified time.

Distributions in a winding up

Section 35 sets up the application of the legislation in respect of a distribution in a winding up made on or after 6 April 2016. The legislation can apply to a distribution made to an individual in respect of the share capital in the winding up of a UK resident company if:

- Conditions A to D are met:
    - A - Immediately before the winding up the individual had at least a 5% interest in the company
    - B – the company was a close company at the date of winding up or at any time within the previous two years
    - C – at any time within the two years after the date of the distribution:
        - The individual carries on a trade or activity which is the same as or similar to that carried on by the company or a 51% subsidiary of the company
        - The individual is a partner in a partnership which carries on such a trade or activity
        - The individual or a person connected with them as a participator in a company in which they have at least a 5% interest and which at that time carries on such a trade or activity or is connected with a company that carries on such a trade or activity, or
        - The individual is involved with the carrying on of such a trade or activity by a person connected with the individual
    - D – it is reasonable to assume, having regard to all the circumstances that
        - The main purpose, or one of the main purposes of the winding up is the avoidance or reduction of a charge to income tax, or
        - The winding up forms part of arrangements the main purpose or one of the main purposes of which is the avoidance or reduction of a charge to income tax, and
- The distribution is not excluded.

Excluded distributions are very tightly defined; they are a distribution that is too small to trigger a CGT liability, and a distribution of irredeemable shares.

Savings and pension measures (Lecture P978 – 8.14 minutes)

Savings allowance and savings nil rate

Section 4 amends ITA 2007 to make provision for the new tax rules on savings which apply to interest credit on or after 6 April 2016. Note that the existing definition of savings income in ITA 2007 **excludes** dividends.

There remains a starting rate for savings, which is a band of £5,000 to which the starting rate for savings applies if the taxable non savings income does not exceed this amount. The current starting rate for savings is 0%.

There is also (i.e. in addition to the savings starting rate) a nil rate for savings (!) which applies irrespective of the amount of non-savings income, but is available dependent upon the “Step 3 income” in ITA 2007, s23 (taxable income net of personal allowances).

- Where this amount is no more than the basic rate limit, and includes some savings income, the first £1,000 is taxed at the savings nil rate, the balance of the savings income being taxed at the normal savings rates (which are presently the main rates).
- Where this amount exceeds the basic rate limit but is no more than the additional rate limit, and includes savings income, the first £500 is liable at the savings nil rate, the balance taxable at normal rates;
- Where this amount exceeds the additional rate limit the nil rate for savings band is zero.

Example

2016/17	£
Salary	36,000
Dividends	8,000
Bank deposit interest received gross	2,500
Total income	46,500
Deduct: Personal allowance	11,000
Taxable income	£35,500

Taxable as follows:

25,000	@ 20%	(non-dividend/non-savings income net of PA)	5,000.00
500	@ 0%	(savings income covered by PSA)	0.00
2,000	@ 20%	(savings income taxable at basic rate)	400.00
4,500	@ 0%	(dividends covered by Dividend Allowance)	0.00
32,000	Basic rate limit		
500	@ 0%	(further dividends covered by Dividend Allowance)	0.00
3,000	@ 32.5%	(dividends taxable at the dividend upper rate)	975.00
35,500			
Tax payable			£6,375.00

Note that although termed an "allowance" – as in Personal Savings Allowance – the gross amount is not deducted from total income, and therefore forms part of the basic rate band or higher rate band as appropriate, in a similar way to the dividend allowance (which has been re-named the dividend nil rate band).

Planning point – Interaction with the £5,000 0% starting rate

A 0% starting rate applies for interest income, but only where taxable non-savings income is less than £5,000. Non-savings income includes employment income, trading income, property income and trust income.

Dividends are not treated as non-savings income and will not affect the availability of the £5,000 0% starting rate.

Where taxable non-savings income is less than £5,000 and the taxpayer has some interest:

1. The taxable non-savings income (if any) is taxed at 20%; and
2. The difference between the taxable non-savings income and £5,000 is taxed at 0%.

Example (assuming a personal allowance of £11,000)

- Salary of £8,000, directors loan interest and dividends on top
  ….£5,000 of 0% starting rate available

- Salary of £11,000, directors loan interest and dividends on top
  ….£5,000 of 0% starting rate available

- Salary of £15,000, directors loan interest and dividends on top
  ….£1,000 of 0% starting rate available

- Salary of £20,000, directors loan interest and dividends on top
  ….0% starting rate not available

Note that where interest income falls in the 0% starting rate band there is no tax liability on the income. However, the income must still be included as taxable interest income in the income tax computation.

In 2016/17 we also have the introduction of the personal savings allowance which creates a 0% rate of tax on interest up to £1,000 for basic rate taxpayers or £500 for higher rate taxpayers. Any interest income thereafter is taxed at 20%, 40% or 45% as normal.

It is therefore possible for a basic rate taxpayer to draw £11,000 salary, £6,000 director's loan interest and £5,000 dividend and pay no income tax at all. Further dividends up to the basic rate band would only attract a 7.5% rate of tax.

Reduced pensions lifetime allowance

As previously announced, the pensions lifetime allowance reduced to £1 million on 6 April 2016, and this will remain the limit until 5 April 2018. After that the standard lifetime allowance will increase to reflect changes in CPI each September, allowing for rounding up to the higher £100 (section 19).

Schedule 4 makes changes to the rules about fixed and individual protection which are available to those affected by the change.

Fixed protection 2016

This is provided for by Part 1 of the Schedule. It allows the lifetime allowance for those invoking fixed protection 2016 to remain £1.25 million.

The conditions for this to apply are that the individual does not benefit from any of the previous versions of protection (such as enhanced protection, fixed protection 2012 or any other similar provision) and the individual has a reference number. This final aspect is new, and relates to the changes affecting all pension protection arrangements for which provision is made by Part 3 of Schedule 4 (see below).

Protection is also withheld if there has been, by the time of a benefit crystallisation event at which protection becomes relevant, a protection-cessation event.

Protection cessation events are defined in Part 1 starting at para 3. These include:

- A benefit accrual in relation to the individual
- An impermissible transfer into any arrangement under a registered pension scheme in relation to the individual
- A transfer of sums or assets representing accrued rights under any arrangement that is not a permitted transfer, or
- An arrangement in relation to the individual is made under a registered pension's scheme other than in permitted circumstances.

Individual protection 2016

Part 2 of the Schedule introduces individual protection 2016 (IP 2016) which is similar to IP 2014. This provides partial protection of the lifetime sum, up to £1.25 million, based on the value of rights accrued at 5 April 2016. IP 2016 does not apply if there is enhanced protection in place, or any of the other alternative forms of protection and once again, the individual must have a reference number (see below).

Issue of reference numbers

Part 3 of the Schedule amends the administrative arrangements for those opting for either fixed or individual protection 2016.

A reference number will be issued on the basis of a valid application by or on behalf of the individual on or after 6 April 2016. Reference numbers may be withdrawn subsequently, so the reference number must still be valid at the date the individual wishes to rely on protection. Applications will be made through a digital service (or any other method specified) and include certain specified information, including, where individual protection is sought, the various amounts specified in the legislation as at 5 April 2016 (value of accrued rights).

The grounds for HMRC withdrawing a reference number are quite tightly drawn. This may only occur if the information given on the application has been found to be incorrect, or there has been a protection cessation event, in the case of fixed protection 2016, or one of the other qualifying conditions has been breached in either case. There is a right of appeal against the withdrawal of a reference number. (Para 16, Schedule 4).

Where an individual has a reference number or a pending application or appeal in relation to fixed protection 2016 and a protection cessation event occurs, he must notify HMRC within 90 days of becoming aware of this.

Where an individual has an individual protection 2016 reference number and one or more of his pension arrangements becomes subject to a pension debit (arising out of pension sharing on divorce) he must also notify HMRC of the existence and amount of the debit within 60 days of the discharge notice in relation to that pension debit.

Other administrative pensions changes

Section 20 amends the legislation dealing with the taxation of so-called "bridging pensions", which is a benefit structure which reduces once the state pension entitlement is established. The change will allow the benefits to be taxed under the Pensions Act 2014.

Section 21 deals with dependants' scheme benefits. The rules currently test dependants' scheme benefits where the deceased had drawn their pension and died aged 75 or over with dependants. The benefits payable are tested against a maximum amount and if they exceed this are taxed as unauthorised payments. The test is to prevent large funds being diverted to dependants' scheme to avoid the lifetime allowance charge. The changes now made simplify this where the fund is small and the chance of abuse is slim; the test calculation will no longer need to be made. This reduces the burden on scheme administrators in these circumstances.

Pensions flexibility

Section 22 merely introduces Schedule 5 which makes further amendments to the detailed legislation on pensions flexibility enacted previously. The changes take effect from Royal Assent.

Serious ill health lump sums

The 45% tax charge imposed on serious ill health lump sums has been removed, and replaced by a marginal rate charge when the individual is aged over 75 on receipt; the lump sum is taxed as if it were pension income of the recipient.

Trivial commutation lump sums

The higher limit applying to trivial commutation payments has now been extended to allow pensions in payment to be dealt with by way of a commutation payment, which will allow very small pensions currently in payment to be dealt with, reducing administrative effort.

Other minor changes

Most of the other changes in Schedule 5 mainly correct mistakes made when the pensions flexibility legislation was introduced. For example, a dependant who had access to funds before the age of 23 can now continue to access those funds after their 23rd birthday – this was an omission in the original legislation.

ISAs – death of the investor

Legislation was brought forward recently to allow an additional annual limit to cover the re-investment of an inherited ISA by a spouse or civil partner of the deceased. This is now supplemented by Section 27 which exempts income and gains to be exempt during the administration of the deceased's estate. The final detail will be settled by Regulations which will set a time limit on the measure.

EIS, VCT etc. changes

Predictably there are further changes to these tax advantaged investment schemes.

Energy generation

Any form of energy generation, including electricity generation, heat generation and producing gas or other fuel is now an excluded activity for the purposes of EIS, VCT and SEIS. This extends a partial exclusion previously applying to subsidised forms of generation. The change applies to investments made on or after 6 April 2016 and is made by section 28.

Definition of certain periods

Legislation in the Finance (No 2) Act 2015 introduced more restrictions on EIS and VCT recipient companies, introducing an age limit for a company and also certain rules applying to knowledge intensive companies. Section 29 clarifies which accounting periods are to be looked at for the purpose of these tests. Essentially the tests will use the end of the last accounting period of the investee company before the relevant shares are issued, provided that falls within the 12 months before the issue date.

If the previous accounting period end is more than 12 months before the issue date, the three year and five-year test periods are taken as ending 12 months before the relevant share issue date.

Section 30 allows companies to elect that the changes made by section 29 do not apply to investments made before 6 April 2016 (but made on or after 18 November 2015, which is the date of Royal Assent to Finance (No 2) Act 2015. In the absence of an election, the amendments apply retrospectively, and are generally expected to be beneficial for most companies.

VCT's – requirements for giving approval

VCT's are permitted by Schedule 6 to F(No 2)A 2015 to make certain investments which would not otherwise qualify for a VCT, for liquidity management purposes. Section 31 clarifies this and makes it clear that 70% of the funds of a VCT must be held in qualifying investments, and the remaining 30% may be held in specified non qualifying investments (as defined in new s 274(3A), introduced by F(No 2)A 2015.

Peer to peer loans

Section 32 provides relief for irrecoverable peer to peer (P2P) loans. Relief is available to a person L if:

- L has made a peer to peer loan (the relevant loan)
- The loan was made through an operator
- L has not assigned the right to recover the principal of the loan, and
- Any outstanding amount of the principal of the loan has, on or after 6 April 2015, become irrecoverable.

The relief is given by deducting the amount in arriving at the net income for the year (deduction is made at Step 2 in section 23 of ITA 2007). However, the amount is restricted to the interest received by L on all relevant peer to peer loans, only in the year in which the loan became irrecoverable.

The mechanism is to grant relief against income arising through the same P2P platform as the loan was made through, and then by claim to P2P interest on loans made through other platforms (termed "sideways relief" by new s 412B ITA 2007).

Section 412C allows a four year carry forward of relief allowing the loss to be offset against the income from P2P loans through any operator / platform for four years after the year in which the loan became irrecoverable. Subsequent recoveries of amounts previously regarded as irrecoverable are to be taxed as if they were interest receivable on a P2P loan.

Lifetime ISAs

From 6 April 2017 any adult under 40 will be able to open a new Lifetime ISA and contribute up to £4,000 each year and will receive a 25% bonus from the government at the end of the year. The savings may be kept in cash or investments and will be allowed to grow tax free within the Lifetime ISA.

Savers will be able to contribute to one Lifetime ISA in each tax year, as well as a cash ISA, a stocks and shares ISA, and an Innovative Finance ISA, within the new overall ISA limit of £20,000. A Lifetime ISA can be funded by transfers from other ISAs in accordance with normal rules.

Contributions can continue to be made with the bonus paid up to the age of 50.

Funds, including the Government bonus, can be used to buy a first home at any time from 12 months after opening the account, and can be withdrawn from age 60 for use in retirement. The limit for property purchased using Lifetime ISA funds will be set at £450,000 and will apply nationally.

Savers can continue to open a Help to Buy ISA until November 2019 and can also choose to open a Lifetime ISA, but will only be able to use the Government bonus from one of their accounts to buy their first home. During the 2017/18 tax year, those who already have a Help to Buy ISA will be able to transfer the savings they have built up into the Lifetime ISA and still save an additional £4,000.

Planning point

In 2016/17 Dean gifted his 18 year old son shares in his trading company. Max now receives a quarterly dividend of £1,250 which is tax free in his hands. The dividend continues for three years and helps Max through university.

After leaving university the company continues to pay the £5,000 annual dividend. Dean and Max have agreed that £4,000 of the annual dividend will be paid direct into Max's lifetime ISA.

If the dividend was reduced to £4,000 it would equate to £5,000 tax free extraction from the company. The company's pre-tax position of £5,000 (to cover a £4,000 dividend) equals the uplifted annual LISA contribution. Hence the tax free extraction.

The dividend is however left at £5,000 as Dean is a generous fellow! He is happy that the company utilises £6,250 of pre-tax profits to pay Max's £5,000 dividend. At the end of each year Max has £5,000 in his LISA and another £1,000 to spend on an annual golf trip with his father! This equates to a £250 tax bill on corporate profits of £6,250 – an effective rate of 4% on extraction.

Capital taxes (Lectures P979/ P980 – 16.07/ 9.11 minutes)

Capital gains tax rates

The rates of CGT for individuals, trustees and personal representatives are reduced by section 82 and Schedules 11 and 12.

The new rates are:

- 10% for basic rate taxpayers and 20% for higher and additional rate taxpayers on disposal of assets other than residential properties.
- 18% and 28% on gains (upper rate gains) relating to disposals of residential properties (although there are no changes to PPR on the disposer's main home). This will include gains charged on those subject to the non-resident CGT rules.
- 10% on gains qualifying for the new investors' relief (IR) up to the lifetime limit of £10 million (see below) – supplementing the existing rate of 10% on gains eligible for entrepreneurs' relief (ER).

The legislation permits the allocation of the upper rate gains into any available basic rate band, in preference to ordinary gains, although any gains subject to ER or IR will be allocated to the basic rate band first (termed special rate gains).

Schedule 12 provides new computational rules for the calculation of residential property interest (RPI) gains and losses, which recognise that a property may not have been used for residential purposes throughout its period of ownership by the disposer.

This therefore provides for the apportionment of those gains or losses into those relating to RPI on which upper CGT rates are chargeable, and other gains not subject to the upper rate. These rules only apply where the ATED-related gain rules are not in point – i.e. the ATED related regime takes precedence over these rules.

Planning point

When incorporating a business it may be worthwhile selling your goodwill to your newly formed company with the proceeds remaining on loan account to the company. An incorporation in 2016/17 would create a 20% CGT liability on the realised gain BUT the taxpayer now has a director's loan account with the company. Interest could be paid on the outstanding monies at a commercial rate of 10% which would allow the taxpayer access to the £6,000 tax free interest rule (see above).

Entrepreneurs' relief – amending previous changes

Changes made in 2014 and 2015 have had some unintended consequences. HMRC has worked with ICAEW and CIOT to identify these and amend the legislation.

Section 83 makes a change in relation to associated disposals, dealt with by s 41 FA 2015 which amended s 169K TCGA 1992. Where there is an associated disposal, the availability of relief was restricted where the disposer did not sell at least 5% of his ownership in the business. This can defeat a family sale of the business, though connected party relationships, so this is amended ab initio – from 18 March 2015 – to reinstate the relief where:

- The disposal is made to persons connected with the claimant, or
- There is a full disposal of the interest in a partnership, but that interest was in less than 5% of the firm.

Section 84 makes a change in relation to the disposal of goodwill, dealt with by s 42 FA 2015, which amended s 169LA TCGA 1992. The changes in FA 2015 restricted the availability of relief where the disposal of goodwill was to a connected company. This new change reinstates relief where the disposer holds shares or voting rights which are less than 5% of the acquiring company's total share capital or rights. Relief will also be available where the 5% limit is exceeded but the holding is disposed of to another company within a short time.

Section 85 and Schedule 13 reverse some of the changes in relation to joint venture companies made by section 43 FA 2015. This amends the definition of a trading company or group to include the activities of a joint venture company to the extent owned by the group, partially reversing a change brought forward on 18 March 2015, provided the claimant has an interest of at least 5% in the joint venture company.

Investors' relief – investors in unquoted shares

Investors' relief (IR) mirrors entrepreneurs' relief (ER) and has been introduced from March 2016 for newly issued shares in unquoted trading companies which are issued on or after 17 March 2016.

The shares must be held for at least 3 years before disposal (staring from 6 April 2016), but this change will limit the tax on disposal to 10% on a separate limit of up to £10 million of lifetime gains – that is in addition to the limit for ER gains. The legislation is at section 86 and Sch 14.

The qualifying shares must be:

- New – that is acquired by the disposer on subscription for new consideration
- Have been issued by the company on or after 6 April 2016
- In an unlisted trading company or an unlisted holding company of a trading group
- Held continually for a period of three years ending on the date of disposal

As there is no income tax relief or reinvestment relief in relation to IR shares, the provisions are considerably shorter than the comparative ER provisions. However, the following is worth noting:

A share is a qualifying share at the relevant time if:

- The share was subscribed for by the person making the (later) disposal
- The investor held the share continuously from the date of issue until the relevant time
- The share was issue don or after 17 March 2016
- At the time the share was issued none of the shares or securities of that company were listed on a recognised stock exchange
- The share was an ordinary share when issued and is an ordinary share at the relevant time
- The company that issued the share was a trading company or a holding company of a trading group when the share was issued and has remained so throughout the period since that date up to the relevant date
- Neither the investor nor a connected person has been an officer or employee of the company or a connected company at any time in the shareholding period, and
- The period from the date of issue of the shares to the date of disposal is at least three years.

The rate of tax applying to the gain on disposal of a qualifying share is 10%. There are provisions dealing with when some of the shares are qualifying shares and some are not, which explain how the relief operates, and provisions to deal with other more complex aspects of the computation.

Employee shareholder shares

This new type of tax advantaged shareholding was introduced to stimulate employee ownership of companies. Employee shareholder shares are issued at a discount in return for employees giving up certain employment rights.

Section 87 introduces a new cap on the amount of gain which can be exempt under these provisions, setting a lifetime limit of £100,000. This amends s 236B TCGA 1992 in relation to shares issue das a result of entering into an employee shareholder agreement after 16 March 2016.

NRCGT returns – exceptions

Section 90 makes the requirement to complete a non-resident CGT (NRCGT) return optional where:

(a) a disposal on or after 6 April 2015 has been made, where, by virtue of any of the no gain/no loss provisions, neither a gain nor a loss accrues, or

(b) the grant of a lease on or after 6 April 2015 which is:
(i) for no premium,
(ii) to a person who is not connected with the grantor, and
(iii) under a bargain made at arm's length.

This is an administrative simplification for those affected.

IHT – residential enhancement

The announcement in 2015 of an extra slice of nil rate band for IHT applying to the family home is to be extended where the home has been sold and its value is represented by other assets in the estate.

Accordingly, Section 92 introduces Schedule 15 which includes the provisions. The legislation is very convoluted, but essentially looks at situations where the value of the residential property in the estate cannot use all of the residential enhancement amount (which is modest in any event) and the deceased previously had another home of greater value. This allows the additional value to be identified and added to the residential enhancement available on the property in the estate.

Note that the value of the residential enhancement was set by F(no 2)A 2015 and is:

Tax Year	Amount
2017 - 18	£100,000
2018 - 19	£125,000
2019 - 20	£150,000
2020 - 21	£175,000

After 2020-21 the amount will be indexed by reference to the Consumer Price Index in the previous September, the amount to be announced by Treasury Order.

New SDLT slice system for commercial property

Following the restructure of SDLT for residential property, Government has now announced a reform of the SDLT charge on business property. The current "slab" system will be replaced by a "slice" system, similar to that now applying to residential property. The rates will be as follows:

Property cost / value	% charge	SDLT on slice
£0 - £150,000	0%	£0
£150,001 - £250,000	2%	£2,000
£250,001 +	5%	N/A

The break-even price is £1.05 million, so all purchasers of properties below this value will pay less SDLT as a result of this change. The changes take effect from 17 March 2016. The legislation, including rules to identify the residential and non-residential aspects of a single transaction, are in Section 126.

There will also be a new leasehold rental charge rate of 2% for leasehold rent transactions worth more than £5 million NPV. These transactions are already taxed on a slice basis.

Additional rates of SDLT

The new 3% additional rate of SDLT applies from 1 April 2016, and was expected to apply to second homes and buy to let investments by individuals. It has now been announced that the extra charge will also apply to major investors and companies, so that the higher rates will apply on all purchases of residential property other than an individual's main home.

The 3% will not apply to properties within the ATED regime, which are subject to 15% SDLT in any event.

Section 127 deals with this change and sets out liability to the additional rates where the purchaser is an individual and Conditions A to D are met:

- A – the chargeable consideration for the transaction is £40,000 or more
- B – the property is not subject to a lease of more than 21 years at the date of purchase
- C – at the end of the day on which the transaction takes place the purchaser has another interest in a dwelling (other than of a reversionary interest in a lease with an unexpired term of more than 21 years) with a market value in excess of £40,000
- D – the purchased dwelling is not a replacement for the purchaser's only or main residence.

The higher rates also apply to any purchaser who is not an individual.

ATED regime – widening the reliefs

Three new categories of property will be exempted from the ATED and related CGT and SDLT regimes from 1 April 2016. These are (with the relevant section of FA 2016 in brackets):

- Property owned as part of an equity release arrangement – referred to by the legislation as regulated home reversion plans (s133)
- Property occupied by certain members of staff (extending the current relief to property rental businesses, and in particular caretakers of a property development) (s 134)

In addition, the 15% rate of SDLT applying to ATED properties will not apply where in the course of running a trade or property rental business an interest in a property is acquired either for use as business premises or for demolition or conversion to one or more relievable purposes (in the ATED legislation). (S 128 refers)

VAT

VAT avoidance by overseas sellers

A range of measures has been implemented to ensure that VAT is not avoided by overseas sellers into the UK, particularly through online trading sites (platforms).

Sections 122 and 123 set out the basic provisions which require overseas sellers to appoint a UK based VAT representative. The following measures are enacted:

- ensure that a VAT representative appointed under section 48 is established in the UK,
- require a taxable person who is subject to a direction to ensure the VAT representative is registered in a register maintained for that purpose,
- allow security to be required from a taxable person who is not established in the UK whether or not there has been any direction regarding the appointment of a VAT representative.
- update references to mutual assistance provisions between the UK and EU and other states
- extend the Commissioners' powers to make regulations regarding the maintenance of a register of VAT representatives.

Section 123 introduces joint and several liability for operators of online market places, to ensure that any VAT due under the arrangements for electronic supplies can be collected. In many situations the operator of the market place is the “customer” for the end supplier, and the operator makes supplies onwards to third party customers across the EU. In this case the operator is already liable to deal with the VAT implications of the supplies made through the online facility.

However, in some cases the operator has taken himself outside the arrangements, leaving the original supplier to supply direct to customers and account for the relevant VAT themselves.

The issue here is non UK suppliers who do not account for UK VAT through either the Union Scheme (known as MOSS) or the non-union scheme. This provision makes the operator of the market place jointly and severally liable for the output tax on the supplies made to consumers in the UK.

Women’s’ sanitary products

Following the relaxation of EU rules on VAT rates, section 125 moves women’s’ sanitary products form the reduced rate of 5% to the zero rate. The new rate applies to supplies made on or after a date appointed by HM Treasury.

Tax administration and avoidance measures

Amendments to the GAAR

Provisional counteraction notices

Section 155 allows HMRC to issue a provisional counteraction notice to tax avoidance arrangements. This allows such a notice to be issued early enough to benefit from the taxpayer safeguards in Sch 43 FA 2013, but before the matter has been referred to the GAAR panel for a ruling. It also allows much earlier intervention in cases where there is a notifiable scheme, but HMRC is currently seeking more information.

The effect of the provisional counteraction notice is to nullify the benefits of the scheme; the officer issuing the notice will make amendments to the taxpayer's affected return to counteract the tax advantage that would otherwise accrue.

The amendments to FA 2013 include a right of appeal against the provisional counteraction notice, and the adjustments will be cancelled if the case is not ultimately passed to the GAAR panel for review, or the panel's decision is that no counteraction is appropriate.

"Lead arrangements" and pooling notices

Section 156 introduces a new concept in the GAAR procedurals – that of lead arrangements. Under this rule other tax arrangements which depend on the structure of the lead arrangements would be tied to them through the issue of a pooling notice, enabling the GAAR panel to rule on the lead arrangements and for HMRC then to counteract any arrangements which were pooled with them, if the Panel ruled that the lead arrangements were abusive. This is clearly a more effective use of the Panel's resources, and enables HMRC to take more effective steps without having to refer every scheme which differs slightly to the GAAR panel.

Two new Schedules, 43A and 43B, are inserted into FA 2013 setting out the procedures, with provisions about notification, appeals etc.

GAAR penalties

Section 157 sets out a new penalty under the GAAR rules, which unlike the two other changes will only apply to tax avoidance arrangements entered into on or after Royal Assent. The other two measures will apply after Royal Assent, irrespective of when the tax avoidance arrangements were entered into.

The new GAAR penalty will be set at 60% of the value of the counteracted tax advantage. New Schedule 43C to FA 2013 sets out the procedures and rules.

Serial tax avoidance

Section 158 and Schedule 18 set out new rules to deal with serial tax avoiders. The Schedule sets out information about issuing warning notices and other sanctions available against serial tax avoiders.

Part 2 of the Schedule sets out the conditions for someone who comes within this new regime. Where a person incurs a "relevant defeat" HMRC must within 90 days send that person a warning notice which species a period for which the warning notice applies (the warning period) and sets out the consequences for the taxpayer of the notice.

Under normal circumstances the warning period will be five years from the day after the notice is given, but if a person within a warning period suffers a further relevant defeat, the warning period is extended for a further five years.

Warning notices can be issued in relation to the following taxes:

- income tax,
- corporation tax, including any amount chargeable as if it were corporation tax or treated as if it were corporation tax,
- capital gains tax,
- petroleum revenue tax,
- diverted profits tax,
- apprenticeship levy,
- inheritance tax,
- stamp duty land tax,
- annual tax on enveloped dwellings,
- VAT, and
- national insurance contributions.

There is a definition for this purpose of "tax advantage" in relation to VAT.

A person incurs a relevant defeat in relation to any arrangements if any of conditions A to E are met in relation to the person and the arrangements, and the defeat is incurred when the first of the conditions is met.

- A – the arrangements have been counteracted under the GAAR and that counteraction is final (no further rights of appeal)
- B – the person has been issued with a follower notice with which he has complied, or under which the denied advantage has been counteracted other than under A
- C – the arrangements are DOTAS and the case does not fall within A or B, but the arrangements have been counteracted in some other way.
- D – the arrangements are disclosable VAT arrangements on which the person has relied, and these have been counteracted.
- E – The arrangements are disclosable VAT arrangements in relation to the VAT affairs of another person (S) who has made supplies of goods or services to P under which P expects to accrue a tax advantage, and those arrangements have been counteracted.

The person in receipt of a warning notice will be required to make an annual information notice to HMRC detailing whether in the preceding year they have submitted any return relying on tax avoidance arrangements, or have failed to make any return for tax purposes which is required of them This notice must be given within 30 days of the end of each year.

Where someone receives two further warning notices in a warning period relating to other relevant defeats after the first, then that person may be named by HMRC (in similar terms to the naming and shaming rules currently in force). Under these circumstances, where the relevant defeats relate to claims for relief, HMRC may issue a restriction of relief notice, the effect of which is to deny the person the right to claim most tax reliefs, including group relief for the restriction period.

Finally, if anyone currently within a warning period incurs a further relevant defeat, they will incur a penalty as follows:

- 20% of the tax advantage counteracted if this is the first relevant defeat in the warning period
- 40% where one warning notice has been issued since the start of the warning period, and
- 60% if more than one warning notice has been issued since the start of the warning period.

Warning periods that have been extended by further warning notices are deemed to commence on the day after the first warning notice giving rise to the warning period.

There is copious other legislation in Schedule 18 dealing with appeals, reasonable excuse and defining the terms used, but the broad outline above should suffice to understand the main points of this new regime.

Promoters of tax avoidance schemes

The legislation dealing with promoters of tax avoidance schemes (POTAS) was in FA 2014, and section 159 makes changes by introducing a new threshold condition. When threshold conditions are met, HMRC issues a promoter with conduct notice lasting for up to two years. The new (additional) threshold condition is that the promoter has suffered 3 relevant defeats in any period of three years in relation to schemes promoted by him.

To support this there is a substantial amount of additional administration, including the provision to promoters of defeat notices, drawing to the promoters' attention a relevant defeat. New Sch 34A to FA 2014 sets out the details.

Large companies – tax strategy publication

Section 160 and Schedule 19 include a new requirement for all qualifying groups, companies and partnerships to publish a tax strategy. Non publication or incomplete information may lead to a penalty.

There will also be sanctions for persistently unco-operative Large Businesses. The definition includes members of non UK groups, but for UK based companies this is a company satisfying either of:

- Turnover in excess of £200 million, or
- Balance sheet total in excess of £2 billion.

The powers include the right for HMRC to issue a warning notice and a special measures notice.

Enablers of offshore evasion

Section 161 sets out a new regime designed to impose civil penalties on the "enablers" of offshore tax evasion. These penalties will commence in the future on a date appointed by the Treasury, and may commence at different times for different taxes.

However, despite the title of the section it is clear that the penalties go far wider than just addressing evasion. There is also reference to "non-compliance" which is defined in terms of the penalties for inaccuracies in returns in Sch 24 FA 2007, penalties for failure to notify in Sch 41 FA 2008 and penalties for failure to make a return for 12 months in para 6 Sch 55 FA 2009. In each case the penalties must be imposed in relation to an offshore activity, matter or transfer. So it is clear that many more situations may make "enablers" such as banks liable to a penalty under these rules.

The two conditions for a penalty are:

1. That P knew that their actions enabled or were likely to enable another person (Q) to carry out offshore tax evasion or non-compliance, and
2. That Q has either been convicted of an offence in relation to the offshore evasion (offences are detailed) or assessed to a relevant penalty (as described above) and that penalty has been imposed and is final.

The penalty to be imposed on P is the greater of 100% of the potential lost revenue and £3,000. HMRC may, under certain circumstances, publish the details of persons on whom penalties are imposed under these provisions.

Penalties in relation to offshore matters and offshore transfers

Section 162 and Schedule 21 increase the current penalties for "offshore matters" and the new penalty introduced in 2015 for offshore transfers, and make changes to the reductions for disclosure rules and the minimum amount of penalty when a disclosure has been made. The new rules set out a separate table of penalties and reductions which apply only to offshore matters. Penalties in relation to UK matters are not affected.

The effect of this is to reduce the discounts for disclosure by increasing the rate of minimum penalty in each case.

For inaccuracy penalties, the new standard and minimum rates of penalty are: (refer to the original legislation to ascertain which levels of penalty relate to which offences)

Standard amount	Minimum penalty – prompted disclosure	Minimum penalty – unprompted disclosure
30%	15%	0%
37.5%	18.75%	0%
45%	22.5%	0%
60%	30%	0%
70%	45%	30%
87.5%	53.75%	35%
100%	60%	40%
105%	62.5%	40%
125%	72.5%	50%
140%	80%	50%
150%	85%	55%
200%	110%	70%

Similar changes apply to the penalties for failure to notify, extended failure to make a return and penalties for offshore transfers.

Publishing the details of deliberate defaulters – offshore aspects

The existing legislation (s 94 FA 2009) allowing HMRC to publish details of deliberate defaulters is extended by s 163 to make the legislation available in respect of offshore defaults unless there has been a full, unprompted disclosure. The change will also enable HMRC to name those who have benefitted from the inaccuracy or failure, where those avoiding tax do so through corporate vehicles or trusts. Currently either unprompted or prompted disclosure allows the person to escape being named.

Asset based penalties for offshore inaccuracies or failures

Section 164 and Sch 22 impose a penalty calculated on the value of an asset, rather than the potential lost revenue, for certain offshore inaccuracies and failure to submit a return. The new penalty is available where a person P has been liable for one or more standard offshore penalties in relation to a tax year and the potential lost revenue threshold for that tax year is met.

Standard offshore penalties are described as:

- Under Sch 24 FA 2007 – only for deliberate inaccuracies
- Under Sch 41 FA 2008 – for deliberate failure to notify
- Under Sch 55 FA 2009 – deliberate withholding of information where a return has not been made more than 12 months after the filing date.

The potential lost revenue threshold is £25,000.

The amount of penalty is the lower of 10% of the value of the asset and the offshore PLR x 10. There are reductions for disclosure but these are triggered only if the original penalty was reduced for disclosure.

Schedule 22 sets out the administrative arrangement for this penalty and includes definitions of all of the terms used. Essentially the penalty applies to offshore failures in relation to asset based income tax (as defined), capital gains tax and inheritance tax, where the value of the asset will be directly related to the offence.

Criminal liability

The new provision imposing a criminal sanction for failure to disclose offshore income, assets and liabilities has been the subject of much debate. The legislation in section 165 introduces a criminal offence with no requirement for HMRC to prove intent where the loss of tax exceeds the threshold amount. There are concerns that this could impose criminal convictions on some people because of an oversight.

The inclusion of a threshold of at least £25,000 loss of tax may go some way to alleviating concerns. The final amount will be set by Regulations, as will much of the detail of this measure. The sanctions include the possibility of a prison term not exceeding 51 weeks.

Office for tax simplification

Sections 183 to 188 and Schedule 25 put the Office for Tax Simplification (OTS) on a statutory footing, setting out how members are appointed (by the Chancellor) and may resign. It also includes the details of the functions of the OTS, reviews and the requirement for an annual report. The Treasury will also conduct a review of the OTS's work, which is also set out in the new legislation.

Autumn Statement

The new Chancellor of the Exchequer, Philip Hammond, will present his first Autumn Statement to Parliament on 23 November 2016.

Written representations for the Autumn Statement should be sent to the Treasury by 7 October 2016

Draft clauses for Finance Bill 2017

Draft clauses for Finance Bill 2017 will be published on Monday 5 December 2016.

Personal Taxes

Loan notes were not restricted securities

Summary - Loan notes contained a forfeiture provision which had no business or commercial purpose and therefore were not 'restricted securities' within Part 7 ITEPA 2003. Therefore the employees acquiring such loan notes did not enjoy the exemption under s425(2) ITEPA 2003 from income tax upon acquisition.

Both companies had entered into a series of transactions that had resulted in three employees receiving loan notes; and HMRC contended that they should account for income tax under PAYE and NICs.

Cyclops and Graceland argued that, because of the existence of a forfeiture provision in the terms of the loan notes, they were restricted securities under Part 7 of ITEPA 2003 and therefore no income tax or NICs was due because of the exemption under s425 ITEPA 2003. HMRC contended that there had been no business purpose for the inclusion of the forfeiture provision; therefore, the effect of the decision of the Supreme Court in *UBS AG* and *Deutsche Bank* this year was that the loan notes were not restricted securities.

Decision:

The director of both companies had accepted in cross-examination that there had been no business or commercial purpose for the inclusion of the forfeiture provisions. The FTT concluded that those forfeiture provisions had been commercially irrelevant and designed only to secure the benefit of the tax exemption in s 425. The tribunal added that, in any event, whether the forfeiture provisions would operate had been in the control of the relevant employees.

The next issue was the amount of the taxable earnings: was it the principal amount of the loan notes or their value? The FTT found that the employees receiving the loan notes had been in the same position as employees receiving cash in a bank account; they could have asked for the redemption of the notes at any point. The measure of the earnings was therefore the capital amount of the loan notes.

Comments - The Tribunal's approach was that the loan notes *were* 'securities' for the purposes of considering whether they were taxable earnings at all at the time of receipt by the employee. For PAYE purposes, they were to be treated as a 'money payment' rather than as the provision of a 'readily convertible asset

Cyclops Electronics Ltd; Graceland Fixing Ltd v HMRC TC 05237

Conditions to transfer PAYE liability from employer to employee

Summary - The taxpayer challenged HMRC's argument and assessments that they were liable personally for a failure by their company to operate PAYE and NICs properly on liquidation. The judge found that the appellant had shown that PAYE and NIC had been deducted (even if not paid) and the conditions of reg 72 SI 2003/2682 had not been fully met and therefore the appeal was allowed.

The taxpayer was the director and shareholder of A. He drew money from the company during the year and recorded these as loans in the director's account. At the end of the year, the company paid remuneration and a dividend into the account, extinguishing the loan. For the years ending 30 April 2007 to 2010, the accounts showed outstanding loans. In 2011-12, an insolvency practitioner advised the taxpayer that the company should be put into liquidation. The adviser also said that the company could not pay the taxpayer any dividends because there were insufficient profits, so it would have to pay him by way of salary. The taxpayer gave his accountant instructions to prepare accounts in line with the advice. The PAYE and National Insurance for the remuneration were shown on the balance sheet as current liabilities but not paid to HMRC.

After an enquiry, HMRC issued income tax and National Insurance determinations transferring the liabilities from the company to the taxpayer. This was on the assumption that he had knowingly received payments from the company on which it had 'wilfully' failed to deduct tax.

The taxpayer appealed. He said, in essence, that he believed the tax had been paid.

Decision:

The First-tier Tribunal was formed of two judges. Judge Clark referred to three conditions that had to be met before the basic PAYE rule that the tax and National Insurance obligations belonged to the company could be set aside (Income Tax (PAYE) Regulations 2003/2682, regulation 72). The conditions were:

- the employer did not deduct PAYE;
- the failure was wilful and deliberate; and
- the employee received remuneration, knowing the employer had wilfully not deducted the tax.

The judge said there was a difference between deducting tax and paying it (*R v CIR, ex parte McVeigh* [1996] STC91). In this case, the accounts showed deductions for tax and National Insurance from the payment to the taxpayer. On this basis, the liability could not be shifted to the taxpayer and the appeal would be allowed.

The other member of the panel, Sandi O'Neill, disagreed with that conclusion. She said it was clear from the accounts that the entries for PAYE and National Insurance deductions were 'entirely notional' and had 'no substance in reality'. The taxpayer signed off the accounts knowing the sums had not been paid to HMRC, and that it would be impossible to pay them from the liquidation of the company's assets. The taxpayer accepted for practical purposes that he and the company were 'one and the same'. The judge concluded that, as he was the company's 'controlling mind' and his knowledge was its knowledge, by creating obligations which the company knew it could not meet, it had 'wilfully failed to discharge those obligations and has done so, in the knowledge, indeed at the instigation of' the taxpayer.

She said Judge Clark's decision to allow the appeal left open the door for 'owner/managers of small businesses that are about to fail and go into liquidation to make preferential and potentially unfair payments to themselves at the expense of trade or other creditors, like HMRC, who are then unable to receive their rightful distribution from a liquidation of the companies' assets'.

She would have dismissed the appeal but, because Judge Clark had the casting vote, the taxpayer's appeal was allowed.

Comments - This verdict is potentially dangerous for HMRC as it has allowed an owner of a business to make payments to himself with PAYE and NIC obligations not met. This does not appear to be the appropriate interpretation of the legislation and runs counter to previous decisions in this area. The case also demonstrates the flaws inherent in having two members of a Tribunal where the decision appears to be the wrong one. This case is of course highly likely to progress to the Upper Tribunal.

S West v HMRC TC5285

Tax liability of free bus pass provided by employer

Summary **–** *The FTT dismissed the joint appeals by Nottingham City Council and one of its employee's, Mr Straw, that a bus pass provided under a salary sacrifice scheme fell within the s243 ITEPA 2003 exemption. The provision of the bus pass was, therefore, a taxable benefit liable to income tax and Class 1A NICs.*

Nottingham City Council provided a free bus pass to an employee, S, under a salary sacrifice arrangement. HMRC decided it was a benefit in kind and assessed him tax. It also charged the council class 1A National Insurance.

The council and the employee appealed. They said the bus pass was exempt under s243 ITEPA 2003 because it was financial support for a local bus service.

Decision:

The First-tier Tribunal agreed that buying a bus pass supported the local bus service but that, on its own, was not sufficient to qualify for relief. The judge said the natural reading of s 243 and s 266 (exemption of non-cash vouchers for exempt benefits) taken together is that 'to satisfy the exemption at s 243 the employer has to provide some support for the local bus service other than buying bus passes because it is a consequence of that support that his employees are not taxable on the benefit of a free or discounted bus pass'. But she did not specify what the 'more' was — this would be 'for another tribunal, with different facts, to decide'.

Another point concerned whether the pass had to be provided for a specific route. The pass issued by the council was a zonal one because ticketing in the UK is organised on this basis. It was agreed that, if zonal tickets could not qualify, no employee would be able to benefit even if the employer provided support within the meaning of s 243. The tribunal concluded that 'the statute is always speaking' and that it would 'frustrate the statutory purpose if no employee could ever qualify for the s 266 exemption because bus passes are no longer issued for single routes'. So zonal passes would have qualified had the other tests been met.

The taxpayers' appeals were dismissed.

Comments - The FTT confirmed that the exemption was not intended to enable employers to provide employees with free bus travel but was initially introduced to exempt them from the benefit in kind that would otherwise arise as a result of the employer subsidising the public bus service and originally, employees were required to pay the same price for the service as other travellers.

However, a concession was then introduced in order that employees could use the subsidised service free or at a reduced price without liability to tax but it was a consequence of the employer's support of the service that the employees were not taxable on free or discounted travel and in this case, the Council had not provided the bus company with the necessary financial support for the exemption to apply.

Nottingham City Council; T Straw v HMRC TC5269

Whether liability is excluded by undertaking

Summary – The Upper Tribunal found that the undertaking by HMRC intended to bring matters to a conclusion was binding

The company was incorporated in 1998 and ceased trading in 2005. In August 2006, the company agreed to make retrospective payments of wages and salaries and for a bonus to be paid to the director and his brother. It did not account for PAYE or National Insurance on the sums, and the payments were not included in the brothers' tax returns.

HMRC opened enquiries into the company's accounting periods between August 2003 and January 2005 and these were closed in 2011. It also enquired into the personal tax returns of the director and his brother. These were closed in 2007. As part of an agreement reached in July 2007, the company said it entered into a binding agreement with HMRC that no PAYE or National Insurance would be demanded on the bonuses.

The company was struck off the register and dissolved in 2007, but on the application of HMRC was restored with retrospective effect in 2010. In 2011 HMRC issued assessments for tax and National Insurance on the bonuses and salaries. The company appealed. The First-tier Tribunal dismissed the company's appeal, so the matter progressed to the Upper Tribunal.

Decision:

Lord Glennie in the Upper Tribunal (Tax and Chancery Chamber) accepted that the exchanges in 2007 did form a binding agreement. Further, HMRC was not entitled to resile from it, even if it was waiting for more information.

That agreement was, however, subject to the condition that no deduction would be claimed for the bonus. Since the company that succeeded to the trade claimed a loss that included that deduction, the condition was broken. As a result, the judge said HMRC was entitled to demand payment of PAYE and National Insurance on the bonuses.

But in 2010, HMRC gave an undertaking to the Court of Session that, on restoration of the company to the register, it would make no further assessments and raise no further enquiries of the company. The Upper Tribunal held that, because the undertaking was given to the court, it should be interpreted in the same way as any legal document. The reference to raising no further assessments was critical. The judge rejected HMRC's argument that this referred only to corporation tax and not PAYE and National Insurance. Lord Glennie said: 'The clear intention of the undertaking was that the outstanding enquiry could be brought to a conclusion and then that would be that.'

The 2010 undertaking prevented HMRC charging PAYE and National Insurance. The taxpayer's appeal was allowed.

Comments – The name of the company will be familiar to many readers as the company and its directors have waged a war of attrition against HMRC on a number of "tax" fronts. In this case they have been successful. Their strategy has worked on this occasion.

Spring Salmon & Seafood Ltd v CRC, Upper Tribunal

Charge on unauthorised pension payment

Summary – The FTT found that the tax charge was correct and the taxpayer's appeal was dismissed.

The taxpayer retired from the civil service and took his pension from 1996. In 2013, he received a lump sum refund of the widows and orphans contributions. Although the pension scheme administrator advised that the payment should be reported to HMRC, the taxpayer failed to include it in his return. HMRC opened an enquiry and assessed the sum to tax at 40%. The taxpayer appealed.

Decision:

The First-tier Tribunal noted that the taxpayer accepted the refund was an unauthorised payment under s166 FA 2004. But he said it should have been made clear to him by the pension scheme administrator that, had he taken the refund as part of his regular pension payments, the tax charge would have been avoided. The tribunal said the letter giving him the options for taking the refund had stated this. The taxpayer had decided that this produced a cashflow disadvantage and so chose to take the lump sum.

The tax charge was correct and the taxpayer's appeal was dismissed.

Comments – The taxpayer was aware of the consequences of the decision as it had been explained to him. Those consequences came to pass as a result of his decision – therefore no surprise.

S McGrevey v HMRC TC5336

Surcharges on unauthorised payments by pension fund

Summary - The FTT found that payments from a pension fund held personally by a member before transfer to another pension scheme were unauthorised member payments. However in the special circumstances the unauthorised payment surcharge should be discharged.

Mr Browne appealed against unauthorised payment charges and surcharges (made under ss208 & 209 FA 2004) arising in respect of his receipt of funds from his Pearl Assurance and Scottish Life pension plans into his personal bank account. Mr Browne had subsequently invested both amounts into a self-invested personal pension plan (SIPP) and contended that no unauthorised payment had therefore been made.

Decision:

The FTT observed that the payments must be regarded as unauthorised payments unless they were 'recognised transfers' under s164(1)(c), which covered sums held for the purpose of one pension scheme which became held for the purpose of another. As recognised transfers could not have an intermediate stage, the payments to Mr Browne were not recognised transfers. Furthermore, these payments were not the result of 'genuine errors', as provided in HMRC's guidance.

The FTT found, however, that Mr Browne's application for discharge of the unauthorised payment surcharge should have been accepted. The tribunal accepted that Mr Browne, as a financial adviser himself, should have been aware of the transfer procedures. However 'his conduct was caused by his foolishness rather than any desire to obtain pension funds under his own control without suffering the accompanying tax consequences'.

Comments - It was clear in this case that the appellant had not intended to obtain a tax advantage. The payments made, not being recognised transfers and hence authorised member payments, were subject to the unauthorised payments charge. However, the FTT made the point, for the parties to consider further, that as the onward payment to the new pension scheme was not therefore a transfer of pension funds, it was possible that it could be regarded as a fresh contribution in respect of which tax relief could be due

P Browne v HMRC TC5331

Capital Taxes

Entrepreneurs' Relief – Disposal Of Business Assets (Lecture B979 – 8.23 minutes)

Business asset disposals: Sole traders etc.

Entrepreneurs' relief offers a capital gains tax rate of 10% on lifetime aggregate net chargeable gains of up to £10 million. A claim for entrepreneurs' relief is available on a material disposal of business assets.

A 'disposal of business assets' must fall into one of the following categories (TCGA 1992, s 169I(2)):

(a) A disposal of the whole or part of a business;

(b) A disposal of (or of interests in) one or more assets in use, at the time at which a business ceases to be carried on, for the purposes of the business; or

(c) A disposal of one or more assets consisting of (or of interests in) shares in or securities of a company.

In the case of (b) above, the disposal of business assets is a 'material disposal' if the following conditions are satisfied (s 169I(4)):

- The business is owned by the individual throughout the period of one year ending with the date on which the business ceases to be carried on; and

- That date is within the period of three years ending with the date of the disposal.

A business is treated as being carried on by an individual if carried on by a partnership of which he or she is a member (s 169I(8)(c)).

Not all types of assets are eligible for relief in this context. If the qualifying business disposal does not consist of company shares or securities, entrepreneurs' relief is only given in respect of the disposal of relevant business assets comprised in the qualifying business disposal. 'Relevant business assets' means assets (including goodwill, subject to an exception in respect of goodwill transferred to a close company; see s 169LA) other than 'excluded assets', i.e. shares and securities, and other assets held as investments (s 169L).

HMRC explains the rationale for entrepreneurs' relief on a disposal within (b) above as follows (CG64045):

> 'Rather than disposing of a business, possibly as a going concern, someone may cease in business and then sell off the business assets. Such disposals will not constitute the sale of the whole or part of a business for TCGA92/S169I(2)(a) but may instead qualify as disposals of assets sold after the cessation of the business for TCGA92/S169I(2) (b) and TCGA92/S169I(4).'

It is a question of fact whether the business has ceased, and whether the asset in question was used for the purposes of the business at that time.

Accountancy practice

The above requirement in s 169I(2)(b) was recently considered in *Amin v Revenue and Customs* [2016] UKFTT 515 (TC), in the context of a sole practitioner accountant and the disposal of an interest in the business premises.

In that case, the taxpayer was a sole practitioner accountant, and the sole owner of the practice premises. He purported to sell 50% of his beneficial interest in the premises in three separate tranches (i.e. 22.7% on 4 April 2008, 22.7% on 25 June 2008, and 4.6% on 23 April 2010). The purchasers in all three transactions were the trustees of a pension scheme.

The taxpayer claimed entrepreneurs' relief in his tax return for 2008/09 in respect of the sale which took place in June 2008. HMRC enquired into the return, and concluded that the taxpayer was not entitled to entrepreneurs' relief.

The taxpayer appealed. He pointed out that he had sold the goodwill of his audit practice in May 2008 for a nominal consideration, as he was no longer able to carry out audit work (due to not being qualified to do so). HMRC contended that the taxpayer had produced no evidence of the sale of goodwill and there was no evidence that the audit work was a distinct part of the rest of the taxpayer's practice.

Unfortunately for the taxpayer, whilst accepting that the disposal of his audit practice had taken place, the First-tier Tribunal held that the entrepreneurs' relief legislation did not allow the appellant to claim relief for the partial disposal of his premises as a result of the disposal of his audit practice. The taxpayer's appeal was dismissed.

A different outcome?

The tribunal's decision that entrepreneurs' relief was not due in this case was on the footing that disposing of a 22.7% share of the *entire* premises did not constitute 'a disposal of (or of interests in) one or more assets in use, at the time at which a business ceases to be carried on, for the purposes of the business' (within TCGA 1992, s 169I(2)(b)).

By contrast, the tribunal commented that if the taxpayer had instead sold distinct office space in the premises (e.g. the second floor) on the basis that he no longer needed this office space as a result of no longer carrying out audit work, he might have been entitled to the relief. However, in the above case the tribunal agreed with HMRC that the disposal of the premises and of the goodwill had to be seen as wholly unconnected transactions.

Non-Dom Update

The Government published on 19 August 2016 further detail and opened a new consultation on aspects of the proposed inheritance tax changes for residential property together with the changes to the way in which non domiciled individuals will be taxed. Not all of the draft legislation has been published, but some important points have been confirmed. The government has confirmed that their intention is to proceed with the reforms, after speculation that the referendum result might lead to a change of heart on some of the proposed changes.

Key highlights published include the following:

- The government has confirmed its intention to pursue charging UK residential property held in offshore structures to inheritance tax
- Individuals who have been resident in the UK for 15 of the last 20 years will become deemed domiciled for all tax purposes
- The government will be introducing the proposed rules for individuals born in the UK with a UK domicile of origin, effectively meaning that such individuals who return to the UK cannot maintain non-domicile status for UK tax purposes beyond a small grace period
- There could be a capital gains tax rebasing available for individuals becoming deemed UK domiciled on 6 April 2017
- For individuals with mixed bank accounts, there is to be a one year window for them to segregate the funds into separate accounts
- The government will not be introducing a 'benefits charge' on trust distributions
- Individuals who become deemed domiciled will have full use of their foreign losses from that date onwards
- The government is seeking input on how to improve business investment relief to encourage further investment into the UK by non-doms

We await the draft legislation on many of the points outlined above, but believe there are some interesting opportunities for non-UK domiciled taxpayers to utilise and benefit from.

Capital gains tax on disposal of trusts' shareholdings

Summary – The FTT found that there had been a single composite transaction that could be characterised as the sale of shares in the market by the trustees that was therefore subject to CGT.

The appeal concerned a tax avoidance scheme to sell shareholdings in Scottish trusts without incurring capital gains tax. It entailed the setting up of Irish trusts, the exercise of put options, the purchase and sale of the shareholdings by the Irish trusts, and the replacement of these trustees with the original ones under the Scottish trusts, and the consequent repatriation of these trusts. The aim was to take advantage of s144ZA TCGA 1992. This disapplies the market rule for determining the consideration for the disposal of shares through an option.

The issue was whether the scheme should be treated as a single composite transaction for the disposal of the Scottish trusts' shareholdings. Applying the *Ramsay* doctrine, the question was therefore whether there had been an expectation that the scheme would be carried through in successive steps and no likelihood in practice that it would not.

Decision:

The First-tier Tribunal said the scheme was 'meticulously planned' and 'expected, planned, and likely to be carried into effect'. Once set in motion, it was reasonable to assume that the next stage would happen as planned. There had been a theoretical risk that the Irish trustees would take a different view from the Scottish trustees but, in reality, there had been no practical likelihood of them doing so.

Taking the facts as a whole, there was a single composite transaction: the sale of shares at market value. Invoking the Ramsay doctrine, the tribunal considered the intermediate step of selling through artificially granted options by artificially created Irish trusts was not relevant. The disposal was liable to capital gains tax.

The taxpayers' appeal was dismissed.

Comments - The scheme was clearly designed to exploit the market value rule in s144ZA TCGA 1992 that applies to the exercise price of an option. Within days of the scheme being implemented, anti-avoidance legislation was enacted in s144ZB that would have caused the scheme to fail. However, the FTT also considered the application of the *Ramsay* principle and its subsequent development in later cases. This therefore provides a useful insight into current thinking.

Trustees of the Morrison 2002 Maintenance Trust and others (TC5025)

Were shares of negligible value at acquisition?

Summary - The Upper Tribunal upheld the FTT's decision that shares that were of negligible value when acquired had not 'become' of negligible value as required by condition A of s24 TCGA 1992.

In 2007, the taxpayers acquired shares in their daughter's fashion business. The shares represented the capitalisation of part of a loan made by the taxpayers to the company. In 2008, the daughter went to the US and the company ceased trading. It was wound up in 2009, and the taxpayers claimed their shares had become of negligible value under s24 TCGA 1992.

HMRC accepted the shares were of negligible value in 2009, but said they were already so when the taxpayers acquired them two years earlier.

The First-tier Tribunal agreed with HMRC; the taxpayers appealed to the Upper Tribunal.

Decision:

Judge Colin Bishopp was satisfied that the First-tier Tribunal was correct to find that there was no formal contact between the daughter and the company. There was no evidence of a remuneration agreement or identification of her duties.

The shares had to be valued as they were in 2007, rather than as they might have been. At that date, the company had no contractual right over the daughter's services, her trademarks or her designs. It had instead an unsuccessful trading history which caused a high level of indebtedness. The company had no assets and no value.

The First-tier Tribunal's conclusion that the shares acquired in 2007 were worthless was 'unassailable'.

The taxpayers' appeal was dismissed.

Comments - The UT agreed with the FTT that no contract between Miss Dyer and JDDL in relation to her services or the intellectual property held in her name could be implied and therefore JDDL was already of negligible value when Mr and Mrs Dyer made their investment and no claim could be made under s24 TCGA 1992.

R and J Dyer v CRC, Upper Tribunal

Error on land transaction return

Summary – The Tribunal found against the taxpayer in clear-cut circumstances

The taxpayer submitted a land transaction return and paid the stamp duty land tax for a lease transaction on a residential flat. The return was filed 39 days late and HMRC imposed a penalty.

The company said it had submitted the return and paid the tax in time, but then discovered, as a result of HMRC saying the relevant certification could not be issued, that the form contained the wrong reference. It resubmitted the form but by then had missed the deadline.

Decision:

The First-tier Tribunal accepted that the agent had made all reasonable efforts to find out why the form had not been received. Further, everyone makes mistakes but this could not provide a reasonable excuse. The taxpayer could not blame HMRC for not informing it that there was an error on the form. It was 'incumbent on those completing forms' that they be completed accurately and within the required deadline.

The taxpayer's appeal was dismissed.

Comments – The decision is self-explanatory

Birchgrove UK Ltd v HMRC TC5247

Administration

Does the extended 20-year limitation period have a criminal nature?

Summary – The UT found that the issue of a discovery assessment under an extended deadline did not amount to a criminal charge.

In June 2010, Mr Wood admitted to underdeclaring income for the years 2002-03 to 2007-08. He intended to use HMRC's tax health plan disclosure opportunity but did not submit a report by the deadline. HMRC therefore issued discovery assessments to collect the outstanding tax. In addition, it raised assessments going back to 1992-93 under s36 TMA 1970 and imposed penalties.

In April 2013, Mr Wood appealed but he died a month later. HMRC cancelled the penalties, but the deceased's advisers decided to proceed with the appeal against the assessments.

They argued that it was impossible, in view of the taxpayer's death, for there to be a fair trial on the issue of whether he deliberately underdeclared his income. They invoked the European Convention on Human Rights, article 6 'right to a fair trial'.

Decision:

Mr Justice Morgan in the Upper Tribunal said the European Court of Human Rights had found that it was 'a fundamental rule of criminal law that criminal liability does not survive the person who has committed the criminal act and inheritance of the guilt of the dead by his personal representative was not compatible with the presumption of innocence required by Article 6(2)'. It was therefore necessary to decide whether s 36(1A)(a) TMA 1970 was penal in nature.

The judge decided it could not be characterised as criminal. The provision allows HMRC to go back 20 years to collect unpaid taxes when a taxpayer's conduct has been negligent or fraudulent. Section 36 did not involve any formal charge, conviction or penalty and could not equate to a criminal charge. The judge said:

> 'It may put the non-compliant taxpayer at a “significant disadvantage” particularly where he has not retained the necessary books and records and make it difficult for him to challenge a discovery assessment made many years after the event but that in our view cannot be characterised as a punishment.'

The criteria in *Engel v Netherlands* [1976] 1 EHRR 647 were not met and article 6 was not in play.

The taxpayer's appeal was dismissed.

Comments - The UT considered that s 36(1A)(a) TMA 1970 operates as an incentive for a taxpayer to submit his tax returns in a timely fashion and the extended time limit acts as a deterrent against non-compliance with that obligation

Personal representative of M Wood (deceased) v CRC, Upper Tribunal

Penalties for late payment of tax

Summary – The FTT found that the taxpayer had a reasonable excuse

The taxpayer filed his 2010-11 return online on time. He should have paid tax on 31 January but did not do so.

HMRC issued penalties and the taxpayer appealed. He said that one of his businesses, a horticultural label manufacturer, received no business in a year. He also owned a business park but that had less than 50% occupancy in the year and the income was less than the mortgage payments. He had tried to reorganise his finances but this resulted in a substantial personal debt.

Decision:

The First-tier Tribunal said the taxpayer had done everything he could to 'exercise reasonable foresight' to pay his income tax. He had time-to-pay arrangements in place for VAT, PAYE and corporation tax. Although insufficiency of funds could not alone constitute a reasonable excuse, the cause of that deficiency might.

In this instance, several factors presented a 'significant and unusual cash flow problem' which the taxpayer could not have foreseen. The tribunal concluded he had a reasonable excuse and discharged the penalties.

The taxpayer's appeal was allowed.

Comments – The decision demonstrates how the taxpayer will succeed with a reasonable excuse where the taxpayer can evidence the circumstances which can validate the excuse.

J Padley v HMRC TC5243

Reliance on a third party for late submission of a return

Summary – The Tribunal concluded that the taxpayer did not have a reasonable excuse

The taxpayer was appointed a director of a restaurant in July 2009. She failed to notify HMRC of this until April 2013, breaching the requirement of s7 TMA 1970 by more than 30 months. HMRC issued a 2012-13 self-assessment return but the taxpayer submitted it 18 months after the due date. The Revenue therefore imposed late filing penalties. The taxpayer made a late appeal which HMRC refused.

Decision:

The First-tier Tribunal agreed to admit the appeal.

The taxpayer's main ground of appeal was reliance on her accountant to deal with the return in the allotted time. The tribunal said 'delegation to the accountant' did not absolve the taxpayer from the 'ultimate responsibility' to submit the return.

A reasonable person would have enquired about the progress of the return, answered queries that may have held up its filing, and appointed a different adviser if the original one was proving unsatisfactory.

Overall, the taxpayer had appeared to ignore time limits and have no awareness of her legal and statutory obligations.

The judge concluded therefore that the taxpayer did not have a reasonable excuse.

The taxpayer's appeal was dismissed.

Comments – It is quite clear from the report of the decision that the taxpayer was unlikely to succeed in the appeal.

G MacDonald v HMRC TC5246

Application for time to notify an appeal

Summary – The FTT refused a taxpayer's application to make a late appeal and the FTT found that it was the taxpayer's responsibility to make a timely appeal and it would not have been fair and just to allow him to make an appeal over three years late.

The taxpayer wished to appeal against a closure notice (s28A TMA 1970) amending his 2006-07 tax return. HMRC sent the notice with a letter dated 27 January 2010, which he claimed not to have received. In October 2012, his accountant appealed on his behalf on the ground that HMRC had been corresponding with the wrong agent.

Decision:

The First-tier Tribunal said the delay in appealing had been 'very substantial' — more than three years. The judge found that the taxpayer had received the notice of closure letter and that it should have been clear that he needed to respond promptly. The taxpayer was, in the judge's opinion, responsible for failing to act.

The judge concluded that there were no extenuating circumstances that would justify a late appeal.

The taxpayer's application was refused.

Comments - This case serves as a reminder that clients should ensure that their tax adviser is fully aware of any HMRC correspondence they receive in case HMRC have not copied it to their adviser.

A S Martin v HMRC TC5221

Incorrect return delivered fraudulently or negligently

Summary - The FTT allowed a tax avoidance scheme user's appeal against penalties imposed by HMRC on the basis that he had fraudulently or negligently submitted incorrect tax returns.

The taxpayer claimed a capital loss in his tax return which he sought to offset against capital gains. The loss arose from participation in a marketed planning arrangement that was found not to work. The taxpayer accepted this and withdrew his loss claim. HMRC said he had submitted an incorrect return fraudulently or negligently and imposed penalties under s95 TMA 1970.

The taxpayer appealed against the penalties.

Decision:

The First-tier Tribunal found that the taxpayer had not acted fraudulently. The judge said the fact that he had claimed a loss when he knew that he had not made 'an economic loss of that amount' did not indicate fraud. The tax system is complex and there are instances when the calculation of a profit or loss for tax purposes is different from the economic one. The taxpayer's state of mind was important — did he have an honest belief that his return was correct? The tribunal concluded that HMRC had failed to show that he had not. Indeed, the tribunal was convinced that he did believe the form was correct.

On negligence, the tribunal noted that the taxpayer had 'concerns' about the scheme's implementation, including the lack of experienced staff handling it. However, he relied on his accountant's assurances that the scheme was legal and used a tax 'anomaly'. There was no reason why he should have sought independent financial advice. HMRC had not established negligence.

The taxpayer's appeal was allowed.

Comments - This case may be of assistance to other taxpayers who have been charged inaccuracy penalties following participation in failed tax avoidance schemes. It is an FTT decision so therefore it is not binding and also could be appealed by HMRC. This case deals with errors made in personal tax returns for periods commencing before 1 April 2008 and therefore the relevant legislation is in (now former) s95 TMA 1970. For errors made in returns for periods commencing on or after 1 April 2008 and due on or after 1 April 2009 the legislation is in *S*ch 24 FA 2008.

A Bayliss v HMRC TC5251

Accelerated payment notices were valid

Summary - The High Court dismissed a claim for judicial review of accelerated payment notices (APNs).

The High Court accepted that the notice requirement for the issue of a valid APN could not be satisfied unless the designated officer had determined that the claimed tax advantage was disputed. In this case , the claimants argued that no such determination had been made. The underlying issue was whether employer contributions have to give rise to an employment income charge to satisfy the definition of 'qualifying benefits'.

This could lead to an argument that an employment income tax charge had arisen that was now barred by limitation, and that statute barred charge meant that the claim for relief from corporation tax was valid.

Decision:

The High Court found that the assessments for PAYE and NICs were protective. They did not show that a primary argument, that the claim for relief from corporation tax was not valid, had been abandoned; or that a claim for that relief was accepted as valid; or that no view had been taken on the efficacy of the claim for relief from corporation tax. The High Court also rejected the assertions that HMRC had not formed a view on the efficacy of the claim for relief, and that the applicants were unaware of HMRC's view. HMRC had publicised its view that the interpretation of the relevant provisions, relied on by the taxpayers to claim relief from corporation tax for employer contributions, was not correct.

Comments - Yet another claim for judicial review of APNs has been dismissed by the High Court. The ground for review was, however, different from the previous challenges, as the claimants contended that they had not been aware of HMRC's position**.**

R (on the application of Vital Nut Co Ltd and another) v HMRC [2016] EWHC 1797

Tax paid late because taxpayer abroad

Summary – The taxpayer was unsuccessful in arguing that there was a 'genuine mistake' between him and his adviser about who would pay the tax.

The taxpayer filed his 2011-12 return on time but did not pay the tax due until two months later. His 2013-14 return was also filed on time, but the tax was not paid in full for more than a year. HMRC imposed penalties and the taxpayer appealed. He said he had moved abroad and instructed his accountant to deal with his tax affairs and inform him of tax due.

Decision:

At the hearing before the First-tier Tribunal, the taxpayer said there was a 'genuine mistake' between him and his adviser about who would pay the tax. The tribunal said there was no evidence to show such a mistake could have happened and nothing to suggest they could have 'got their wires crossed'. A reasonable person would have ensured funds were available to pay the tax and would have checked to ensure his tax obligations were being carried out.

The judge was sympathetic to the taxpayer's position of being abroad and not in communication with his advisers, but said the necessary arrangements should have been put in place.

The taxpayer's appeal was dismissed.

Comments – The decision was self-explanatory.

C Stroud v HMRC TC5300

Late filing of personal tax return as PAYE insufficient

Summary – The Tribunal found that the taxpayer had underpaid tax and it should have been repaid

In July 2015, HMRC sent the taxpayer a notice to file a return for 2013-14. The deadline was 25 November but the taxpayer did not submit it. HMRC issued penalties against which he appealed.

The matter proceeded to the First-tier Tribunal.

The taxpayer said he did not understand why he had been told to submit a return. He was an employee and, as far as he was aware, had no tax liability. HMRC said his records showed he had been given two personal allowances. He had begun employment with one company in May 2012, but had started a second job in September 2013. He did not give the second employer a form P45 but completed a checklist to establish his PAYE code. This indicated, wrongly as it turned out, that it was his first job since April 2013, so the employer allocated the full personal allowance. As a result, he underpaid tax for the year. HMRC could not code out the tax for 2014-15 because he had changed jobs and was below the tax threshold. It therefore wrote to ask the taxpayer to pay the amount owed.

The taxpayer failed to respond, so HMRC sent the return.

Decision:

The First-tier Tribunal had sympathy with the taxpayer, who believed that the PAYE system would deal with his tax. But it was clear from HMRC's correspondence that he had underpaid tax. He should have taken steps to make the repayment and complete the return. He had 'failed in his duty' and the penalties were correct.

The taxpayer's appeal was dismissed.

Comments – The First-tier Tribunal had sympathy with the taxpayer, who believed that the PAYE system would deal with his tax. But it was clear from HMRC's correspondence that he had underpaid tax. He should have taken steps to make the repayment and complete the return. He had 'failed in his duty' and the penalties were correct.

S Battu v HMRC TC5303

Wording in a notice requiring information

Summary – The Upper Tribunal dismissed TelNG's appeal against the decision of the First-tier Tribunal to uphold the validity of an information notice.

HMRC had notified the taxpayer in a letter that it should produce particular papers by post or by email by a specified date under Para 1 Sch 36 FA 2008. After some delays on the part of the taxpayer, HMRC collected the documents from the taxpayer after the deadline. As a result, HMRC imposed a penalty.

The taxpayer said the notice was invalid and the penalty could therefore not stand. The First-tier Tribunal dismissed the taxpayer's appeal, and the matter progressed to the Upper Tribunal. The taxpayer said, because the notice required 'production of documents' rather than the 'provision of information', they should be 'produced at a place'. But it did not specify this.

Decision:

The Upper Tribunal said there was 'some merit' in the taxpayer's argument. But this was to take a literal approach when the legislation had to be construed purposively. The relevant provision for complying with a notice was para 7. The judge said this, as a whole, was concerned with compliance and a purposive construction would suggest that 'no part of it should be construed so as to limit, otherwise than by reference to reasonableness, the nature of the requirements to be complied with either as regards the provision of information or the production of documents'.

In essence, if the taxpayer could not post or email the information, it could have produced them at an agreed location.

The taxpayer's appeal was dismissed.

Comments - Arguably, the FTT and UT are unlikely to find that an information notice is invalid merely because of a narrow interpretation of the law. At the FTT, TelNG had also argued that it had a reasonable excuse for the supposed failure to comply with the notice, but that argument was not pursued at the UT.

TelNG Ltd v CRC, Upper Tribunal

Flawed decision on conditions to suspend a penalty for careless inaccuracy

Summary – The FTT allowed a taxpayer's appeal against HMRC's decision not to suspend a careless inaccuracy penalty. The FTT found that it was the taxpayer's failure to keep proper records of the disposal of his business premises that led to him failing to spot that his accountants had missed the disposal from his return and this was something that could be dealt with by way of a suspensive condition.

The taxpayer did not include the gain arising from the disposal of his business premises on his tax return. This was because the return had been prepared by a different partner at his accountants and he had not checked the file.

HMRC imposed a penalty on the ground that the omission had been careless. It refused to suspend the penalty because no suspension conditions could be put in place (Para 14 Sch 24 FA 2007). This was because a similar omission would not recur in future returns, so any suspension conditions imposed could only prevent a different inaccuracy arising in future.

The taxpayer appealed.

Decision:

The First-tier Tribunal said there was only one specific limitation on HMRC's discretion. This was that a penalty could be suspended only if such an action would help the taxpayer avoid future penalties for careless inaccuracy. On one-off events, the judge referred to another tribunal's decision in *Fane*. In that, the tribunal endorsed HMRC's guidance that a one-off event would not normally be suitable for a suspended penalty. However, since then other cases, such as *Testa* (TC2549) and *Boughey* (TC2082), had cast doubt on that endorsement, finding instead that the condition did not have to be specific.

In this case, HMRC failed to exercise its discretion in the way that a reasonable decision-maker would. The question was whether there was scope for future careless errors to be minimised.

The judge said: 'The enquiry should not stop with the identification of a human error; it should start with it.' HMRC's dependence on the explanatory note to Finance Bill 2007, which 'suggested' that one-off errors may be excluded from suspension, was 'a fetter' to its powers of discretion and 'unwarranted by the language of para 14'.

The tribunal concluded that HMRC's decision not to suspend the penalty was 'flawed according to judicial review principles'. The judge continued:

> 'It proceeded on a flawed basis as to the underlying cause of the careless inaccuracy and it unreasonably confined the scope of HMRC's discretion both as regards its consideration of future risk and its unduly narrow focus on systemic failure. In doing so it unreasonably fettered its discretion. Those failures are such that we are unable to conclude that, had HMRC exercised their discretion in a proper manner, the decision would inevitably have been the same.'

The judge ordered HMRC to suspend the penalty. The tribunal could not impose the conditions, but said one that gave the taxpayer an 'effective means of double-checking' that his tax file contains all the documents required to file an accurate return should be considered.

The taxpayer's appeal was allowed.

Comments - This is yet another case where the FTT has disagreed with HMRC’s interpretation of the law on the suspension of penalties. One of the arguments put forward by HMRC was that it was not enough for the suspension conditions to help meet an existing statutory obligation to submit accurate returns. But in the FTT’s view that was precisely what a suspensive condition had to do.

E Eastman v HMRC TC5276

Reasonable excuse for delay in paying VAT - Hanging on the telephone

Summary – The First-tier Tribunal held that HMRC’s busy phone line provided a reasonable excuse for failing promptly to agree a deferred due date for payment.

The taxpayer had been late paying his VAT three times. HMRC imposed a default surcharge. He appealed, claiming reasonable excuse. His agent had repeatedly telephoned HMRC to set up a time-to-pay arrangement, but the calls were never answered.

Decision:

The First-tier Tribunal noted that the taxpayer's cash flow problems caused by late payment of debts would not on its own constitute a reasonable excuse. However, through his agent, he had done all he could to settle the VAT bill. The agent began calling HMRC on 5 February (payment being due on 7 February) but failed to make contact until 12 February when a time-to-pay agreement was made and adhered to. The problems calling HMRC were 'unexpected and unforeseeable'.

The tribunal rejected HMRC's claim that the taxpayer and the agent should have been aware that the phone lines would be busy leading up to the payment due date. The judge said the Revenue did not publish times when its lines were likely to be busy and, 'rather than expecting delays', it was 'reasonable for a taxpayer to expect calls to be answered without delay'.

Indeed, the judge said: 'HMRC are in a better position than the appellant to know when there is a likelihood of a large volume of calls and they should have arrangements in place to deal with the higher volume of calls promptly.'

The taxpayer's appeal was allowed.

Comments – With this type of case the outcome is critically dependent upon the facts. It remains to be seen if HMRC will do more to publish the times when their lines are likely to be busy or if more staff will be made available to answer the phone.

McNamara Joinery v HMRC TC5278

HMRC not barred from taking part in proceedings

Summary - The First-tier Tribunal refused an application by taxpayers to bar HMRC from taking further part in an appeal and an application for one ground of appeal to deferred as a subsidiary issue, but partly allowed the taxpayers' application for costs.

The application related to two separate appeals made by Mr and Mrs Ritchie concerning CGT on the disposal of a property they had jointly owned.

HMRC had used in its statement of case without prejudice material obtained as part of an unsuccessful alternative dispute resolution (ADR) process. The main application was for HMRC to be barred from taking further part in the proceedings, on the basis that it had failed to cooperate with the tribunal, or to withdraw its statement of case and issue a new one.

Decision:

The FTT agreed that providing a defective or inadequate statement of case could amount to a failure to co-operate with the tribunal, as it was likely to hinder the tribunal in furthering the overriding objective of dealing with a case fairly and justly.

However, the FTT held that the inadvertent use of the without prejudice material in HMRC's statement of case, and the subsequent delay in agreeing to remedy the situation, did not amount to a failure to co-operate with the tribunal to such an extent that the tribunal could not deal with the proceedings fairly and justly. HMRC should not therefore be barred from further participation in the proceedings on this basis. The FTT simply directed HMRC to issue a revised statement of case without any reference to comments made during the ADR process.

Comments - While the FTT refused to bar HMRC from the appeal process it was clearly not impressed with some of their actions. HMRC needed to put in place procedures to ensure that follow up correspondence from an ADR meeting which still forms part of the ADR process is kept separate and is not included in the case file which is then passed to the litigation team

Ritchie & Ritchie v HMRC TC5258

Extension for late appeal granted

Summary - The Appellant's applied for permission to appeal an assessment made by HMRC out of time concerning the CGT and related penalty on the sale of a property. The Tribunal in applying case law relating to the reasonableness of granting an extension and applying Tribunal rules on acting 'fairly and justly', including 'avoiding delay', decided to allow the appeal to be heard.

Ms Rowledge had purchased a property and it had been occupied by her brother until she had sold it to him. HMRC had issued an information notice (Sch 36 FA 2008) and a penalty for non-compliance with the notice, but Ms Rowledge claimed that she had not received either of those documents. HMRC had then issued a notice of assessment to CGT on the sale in July 2013 and Ms Rowledge had written to HMRC in November 2014 asking it to review the position. HMRC had replied in January 2015 that the time limit to appeal against the assessment had expired 30 days after it had been sent.

The FTT noted the following facts:

- Ms Rowledge had purchased the flat for her brother because of his inability to obtain a mortgage but it had been understood that he would deal with tax issues. However, he had been suffering from severe depression.
- Ms Rowledge had mistakenly understood that she was appealing the assessment during her numerous phone calls to HMRC.
- Ms Rowledge had been hospitalised and was immobile.

The FTT decided to grant permission to make a late appeal, given the circumstances of the taxpayer.

Comments - The Tribunal here have made an equitable decision to permit an appeal made out of time based on the subjective analysis of the fairness in doing so. The danger in this decision is being able to apply this subjectivity in a consistent manner. This could lead to more challenges from individuals where such appeals have been made out of time in the future.

C Rowledge V HMRC TC5305

Application for a closure notice

Summary - *Closure notices in respect of enquiries into SDLT returns were refused where the taxpayers had not provided the documentation requested by HMRC*

The taxpayers took part in a stamp duty land tax avoidance scheme marketed by C. The arrangement relied on s45 FA 2003 to exempt from SDLT the purchase of residential property and s71A FA 2003 to exempt the sale and leaseback transaction. The scheme was used by many other taxpayers.

HMRC opened an enquiry into the taxpayers' SDLT returns. Subsequently it sent the taxpayers a settlement invitation. This stated that HMRC believed the scheme did not work and invited them to withdraw from it and settle. It requested several documents from the taxpayers.

The taxpayers' adviser objected to the request but HMRC sent a second identical settlement offer to the taxpayers. They applied for a closure notice. HMRC said no such notice could be issued because it had insufficient documentation on which to base one.

Decision:

The First-tier Tribunal agreed that HMRC did not have enough information to issue a closure notice. The judge said HMRC 'clearly have insufficient information and documentation concerning the detailed implementation of the scheme which would enable them to draw anything more than a high level conclusion on its efficacy'. If the tribunal were to order a notice be issued, it would 'result in the inappropriate shifting of matters properly to be determined by [HMRC] to case management for the tribunal'.

The taxpayers' appeal was dismissed.

Comments – This decision draws out some of the practical difficulties facing HMRC where, in connection with tax return enquiries, HMRC deal with a 'scheme promoter' and/or identify a sample of scheme users from whom full documentation is requested. One of the potential difficulties, in the context of the statutory enquiry and/or appeal process, is where the promoter is corresponding with HMRC on no more than an 'informal basis' on behalf of the taxpayer clients it represents.

A Frosh and R Joyce; D Goring-Thomas and P Goring-Thomas v HMRC TC5307

HMRC News

Deadline Dates

1 October 2016

- Payment of corporation tax liabilities for periods ended 31 December 2015 are due for small and medium-sized companies not liable to pay in instalments.
- National minimum wage rates increase on this date.

5 October 2016

- HMRC must be advised by this date of income tax or CGT liabilities for 2015-16 if a tax return or notice to file has not been received.

7 October 2016

- Due date for VAT return and payment for 31 August 2016 quarter (electronic payment).

14 October 2016

- Form CT61 to be submitted and tax paid for quarter ended 30 September 2016 by this date.
- Due date for quarterly corporation tax instalment for large companies depending on accounting year end.
- Due date for monthly EC sales list (paper return).

19 October 2016

- Pay PAYE/CIS liabilities for month ended 5 October 2016 if by cheque by this date.
- File monthly CIS return by this date.
- PAYE settlement agreement tax/class 1B NIC liabilities if paying by cheque are due.
- Due date of payment of PAYE liability for quarter ended 5 October 2016 if average monthly liability is less than £1,500.

21 October 2016

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

22 October 2016

- PAYE/National Insurance/student loan/CIS payments are due if being paid online.
- Electronic payment date of PAYE for quarter ended 5 October 2016 if average monthly liability is less than £1,500.
- Electronic payment date of PAYE settlement agreement liabilities.

31 October 2016

- Deadline for submission of 2015-16 paper self-assessment tax returns.
- Deadline for individuals with PAYE income to request a self-assessment tax return for 2012-13 under s711 ITEPA 2003.
- Companies House should have received accounts of private companies with a 31 January 2016 year end by this date.
- Companies House should have received accounts of public limited companies with a 30 April 2016 year end by this date.
- HMRC should have received corporation tax self-assessment returns for companies with accounting periods ended 31 October 2015 by this date.

Making Tax Digital (Lecture B978 – 15.44 minutes)

MTD Roadmap

In December 2015 HMRC published their MTD Roadmap that sets out their plans to make tax digital by 2020. This has been followed by six consultation documents that were published on 15 August 2016 and we have until 7 November 2016 to submit our comments.

Consultation document 1: Bringing tax into the digital age

This document applies to all self-employed individuals, landlords and unincorporated businesses. These businesses will need to acquire approved software to keep their records in a digital format with the headline figures from these records then being filed with HMRC. As part of the consultation HMRC are consulting over transitional help for paper record and spreadsheet users.

Agents will have software that will interface rather than directly access their clients' affairs.

Under the proposals key figures must be submitted to HMRC quarterly, with year-end adjustments being made by 9 months after the year-end. Businesses with turnover of less than £10,000 per annum will be exempt but HMRC are also consulting as to whether a wider group should be given an extra year to prepare.

Consultation document 2: Simplifying tax for unincorporated businesses

A number of simplifications are being considered:

- Making the cash basis available for businesses with turnover of up to £166,000 per annum or twice the VAT registration threshold;
- Upfront relief for most non-property expenditure to help simplify the capital versus revenue distinction;
- Removal of the tax year-end once perpetual quarterly filing is up and running and a way has been identified to map income and expenditure directly to tax years instead. HMRC are considering the removal of overlap relief brought forward.

Consultation document 3: Cash basis for unincorporated property businesses

HMRC are considering extending the cash basis to most types of landlords. irrespective of turnover.

Consultation document 4: Voluntary pay as you go

Currently there is no mention of changing the required payment dates. However, HMRC believe that some taxpayers may like to opt to make regular payments towards their tax liabilities. This consultation documents considers how to manage and allocate the different taxes under such a system.

Consultation document 5: Tax administration

HMRC are considering the introduction of a points system for non-deliberate failure to submit information online with an opportunity to correct information before sanctions are imposed.

There will be a stronger sanction for deliberate failure, a new penalty interest regime is proposed as well as two possible models for aligning existing late payment dates.

Additionally HMRC are looking at a phased approach to align interest regimes across the taxes.

Consultation documents 6: Better use of information

HMRC are looking at how to improve the use of existing information from third parties by pre-populating this information into taxpayers' digital tax accounts. This might include PAYE information from employers, bank interest and dividends.

What does the taxpayer want?

Taxpayers want to be confident that they have complied with their tax obligations and also to know how likely HMRC are to start an enquiry or investigation into their affairs. Ideally they want to be left alone.

They also want to know that they have paid the correct amount of tax, having claimed all of the reliefs and allowances that they are entitled to.

How will data be used?

In time we made be asked to file our information using specific industry codes. HMRC will know for each type of business the levels of tax and national insurance that they are expecting to receive. Results that fall outside of the expected amounts could be used to trigger an HMRC enquiry. Equally advisors may be able to use the same information to identify clients who may not be claiming all of their expenses and relief.

Big challenge

Under making tax digital, tax advisors will need to add value to the tax compliance process. We will need to check information that has been input by clients to make sure that it is correct and complete.

Practices will need to look for new ways to add value.

HMRC launches worldwide disclosure facility

A new online disclosure facility was launched on 5 September 2016 giving offshore evaders a last chance to come forward and settle tax on their wealth hidden offshore ahead of new data sharing arrangements and tougher penalties being introduced.

The Worldwide Disclosure Facility (WDF) is the final chance for those few still dragging their feet to put things right with any outstanding tax on undeclared offshore money or assets.

The WDF offers no special terms: those who come forward will pay the tax in full, with interest on top, with a minimum penalty of 30% of the tax due for evaders, and they could still face criminal prosecution. The quality of the information disclosed will be taken into consideration and it is always advisable to come forward and ensure any outstanding tax liabilities are in order as soon as possible.

The Government has made clear it is committed to getting tougher on tackling all forms of tax evasion. The changes outlined here and the principles behind them apply to both onshore and offshore issues ensuring a strengthening of our penalties for all tax evasion.

From 5 September 2016 HM Revenue and Customs (HMRC) will also consider how long it has taken for someone to put their tax affairs in order when calculating penalties. This means that those who have delayed disclosing or ignored past opportunities will no longer get a reduction for disclosure.

This last chance comes before HMRC starts to receive an unprecedented amount of data on offshore accounts closing the net further on tax evaders, who are to be hit by tougher sanctions. This will be added to the offshore data HMRC receives year-on-year that is used to help settle hundreds of criminal investigations.

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

> "HMRC is getting even tougher on tax evasion. We relentlessly pursue tax evaders to ensure they pay every penny of the taxes and fines they owe, pushing for the toughest possible sanctions where appropriate.
>
> "We've closed old disclosure facilities, increased penalties, and ramped-up our powers to tackle evaders and those that help others evade. Alongside this, international cooperation through global tax transparency is making it easier for us to catch evaders, as we increasingly receive more information about financial assets which people had hoped would remain hidden. Our message couldn't be clearer: there are no safe havens left for tax evaders and no-one should be in any doubt that the days of hiding money offshore with impunity are gone."

Further guidance and detail on the changes to disclosure and the WDF have been published. Those who do not come forward will face the new Requirement To Correct (RTC) penalties being consulted on; one option being considered is a minimum 100% penalty - significantly higher than the current minimums.

These latest actions build on the wide range of measures introduced by the Government to toughen sanctions for all those involved in offshore tax evasion. This includes a new criminal offence for tax evasion, increased civil sanctions for offshore tax evaders, and civil sanctions for those who enable offshore evasion.

In 2014-2015 HMRC brought in £26.6 billion from tackling tax evasion and avoidance, and since 2010, has raised over £2.4 billion from offshore evasion initiatives, including more than 10,000 disclosures.

Changes to Corporation Tax forms from 19 September 2016

Acknowledgement of a Company Tax Return letter (CT620 ACK)

HM Revenue and Customs (HMRC) issues this paper acknowledgement to companies and authorised agents when a Company Tax Return has been filed successfully through HMRC's CT Online Service.

HMRC will stop issuing this letter and is changing the Government Gateway email that confirms filing, to prompt customers to check CT Online View Liabilities and Payments (L&P) where they can see their return details.

Agents will also be able to view this information by entering their agent authorisation details.

Important dates letter (CT610/CT610A)

HMRC issues this letter to companies and authorised agents showing key dates (first accounting period, payment and filing dates) based on the information that HMRC has for the company.

HMRC will stop issuing this letter as customers can use CT Online View Liabilities and Payments (L&P) to get the information.

Depending on a company's circumstances, its actual accounting periods may differ from those recorded by HMRC and shown in CT View L&P.

A company's actual accounting periods will depend on when it started in business and the date to which it draws up its accounts.

The Corporation Tax payment date is normally 9 months and 1 day after the end of the accounting period.

The return filing date is normally 12 months after the end of the accounting period.

If the CT View L&P information is correct, the company can use it to work out its payment and filing dates. Otherwise, HMRC can update its records if the company provides the correct information.

Agents will also be able to view this information by entering their agent authorisation details.

Various paper guidance notes and inserts that HMRC will stop issuing and instead make available on GOV.UK:

Budget insert (CT600)

Issued with the Notice to deliver a Company Tax Return (form CT603) will be made available online.

Authorising your agent (Form 64-8)
Issued with the Information for new companies letter (form CT41G).

CT211 Notes
Issued with certain Notices of penalty determination (form CT211).

CT620 Notes
Issued with certain Notices relating to Company Tax Returns (form CT620).

CT630/CT631 Notes
Issued with Notices to companies in group payment arrangements (forms CT630 and CT631).

CT220 Notes
Issued with Notices of assessment for Corporation Tax Pay & File accounting periods ending before 1 July 1999 (form CT220).

Return reminder letter (CT205/CT205A)

Issued to companies and agents 28 days before the filing date if a payment has been received but no return received.

HMRC will stop issuing the CT205 to companies with an authorised agent. Authorised agents will still receive form CT205A listing clients that have not yet filed. Unrepresented companies will continue to receive the CT205 as normal.

Return and payment reminder letter (CT208 (PR2)/CT208A)

Issued to companies and agents 28 days before the filing date if no payment or return has been received.

HMRC will stop issuing CT208 (PR2) to companies with an authorised agent. Authorised agents will still receive form CT208A.

Unrepresented companies will continue to receive the CT208 (PR2) as normal.

Various forms and notices that HMRC has a legal obligation to serve on companies:

- Notice of correction to a Company Tax Return (form CT620 COR) Notice of amendment to a Company Tax Return (form CT620 AMD)
- Acknowledgement of amendment to a Company Tax Return (form CT620 AMK)
- Notice of amendment of self assessment during enquiry into a Company Tax Return (form CT620 ASA)
- Notice of completion of enquiry into a Company Tax Return (form CT620 CLO)

- Notice showing the effect of claims and elections not included in a Company Tax Return (form CT620 CLA)
- Determination of tax payable in the absence of a Company Tax Return (form CT620 DET) Assessment to make good to the Crown a loss of tax (form CT620 DIS)
- Notice of penalty determination (form CT211)
- Where a company's Registered Office and its authorised agent's address are the same on HMRC's records, we will issue these forms to the company only. Companies will need to tell their agents when they receive these forms.
- When a company's Registered Office and its authorised agent's address are different, we will continue to issue these forms to the company and its agent.
- Unrepresented companies will continue to receive these forms as now.

Business Taxation

Gift or payment for a service?

Summary – The FTT decided that the money received for services the taxpayer had provided to another person should be taxed under ss687-689 ITTOIA 2005 rather than received tax free as a gift.

The taxpayer received a substantial cash payment from L, when he sold a piece of land that the taxpayer had used for grazing horses. It was described as 50% of the profit on the sale of the land and he signed a document styled 'invoice' to acknowledge receipt. He asked various people, including a solicitor, whether the sum was taxable. He told them it was a gift and he had done no work for it. They advised him that, on that basis, it was not taxable. The taxpayer did not, therefore, declare it as a taxable receipt.

HMRC became aware of the payment and assessed it to tax on the ground that it was a share of the profit on the sale of the land. The officer also claimed that the taxpayer had received a further £11,000.

Decision:

The First-tier Tribunal decided that the invoice was evidence of an agreement between the taxpayer and L that the former would receive a payment of 50% of the profit. The 'only reasonable explanation' for that was that the taxpayer had 'in some way put the land in L's way'. Therefore, the payment was consideration for a service rendered to L by the taxpayer and subject to income tax under ss687-689 ITTOIA 2005.

However, the tribunal found no evidence to show the taxpayer had received the additional sum contended by HMRC and reduced the assessment and penalty as a result.

The taxpayer's appeal was dismissed.

Comments - This was a fairly straight forward case and shows an example of when a court would determine that taxable income had been received and should be taxed under s687 ITTOIA 2005.

D Daly v HMRC TC5248

Entitlement to IBAs - Grant of an underlease is the sale of a relevant interest

Summary – The FTT allowed a taxpayer's appeal against HMRC's refusal of his claim to industrial buildings allowances (IBAs).

The taxpayer was a director of HCL. The company bought a long lease of land on which it developed two industrial units. It granted the taxpayer an underlease of one of the units. He claimed industrial buildings allowances on the purchase price (s290 CAA 2001). HMRC refused the claim on the ground that the taxpayer and HCL were connected persons (s 291(1)). The taxpayer accepted this but claimed the underlease was the sale of a relevant interest for the purpose of s 296.

Decision:

The First-tier Tribunal agreed with the taxpayer that the legislation did not specify when the granting of a sublease might cause the relevant interest to cease to exist because it was a matter of degree. The legislation did not prescribe all the circumstances when a grant might amount to the transfer of a relevant interest, although it did say that any lease of more than 50 years would amount to one. Therefore it depended on an interpretation of the facts.

The judge noted that the sale could have been completed in either of two ways: the grant of a sublease or an assignment of the lease. The taxpayer would pay the same consideration, regardless of the completion method. This suggested there was 'no commercial difference between the lease … and the underlease'. He accepted the taxpayer's claim that the grant of the underlease satisfied the statutory description of a sale of the relevant interest. Therefore the taxpayer qualified for industrial buildings allowances.

The taxpayer's appeal was allowed.

Comments - This case is of historic interest as it concerns IBAs which were abolished in 2011.

D Wellstead v HMRC TC5242

Payment is taxable as loan relationship scheme fails

Summary – The Court of Appeal found that a loan relationship scheme partially failed.

Greene King plc loaned £300m to GKB, a wholly-owned subsidiary, in 2000. At the same time, GKB created unsecured loan stock with a nominal value of £300m, which was issued to Greene King as security for the loan.

In 2003, Greene King plc assigned its right to receive the interest on the unsecured loan stock in exchange for preference shares carrying a special initial dividend issued by another subsidiary, GKA.

GKB paid loan interest to GKA. However, Greene King plc retained the right to receive the repayment of the £300m.

HMRC said that the purpose of the arrangements was to take advantage of a loophole in the loan relationship rules. The aim was to make a tax saving by allowing GKB to claim a deduction for the interest payable without Greene King plc or GKA being taxed on the interest.

The First-tier Tribunal and Upper Tribunal dismissed the taxpayers' appeals, but said both GKA and plc were potentially taxable.

Decision:

Sir Terence Etherton in the Court of Appeal decided that GKA had a loan relationship with GKB, within the meaning of s81 FA 1996. The assignment of the interest to GKA had created a relationship of creditor and debtor between GKA and GKB, in respect of the debt represented by the future instalments of interest.

GKA had recorded the asset strip as a receivable from GKB in its balance sheet at its current value (£20.5m). It had credited the nominal value of the preference shares issued in return (£1.5m) as a non-capital equity instrument and credited the difference (£19m) to its share premium account.

The judge said the £20.5m arose from the loan relationship between GKA and GKB. For the purposes of s 84(1)(a), the present value of those future payments, which was recorded in GKA's balance sheet and which gave rise to the profit transferred to GKA's share premium account, could be of no different character. The £19m taken by GKA to its share premium account was therefore excluded from s 84(1)(a) by s 84(2)(a).

The court allowed the appeal in respect of GKA but dismissed plc's appeal.

Comments - Heather Self, partner at Pinsent Masons, said: 'The aim of these arrangements was for loan interest to be deductible in one company (GKB) but not taxable in the hands of either the recipient (GKA) or the original lender (plc). Ultimately, it failed, with the Court of Appeal deciding that plc's accounts were incorrect and it had to pay tax on £20.5m, being the net present value of the interest it had assigned to GKA. However, the final decision was only a partial victory for HMRC, since the Upper Tribunal had wanted to tax GKA, as well as plc, on the grounds that it did not have a “meaningful” loan relationship.'

Greene King plc and another v CRC, Court of Appeal

Treatment of manufactured overseas dividends

Summary – The Court of Appeal found that payments made as part of a tax avoidance scheme were not deductible manufactured overseas dividends (MODs).

In his self-assessment tax return for 2005-06, the taxpayer claimed a deduction from his total income of £303,123 for two payments made for loan notes. He claimed that he was entitled to deduct them because they were manufactured overseas dividends (MODs)(Para4(1) Sch23A ICTA 1988)) and, as such, were annual payments within s 349(1) and reg 2B(3) of the Income Tax (Manufactured Overseas Dividend) Regulations SI 1993/2004. The payments had been made as part of an avoidance scheme and had no wider commercial purpose. HMRC disallowed the deduction.

The First-tier Tribunal and Upper Tribunal found for HMRC.

The taxpayer appealed.

Decision:

In the Court of Appeal, Lord Justice Patten said one purpose of the borrower of the overseas securities being able to treat MODs as deductible annual payments under reg 2B(3) was to prevent the borrower being taxed on the dividends or interest he received during the period of the loan. The lender of the securities was treated as having received an overseas dividend which would have been taxable. The only way to avoid the charge would have been for the lender to have been non-resident.

The judge said: 'The significant aspect of reg 2B(3) is the relief which it gives to the borrower in being able to avoid a tax charge on the dividends or interest from the securities and this is clearly intended to benefit the parties to real-world, commercial transactions involving the lending of marketable securities and not to transactions which lack those characteristics and whose only purpose is to obtain tax relief.'

The taxpayer's appeal was dismissed.

Comments – In this case, although disagreeing with the UT on some aspects of their findings, the Court of Appeal has ultimately confirmed the decisions of the FTT and UT that a tax avoidance scheme provided by NT Advisers and known as 'Highlands' failed to achieve the income tax shelter sought. The Court of Appeal dismissed the appeal finding that the relief given by SI 1993/2004, that allowed a deduction against total income for a manufactured overseas dividend paid, thus enabling the borrower of the securities to avoid a charge on the dividends or interest received but then paid away, was intended to benefit parties to real-world, commercial transactions involving the lending of marketable securities and not to transactions which lacked those characteristics and whose only purpose was to obtain tax relief.

Chappell v CRC, Court of Appeal

Is asparagus growing business market gardening or farming?

Summary – The Upper Tribunal set aside a FTT decision on sideways loss relief and remitted the case back to the FTT. The UT decided that it was an error of law for the FTT not to reach a conclusion on whether the taxpayer's asparagus growing business was farming or market gardening.

In 2004, the taxpayer began trading as a horse breeder. Four years later she began a new trade of asparagus farming which she anticipated would return substantial profits, although it would be three years before the first crop was harvested.

In her 2008-09 self-assessment tax return, she claimed sideways loss relief under ss64 (1) & (2) ITA 2007 for her equestrian and asparagus businesses.

HMRC refused the claim.

The taxpayer appealed. The First-tier Tribunal dismissed her appeal, saying that the taxpayer was operating two ventures as a single trade but although the asparagus element was run on a commercial basis, the horse breeding one was not.

Decision:

The Upper Tribunal said the First-tier Tribunal had made an error in law in saying there was a single trade. It was therefore necessary to consider whether the asparagus business was market gardening and, if it was, whether as a matter of fact the equestrian activity and the asparagus business constituted a single trade.

The judge concluded that there was insufficient information about the relevant factors to decide whether the land on which the asparagus was grown was a market garden. More details were also needed about how the land was cultivated, the use of farming machinery and the skill required to grow it.

The tribunal decided to remit the case to the First-tier Tribunal to reconsider the issue. On that basis, it was not appropriate to judge whether the asparagus growing and horse breeding were a composite single trade.

The taxpayer's appeal was allowed.

Comments - Sharon Omer-Kaye, head of rural services at RSM, said: 'This case is a further example of the tax complexities facing rural businesses and the outcome could have important implications for many in the sector.' The FTT's conclusion that the taxpayer's equestrian activity and asparagus trade were a single trade, and viewed as such, not carried on on a commercial basis, which lead to the loss claim being disallowed, could not stand.

J Thorne v CRC, Upper Tribunal

Derivative contract scheme fails

Summary – The FTT dismissed the Appellant company's appeal on the basis that an accounting debit of £39,149,128 did not fairly represent a loss arising to the company from its derivatives contracts for the purposes of Para 15 Sch 26 FA 2002.

Union Castle was a wholly owned subsidiary of Caledonia. The board of Caledonia had believed there was a significant risk of a fall in the UK equity markets; and had decided to protect the value of Caledonia's investment portfolio by purchasing a series of FTSE 250 put options. In order not to imperil Caledonia's investment trust status, the purchase had been made by Union Castle. It was subsequently decided that Caledonia itself could purchase FTSE options as a legitimate part of its investment activity.

Consideration was given to novating the derivatives contracts from Union Castle to Caledonia, but a tax charge would be crystallised in Union Castle based on the value of the options as a result. On the advice of Deloitte, Caledonia decided to implement a scheme previously disclosed under DOTAS. Union Castle issued a new class of share capital to Caledonia with dividend rights that effectively transferred the economic benefit of the derivatives contracts.

It applied pass-through accounting which required it (under the International Accounting Standards) to write off the value of the options, thereby crystallising an equivalent tax loss. HMRC disallowed the loss.

Decision:

The main issue was whether the loss represented a loss arising to Union Castle from its derivative contracts under Para 15 Sch 26 FA 2002 and s595 CT 2009. The FTT found that there was no loss, as Union Castle had received the cash benefit under the derivative contracts and had given it away. The FTT also held that any deduction to which Union Castle would have been entitled (had it concluded that a loss was established) would not have been eliminated or reduced by a transfer pricing adjustment. This is because the issue of bonus shares did not amount to 'provision' for the purposes of Sch 28AA ICTA 1988, so that neither the transfer pricing provisions nor Para31A Sch 26 FA 2002 were engaged.

Comments - This decision is a comprehensive analysis and guide to the derivatives code in Sch 26 FA 2002, as well as a helpful reminder of the rules on transfer pricing. The sticking point in this case was that as a result of the arrangements entered into by the Appellant Company it appeared to have passed 95% of the economic benefit of the derivative contracts to its parent company but the FTT held that there was no real loss because the Appellant Company was entitled to the same amount of cash benefit before and after the issue of the A Shares. The Tribunal expected to see an actual reduction in the resources of the Appellant Company to support the existence of a loss. Since the Tribunal in this instance disagreed with the entire reasoning of the 2015 decision in *Abbey National Treasury Services v R & C Commrs* and since this case was designated as a lead case legally binding two other large companies with several million pounds of tax at stake, an onward appeal to the Upper Tribunal and beyond is anticipated

Union Castle Mail Steamship Company Ltd v R & C Commrs TC5275

No change of basis period

*Summary - The FTT dismissed a taxpayer's appeal against HMRC's decision that his attempt to change his accounting date had failed. The FTT found that the taxpayer did not have accounts with an accounting period of less than 18 months to his new accounting end date at the time he notified the change in accounting date to HMRC, and he had therefore not met the 18 month test in ITTOIA 2005***.**

A trader pays tax on his profits from a trade in relation to 'basis periods'. Mr Grint had an annual accounting date of 31 July. He decided to change his accounting date to 5 April in order to bring into account in the tax year 2009/10 income earned in the 20 month period from 1 August 2008 to 5 April 2010. This would bring forward his liability, thus avoiding the new 50% tax rate on the relevant income. S216 ITOIA 2005 permitted him to do so if the conditions set out in s 217 were met. HMRC contended that they were not.

Decision:

The FTT found that the new accounts were accounts as understood by the accountancy profession; they met the legislative requirements of s 217, except that they did not exist at the time the change in accounting date was notified.

Any accounts relating to an entity, which it intended to be its accounts and which represented (however accurately) its past transactions over a set period of time, qualified as 'accounts' for these purposes. 'Accounts' in ITTOIA was a reference to general purpose trading accounts and did not refer to accounts drawn up solely for tax purposes. They also did not have to be GAAP compliant.

Comments - This case will be of significant interest to many taxpayers and their advisers because tax planning ahead of the introduction of the 50% additional rate of tax in April 2010 was widespread. In this case it involved a taxpayer changing his businesses' year end to move income that would have been taxed in 2010–11 into the previous tax year when the tax rate was 10% lower. While this was a perfectly legitimate form of tax planning the FTT found that it did not work in this instance because although the taxpayer's accountant had prepared what they purported to be separate accounts of 12 and 8 months respectively the accounts were not 'accounts' within the meaning of the legislation.

R Grint v HMRC TC5286

Had film partnerships been trading?

Summary - In the three joint appeals of Ingenious Games; Inside Track Productions LLP; Ingenious Film Partners 2 LLP, the FTT dismissed Ingenious Games LLP's appeal on the basis that it was not carrying on a trade and allowed in part the appeals by Inside Track Productions LLP and Ingenious Film Partners 2 LLP on the basis that deals for the making of films to the extent that they required a capital contribution by the LLPs of 30 (or 35) out of 100 of the total contractual budget for each film amounted to trading with a view to profit

The appellants were members of film LLPs, whose activities included media consultancy and corporate finance, film and TV investment, etc. Those LLPs had incurred losses and the appellants claimed that these should be set against their other taxable income. HMRC had denied the claims.

Decision:

The first question was whether the LLPs had carried on a trade with a view to profit. The UT accepted that the complex structure adopted for the business model of the LLPs had been devised to deliver enhanced tax losses to their members. However, this did not denature the trade carried on by the LLPs, except for one of them, which had had no real involvement in the creative input or evaluation of the merits of the projects. As to the expectation of profit, the UT noted that although the members were hoping to obtain tax relief on 100% of the expenditure, the LLPs only put in 30% of the costs and were entitled to only 30% of the net profits. On that basis, a profit was not unrealistic. Similarly, the UT found that the only economic burden suffered by the LLPs was an outflow of 30% and that expenditure was incurred wholly and exclusively for the purpose of the LLPs' trades. Finally, the profits of the LLPs had not been computed in accordance with GAAP, as the expenditure had been 30% and not 100%.

Two appeals where therefore partly allowed, whilst the third appeal (by the LLP which had been found not to trade) was dismissed.

Comments - The decision notice in this case is lengthy (it extends over 248 pages (342 including appendices) and was set out in 13 different chapters each with separate sections and subsections). This decision is one of the most extensive, detailed and comprehensive decision notice issued by the FTT to date. It is a helpful and insightful guide on the legal principles and factors to be considered when deciding whether a claimant for trading losses has conducted its business as a trade with a view to profit as well as a good illustration of the wholly and exclusively test. The decision also deals in depth with accounting practice and policy and the application of GAAP to specific factual scenarios.

There were no clear winners in this case with two out of three appellants being allowed their appeals on a very limited basis and many other findings made in rejection of HMRC's arguments. This, together with the enormous amount of tax at stake (£1bn), is likely to be sufficient reasons for onward appeals and cross-appeals to the Upper Tribunal. That being the case, a final resolution of the appeals cannot be expected for a few years yet.

Ingenious Games LLP; Inside Track Productions LLP; Ingenious Film Partners 2 LLP [2016] TC 05270

Expenditure not incurred for purpose of the trade

Summary - The Upper Tribunal has dismissed the lead appeals by various 'Icebreaker partnerships' against the decision of the First-tier Tribunal finding that the FTT were correct to conclude that borrowings by LLP investors which were purportedly applied by the LLP's wholly and exclusively for the purposes of their trades were payments for the acquisition of a guaranteed income stream, not for the exploitation of intellectual property rights, and could not be brought within the calculation of LLPs profits (and losses) by reason of s341(1) ITTOIA 2005.

All the appellants were members of partnerships, which had implemented arrangements giving rise to an accounting loss in each of the partnerships' first accounting period. The loss was derived from the acquisition of intellectual property rights for a modest sum and the payment of a substantial exploitation fee to an exploitation company. The injection of capital by each member was mainly financed by borrowings, which were to be serviced by a guaranteed return on investment for the members. The appellants claimed that they were entitled to sideways loss relief against their income and capital gains tax liabilities

The main issue of the appeal was whether the expenditure claimed by the LLPs satisfied the requirement of s34 ITTOIA 2005; that the losses arise from expenses incurred wholly and exclusively for the purposes of the trade. It was accepted that the LLPs were trading with a view to profit.

Decision:

The UT accepted the FTT's finding of fact that the borrowing had been an artificial inflation of the apparent size of the amount paid for the exploitation of the intellectual property rights. It increased neither the return to the individuals, nor the likelihood of the rights being exploited. It was therefore an arrangement with no commercial purpose but only a tax purpose.

The UT explained the transactions as follows:

> 'If therefore in a transaction which is designed to have beneficial tax consequences A agrees to pay B £5m ostensibly for some services, but in circumstances where A has borrowed £4m, where it is known to A that the £4m is not going to be used by B for providing those services, where B does not want the £4m for those services and regards the receipt of the £4m as a nuisance, and where B, to the knowledge of A, is immediately going to put the £4m in a blocked account the sole purpose of which is to repay A's borrowing, it is not surprising if a tribunal regards it as far from self-evident that the £5m is really being paid for services.'

The UT therefore upheld the FTT's finding that the fee paid by the LLPs had not been paid wholly and exclusively for the purpose of exploiting intellectual property rights.

Finally, however, like the FTT, the UT accepted that the amount paid by the LLPs after deduction of the borrowing was paid wholly and exclusively for the purposes of the LLPs' trade.

Comments - This is the lead appeal for a number of LLPs against one aspect of the decision of the FTT in Acornwood LLP TC3545, (known unofficially as 'Icebreaker 2', having followed the decision in Icebreaker 1 LLP v R & C Commrs in 2011). It is also the tax avoidance scheme famously used by three members of Take That. The LLPs, known as 'Icebreaker partnerships', attempted to claim sideways loss relief for payments purportedly made for the exploitation of intellectual property rights which were claimed to be trading losses. The UT has dismissed the LLPs appeals confirming the FTTs findings that monies borrowed by individual investors and paid through the LLPs to an exploitation company did not constitute allowable expenditure in calculating the LLPs trading profits (or losses). Although the appeal in respect of the second part of the FTT's decision on whether the individuals could claim sideways loss relief in relation to the losses has yet to be heard, the findings in this case have significantly diminished the quantum of the losses involved.

Acornwood LLP & Ors v Revenue and Customs Commissioners Upper Tribunal

Trade or investment?

Summary - The Appellant claimed losses generated from activities relating to a football talent scheme against his personal income. A discovery assessment was raised by HMRC and a challenge into the availability of the losses on various grounds. The tribunal found for HMRC and upheld the discovery assessment and denied the use of the losses.

Mr Anderson claimed losses of £3,002,772 in his personal income tax return. HMRC considered that these losses, arising from activities undertaken to develop and bring young South African footballing talent to the European football market, were not allowable (Ss66 & 74 ITA 2007).

Mr Anderson had invested the amount claimed in a South African soccer academy, Bafana, having borrowed the amount from a Jersey based entity, Maddox.

Decision:

The FTT found that Mr Anderson had not established that the time recorded in his logs was spent seriously pursuing core profit making activities relating only to the Bafana Scheme. It also found that Mr Anderson's actual input into the activities of Bafana was not in line with the large amount of money which he put into the venture. Similarly, his attitude to the documents and commercial arrangements, especially the loan repayments, were not the actions of a businessman who was seriously involved in a commercial trading enterprise.

The FTT concluded that Mr Anderson's activities did not fulfil the conditions of ss 74(1) and 66. He had not carried on a trade on a commercial basis with a view to profit. His involvement with Bafana had been as an investor, with knowledge of the market in which he was investing but no substantial active day to day involvement in the activity.

The FTT also found that the discovery assessment issued to Mr Anderson had been valid. TMA 1970 s 29(1) had been satisfied. HMRC's knowledge that the Bafana Scheme existed, that it was an orchestrated scheme, that its participants included Mr Anderson and that the scheme had implementation issues, had been sufficient to form the basis of a 'reasonable belief ' that there had been an under-assessment. Section 29(5) was also satisfied; there had been nothing in Mr Anderson's return to suggest to HMRC that the Bafana Scheme was a tax planning technique which might not be effective to obtain the losses that were claimed.

Comments - This is an important and detailed case concerning the usage of losses and the technical arguments for and against as to whether those losses were legitimately created as part of a commercial trade. The tribunal gave clear guidance on the knowledge expected of a Tax Inspector to be able to raise a discovery assessment, reaffirming past case law that HMRC should have a ‘reasonable belief’ that there is an insufficiency in taxes declared.

Anderson v v HMRC TC 5314

VAT

Planning tips with voluntary registration (Lecture B980 – 12.11 minutes)

Introduction

In most cases, it will be clear whether a business should register for VAT as soon as it starts trading. This might be because it has a large amount of input tax to claim in relation to buying capital assets or stock, or because all customers can reclaim input tax anyway because they are also VAT registered. In some situations, a business owner might want to register because of the 'prestige' factor ie a VAT number indicates to potential customers that the business is a serious player trying to get things right.

Example 1
John has bought the freehold of a commercial property for £200,000 + VAT to rent out to a firm of solicitors on a 10-year lease for an annual charge of £15,000. It would be sensible for John to opt to tax the property as soon as he has acquired it (VAT1614A is sent to HMRC's option to tax unit in Glasgow) and become VAT registered in order to claim input tax of £40,000 on the property purchase. The VAT charged to the solicitors will not be a problem because they will be VAT registered and fully taxable ie not partly exempt with an input tax restriction.

Can a business register for VAT before it makes a sale?

Yes. This is known in VAT speak as an 'intending trader' application. And contrary to popular thinking, there is no time limit between when a business becomes registered to when it makes its first taxable sale. HMRC will almost certainly require evidence of trading intentions in the form of business plans, potential customer orders and possible deals with suppliers, or details about trading premises (if relevant). They have the power to refuse an application where they are not satisfied there is a genuine intention to make taxable supplies.

Voluntary registration…….recent First-tier tribunal case
In the case of *TL Step by Step Ltd* (TC4338) the company was compulsorily deregistered by HMRC on 1 October 2013, the same day that it had initially registered on a voluntary basis. The reason for the cancellation was that the director could provide no evidence that the company intended to make taxable supplies. The declared activity was the sale of beers, wines and spirits plus business consultancy and she provided evidence of two wine sales for small amounts to friends (eight months apart) but could provide no details of purchase orders, correspondence, business plans or other documentation regarding her intention to sell wine to retailers and restaurants or carry on a proper business activity. Her appeal against the cancellation of the registration was dismissed.

<u>Can a business retrospectively register for VAT?</u>

A business must register for VAT on a compulsory basis if it has made more than £83,000 of taxable sales in any rolling 12-month period, or it expects taxable sales to exceed £83,000 in the next 30 days. In the latter case, the registration date is the beginning of the 30 day period. In the case of the rolling 12-month historical test, the registration date is the first day of the second month after the limit has been exceeded.

However, the legislation also allows a business to retrospectively register on a voluntary basis by going back up to four years from the application date (VATA1994, Sch 1(9) – see also HMRC guidance note VATREG21300). This might give scope for a windfall of input tax – and the four year window for input tax gains could be extended by pre-registration claims as well (see below).

A common question relates to VAT returns for a retrospective registration. HMRC will issue a single long period return for the retrospective period, rather than dividing the period into quarters and asking for many different returns to be submitted. And as a final tip, be careful to get the requested date of registration correct on the initial VAT1 application form. Once HMRC has issued a VAT registration number based on the requested date, there is no scope to go back and ask them to adjust it.

Dealing with output tax on sales invoices already issued before registration but which are now captured by the retrospective period

This is a tricky aspect of VAT accounting and is best explained by an example.

Example 2
Mary is a self-employed tax consultant who provides services to one customer, a firm of accountants called Hyde and Co. She started trading on 1 October 2014, and achieved sales of £60,000 in the year to 30 September 2015. She has retrospectively registered for VAT on a voluntary basis from her first day of trading, and must submit a 12-month return to HMRC for the period to 30 September 2015. It is now November 2015.

In this situation, Mary will issue a VAT only invoice to Hyde and Co for £12,000 in relation to the retrospective period. The invoice will show a current date – let's say 15 November 2015. Hyde and Co will claim input tax on the VAT return that includes this date. However, Mary will declare output tax of £10,000 on her September 2015 VAT return (£60,000 x 1/6) and then £2,000 on her December VAT return ie £12,000 less £10,000. This is because the sales in the retrospective period are treated as being for "£60,000 including VAT"

Note – the above process is very important in the case of compulsory registrations backdated on a retrospective basis, where a business might be faced with a late registration penalty based on the tax due in the late period. So a correct adjustment as above will reduce output tax in the late period ie reducing the potential penalty.

Input tax on pre-registration expenses

A welcome opportunity for a newly registered business is to be able to claim input tax on certain pre-registration expenses:

- **Goods** – which were purchased within the four year period before the date of registration (and VAT was charged by the supplier), and which have been used in the business during that time. They must still be owned by the business on its first day of VAT registration. The definition of 'goods' includes both stock and fixed assets.
- **Services** – the time window is capped at six months before registration, and the service cannot relate to a sale that has been invoiced before registration.

Here are three examples of when a claim cannot be made:

- A friend started his business on 1 January this year and immediately became VAT registered – but he could not claim input tax on the laptop and other computer equipment bought in the previous four years as they did not relate to his business at the time of purchase because there was no business. In other words, private expenditure cannot be turned into business expenditure at a future date.
- A computer consultant claimed input tax on the cost of subcontractor fees incurred in the six month period before registration, which would normally be fine. However, the problem was that the services in question related to completed jobs which he had invoiced before he became registered.
- A hairdresser who fitted out her salon must recognise that a lot of the pre-registration expenditure will relate to capital building services rather than goods ie where the six month window is relevant rather than four years. There is no problem with input tax recovery using the four year window on physical items such as hairdryers and chairs but definitely an issue with spending on eg decorating, electrical and plumbing works.

A recent challenge on this subject is that it has come to light that HMRC expect a depreciation adjustment to be made to reflect the use of goods in the pre-registration period.

Example 3

Bob the builder became VAT registered on 1 October 2015 because he exceeded the registration threshold on 31 August 2015. He bought a van on 1 October 2012 for £10,000 + VAT that he has used in his business since that date. How much input tax can he claim on his first VAT return?

The van has been used for three years before registration, so HMRC would expect the claim to be less than £2,000. Based on a 20% reducing balance method of depreciation, the VAT not claimed would be £976 (£400 in year 1; £320 in year 2; £256 in year 3) ie a net claim of £1,024 on the first return.

The flat rate scheme?

If a newly registered business is eligible for and adopts the flat rate scheme (expected taxable sales in the next 12 months are less than £150,000 excluding VAT), there are a number of planning points to recognise:

- A business can claim a 1% discount on its relevant flat rate percentage in the first year of VAT registration.
- A business using the scheme for its first VAT period can claim pre-registration input tax on this return in the same way as a non-scheme user as considered above. This is the only time that a scheme user can claim input tax unless it buys capital goods costing more than £2,000 including VAT.

Some advisers incorrectly think that the 1% discount can be claimed by a business in its first year of using the scheme. This is incorrect – it is only in the first year of VAT registration. And if a business joins the scheme part way through its first year of registration, the 1% discount applies to the remaining balance of the first year period.

Example 4
John became VAT registered as an accountant on 1 January 2015 and he joined the flat rate scheme on 1 July 2015. He can apply a flat rate percentage of 13.5% for his next two returns ie until 31 December 2015, and a rate of 14.5% will take effect from 1 January 2016.

VAT treatment of a clubhouse

Summary – *The Upper Tribunal dismissed HMRC's appeal against the decision of the FTT that zero-rating applied to supplies made in the course of constructing a clubhouse.*

Caithness Rugby Football Club, a charity registered in Scotland, built a new clubhouse funded in part from Sports Scotland and the rest from grants and fundraising events. HMRC said the building works should be standard rated but the First-tier Tribunal concluded they should be zero rated under VATA 1994, Sch 8 group 5 note 6(b).

HMRC appealed. It said, to satisfy note 6(b), the local community had to direct or control the use of the building. The clubhouse in this case had a much broader use. HMRC referred to article 17 of the Second VAT Directive, which states that reduced VAT rates or exemptions can apply only 'for clearly defined social reasons and the benefit of the final consumer'.

Decision:

Lord Doherty, sitting as a judge in the Upper Tribunal, said nothing in article 17 suggested that the degree of closeness between the consumer and the supply would 'necessarily be insufficient to make the consumer the final consumer unless he has … control of the goods or services or … building in which they have been incorporated'.

He said HMRC's interpretation of note 6(b) was wrong. A local community did not have to have direction over the use of the building. Rather, the use of a building could be intended to be at the disposal of a local community, even if it was not the body controlling it.
HMRC's appeal was dismissed.

Comments - The decision in this type of case depends on the facts. Much of the evidence concerned the use to which the building was put since it was constructed. HMRC claimed that the actual use of a building following its construction may not be the use that was intended at the time of construction. The result of this case is a victory for common sense.

CRC v Caithness Rugby Football Club, Upper Tribunal

Apportionment of VAT on taxable and non-taxable supplies

*Summary – The Upper Tribunal dismissed the company's appeal against the decision of the First-tier Tribunal that input tax must be apportioned between taxable supplies and 'outside the scope' of VAT activities***.**

The taxpayer ran car parks on private land. Its clients were the owners of the car parks. The taxpayer's revenue was derived from parking permits but mainly from parking charge notices (PCNs) issued to motorists who were in breach of the rules for parking in the car parks.

The Court of Appeal ruled in a case concerning the same taxpayer, *Vehicle Control Services v CRC* in 2013, that PCN income was not liable to VAT. HMRC decided that, since 8% of the taxpayer's revenue was taxable consideration, it could recover only that portion of the input tax claimed. The taxpayer said it was entitled to recover all of the VAT paid on its supplies. The First-tier Tribunal dismissed its appeal. The taxpayer appealed.

Decision:

The Upper Tribunal said a taxable person who carried out transactions on which VAT is deductible and transactions which are out of scope could deduct the proportion of VAT attributable only to the former.

When a taxable person used purchased goods or services for taxable and non-taxable supplies, VAT could only be deducted in so far as it was attributable to taxable supplies.

The First-tier Tribunal had been correct to decide that it was necessary to make an apportionment of the input VAT incurred by the taxpayer on its general overheads between its taxable and non-taxable transactions.

The taxpayer's appeal was dismissed.

Comments - This case clarifies the need for apportioning input tax between taxable supplies and activities that are 'outside the scope' of VAT.

Vehicle Control Services Ltd v CRC, Upper Tribunal

Were supplies of child welfare services or sports based activities?

Summary – The FTT dismissed the appeal against HMRC's decision that services supplied at school camps were not directly connected with the care or protection of children, so exemption did not apply.

The taxpayer ran children's day camps at school sites during school holidays. They provided a range of sporting, dance and other activities for the children. The staff were mainly sports coaches under the supervision of a separate camp manager.

The company had been VAT registered as an activity sports club in 2010 but new owners decided in 2012 that this was incorrect and applied for deregistration back to 2010 on the basis that the company did not make any taxable supplies. The company offered childcare for working parents and the wide range of activities on offer was necessary. Parents expected their children to be 'stimulated and/or educated while being cared for in a safe and secure environment'. As such, this was an exempt composite supply of care and protection.

HMRC agreed that the services linked to children aged between three and five would qualify for exemption.

Decision:

The First-tier Tribunal decided that the taxpayer provided a single service of the activities to be enjoyed by the children, rather than a distinct supply of 'care and protection'. The latter was incidental to the main supply of the activities. A key consideration was that the coaches recruited by the company had 'to deliver structured sport, art and fun activities to groups of children … with an emphasis on development, enjoyment and fun'.

The taxpayer's appeal was dismissed.

Comments - Neil Warren, independent VAT consultant, said: 'It is difficult for any business to backpedal on its original decision that its supplies should be exempt rather than standard rated. Overall, the parents of the children were paying for their children to take part in activities, and the coaches had to ensure these activities provided "enjoyment and fun", so the decision looks correct.'

Sport Academies Ltd v HMRC TC5171

Submission of VAT returns four years after issue of central assessments

Summary – The taxpayer failed in his argument to extend the time limit.

The taxpayer failed to submit returns for four quarters. HMRC used its best judgment powers (s73(1) VATA 1994) to issue estimated assessments for about £47,500.

The returns were submitted on 29 July 2014. They showed a difference in the return liability and assessments of about £43,000 overpaid.

HMRC refused to repay the difference, saying the taxpayer was out of time under s 80(4) and the assessments could not be adjusted.

The taxpayer appealed on the ground of his ill health and said the estimated assessments were 'unreasonably excessive and punitive'.

Decision:

The First-tier Tribunal said the language of s 80(4) was 'clear and unambiguous'. There was no statutory basis which would authorise HMRC to extend the time limit. Further, the taxpayer's illness was not relevant, particularly as it appeared from the evidence that he was engaging with HMRC in the period.

The taxpayer's appeal was dismissed.

Comments - Neil Warren, independent VAT consultant, said: 'It is not uncommon for assessments issued by HMRC in the absence of a return to be inaccurate — they can only rely on historic knowledge of the taxpayer's business from past returns rather than any known trading facts for the VAT period in question. The message is clear that the prompt submission of returns is the best way of avoiding future problems with HMRC.'

Mr XYZ v HMRC TC5157

Exception from VAT registration

Summary – The taxpayers failed in their request to be excepted from registration for the purposes of VAT

The taxpayer had run a garden maintenance business for many years. In November 2012, the business exceeded the annual VAT registration threshold, but the taxpayer's accountant requested an exception to registration on the basis that it had carried out landscaping work of £3,500 in November 2012, which would not be repeated in the future.

HMRC asked for more information which was not forthcoming so registered the business from 1 January 2013. A partner in the taxpayer explained to HMRC in December 2013 that he would not exceed the threshold again due to his own ill health and his wife's retirement from the business.

However, after a detailed check of the business's accounts, HMRC found that the threshold was exceeded in the 12-month period ending 30 September 2012, and the deregistration threshold was not achieved until January 2014. As a result, it registered the business with effect from 1 November 2012 and deregistered it on 31 January 2014. HMRC refused the request for an exception because there was no evidence of reduced trading in November 2012.

The taxpayer appealed.

Decision:

The First-tier Tribunal agreed that there was no evidence to support the request for an exception and the appeal would be dismissed. Another issue concerned the VAT due. HMRC's first letter to the taxpayer requested an agreement that VAT of £2,627.30 was due.

The taxpayer agreed and HMRC sent an acknowledgement. A few days later, HMRC increased the VAT to £14,888 and raised an assessment for this sum. The department defended the higher figure on the basis that no VAT return had been submitted, so the taxpayer could not present a legitimate argument that the smaller amount was correct.

The tribunal was sympathetic, saying, given the taxpayer's lack of knowledge of VAT, there was no reason why it would assume HMRC had made an error. The judge said: 'HMRC will no doubt give careful consideration to the question of enforcement'.

Comments - Neil Warren, independent VAT consultant, said: 'The taxpayer must have felt he was dealing with a dodgy second-hand car dealer rather than a respected government department when the deal he had agreed with HMRC for £2,627 ended up being £14,888. The problem was that he achieved turnover of £105,000 for the late registration period, so a liability of £2,627 for a mainly labour only business would not have been a realistic figure and £14,888 was clearly nearer to the true liability. But it is hoped HMRC will apply common sense and give some discount to the assessed figure. The taxpayer was not an accountant so could not be expected to recognise that the liability of £2,627 to which he agreed was too low.'

Doogs Garden Services (TC5102)

Could bed-sits qualify as dwellings?

Summary – The FTT allowed the appeal against HMRC’s decision that multi-occupancy units (dwellings) were not zero-rated as ‘self-contained living accommodation’.

The taxpayer bought a freehold office building with the intention of converting it to residential accommodation. It reclaimed the input tax it had to pay on the purchase price.

HMRC allowed the claim on the basis that the sale would be of a single unit and therefore zero rated under Item 1(b) Group 5 Sch 8 VATA 1994. The completed units comprised ten bedrooms for individual use as bedsits; four of them had an ensuite bathroom facility, but the other six shared two communal bathrooms. There was no kitchen facility in the rooms but each room could be locked by the occupant.

However, after further enquiries, HMRC told the taxpayer that, because the building has been converted for multiple occupancy, it was an exempt supply and the input tax was not recoverable. The taxpayer appealed.

HMRC relied on its guidance that the units were not self-contained accommodation because some of the living elements were shared with other bedsits.

HMRC therefore said the bedsits failed one of the four conditions of a dwelling (note 2 of group 5) because they were not deemed to be 'self-contained living accommodation'.

Decision:

The First-tier Tribunal disagreed on the basis that people lived in the units as their main home.

The judge said that, in *Amicus Group Ltd* (17693), the tribunal accepted Customs' submission that the purpose of the legislation is 'to zero rate the creation of new home where none existed before'. On a purposive construction of Sch 8, the tribunal decided that 'a property with multiple occupancy where people live can be a dwelling within the zero-rating provisions'.

The taxpayer's appeal was allowed.

Comments - Neil Warren, independent VAT consultant, said: 'This is a controversial decision and an appeal by HMRC is likely. The tribunal's view was that the key issue was the fact that people could live in the property which was not possible when it was an estate agent's office before the conversion project, so there must be the creation of a dwelling or dwellings.'

Capital Focus Ltd v HMRC TC5193

Was a vehicle 'made available' for private use?

Summary – The FTT allowed the appeal against HMRC's decision to disallow a claim for input tax on the purchase of a car by a builder.

The taxpayer bought a Land Rover Freelander as a commercial vehicle for her building business. She owned another car for private use. HMRC disallowed input tax of £4,913 on the purchase of the Freelander and issued a £736 penalty. The taxpayer said the vehicle was 'exclusively used for the purpose of her business' and that it was 'so dirty from business use that it was entirely unsuitable for private use'. The car was insured for business only and was never intended to be used by her or anyone else for private purposes.

Decision:

The First-tier Tribunal decided that the taxpayer had 'specifically arranged and maintained insurance cover which extends only to business use of the car'. The judge concluded that, on the basis of the evidence as a whole, the taxpayer 'had no intention, at the time she acquired the Freelander, to make it available to herself or any other person for private use'.

The taxpayer's appeal was allowed.

Comments - Neil Warren, independent VAT consultant, said: 'The key phrase in the legislation (Article 7 of the VAT (Input Tax) Order 1992) is that a vehicle should not be "made available" for private use. This is a different test from having 100% business use and therefore no private use. It is difficult to justify input tax recovery on a motor car unless it relates to a driving school, taxi business or car hire business. The taxpayer did well to convince the tribunal and win this appeal.'

Jane Borton v HMRC TC5224

Nature of agreement to buy a holiday home – Composite supply

Summary – The Upper Tribunal dismissed the company's appeal against the decision of the FTT that Fairway did not make a zero-rated supply of construction services to a customer, but a composite standard-rated supply of construction services and procuring the landowner to grant a lease of the completed holiday lodge to the customer.

F Ltd built and sold holiday homes on an estate that belonged to a third party. HMRC said when F Ltd entered into an agreement with a customer in connection with the construction of a lodge and its sale to the customer, it made a composite supply of construction services and of the procurement that the landowner would grant to the customer a lease of the plot of land on which the lodge was to be built. F Ltd said the agreement provided for supplies of construction services only. These should be zero rated (VATA1994, Sch 8 group 5 Item 2).

The taxpayer's appeal to the First-tier Tribunal was dismissed.

Decision:

The Upper Tribunal reviewed the agreement and noted that it provided for the sale by F Ltd of a lodge. On completion of the property, the customer was to be given vacant possession, but this could be given only by the landowner. On this basis, the judge said the First-tier Tribunal's conclusion was correct that the agreement provided that F Ltd would ensure the landowner would grant a lease to the customer.

The judge concluded that, when the customer signed the agreement, it was to buy a built lodge from F Ltd and to take the lease from the landowner. This constituted a composite supply that should be standard rated for VAT.

The taxpayer's appeal was dismissed.

Comments - Fairway's appeal was not helped by the Agreement being less than clear. The solicitors had modified an old agreement for selling a more conventional property, but perhaps they should have started from scratch by preparing a new document.

Fairway Lakes Ltd v CRC, Upper Tribunal

Fiscal neutrality in relation to welfare services

Summary – The FTT allowed the appeal against HMRC's decision that exemption did not apply to certain welfare services.

The taxpayer, a limited company which was a not-for-profit organisation, provided welfare services to individuals with learning difficulties. The clients would be collected from their homes at the beginning of the day, taken to the relevant location and returned later. Activities included cooking, exercise, money and social skills and personal health advice.

About 25% of the services were supplied to individuals in residential homes, 50% were paid for directly by the local authority, and the rest supplied to individuals or their carers out of their personal budgets provided by the council.

The services did not qualify for exemption under item 9 Group 7 Sch 9 VATA 1994 because the company was not a local authority, public body or state regulated company (and therefore not regulated by the Health and Social Care Act). However, the taxpayer said it was disadvantaged because similar services provided by charities qualified for the exemption. The issue of fiscal neutrality was relevant to the 75% of supplies to individuals or the care homes whose VAT was borne by the consumer, but would not have been had the supplier been a charity.

Decision:

The tribunal agreed with the taxpayer that, by recognising charities and not recognising the appellant, item 9 breached the principle of fiscal neutrality. As a result, the taxpayer's supplies of welfare services should be treated as exempt.

The taxpayer's appeal was allowed.

Comments - Neil Warren, independent VAT consultant, said: 'The principle of fiscal neutrality is relevant to EU law and means that similar supplies should not be taxed differently as far as VAT is concerned. But the principle of different treatment for profit and non-profit making bodies is well established in many parts of VAT law so an appeal by HMRC against this decision is likely.'

Life Services Ltd v HMRC TC5197

Economic activity by a charity

Summary - The Court of Appeal ruled that the First-tier Tribunal (FTT) had erred in law by applying the wrong test in determining whether a charity was carrying on a business, and the Upper Tribunal (UT) had been wrong to hold that the FTT had not committed an error of law. The correct test was one of direct link between the goods or services supplied and the consideration received by the supplier

Longridge provided water-based and other outdoor activities (for both recreational and educational purposes) and gave instruction in how to undertake such activities. It charged for these facilities but the charge was adjusted to meet the ability of the end user to pay, insofar as donations or receipts from other activities permitted it. It was not registered for VAT.

Longridge had incurred VAT on the construction of a training centre and it contended that the construction supplies should be zero-rated (under VATA 1994 Sch 8 Group 5 item 2 note 6), as the building was intended for use solely for relevant charitable purposes. HMRC considered that Longridge was carrying out business activities so that zero-rating did not apply. It argued that the CJEU had recently clarified the test for determining whether there was an economic activity. HMRC claimed that this now focused on whether there was a direct link between the service which the recipient received and the payment which he made, and not on the wider context in which the payment was made — which had been the position adopted by the both the FTT and the UT.

Decision:

The Court of Appeal noted that a charity did not enjoy 'blanket relief from VAT for its activities'. Its liability to VAT depended on whether its activities were economic activities, judged objectively. Agreeing with HMRC, the Court of Appeal held that if there was a direct link between the service and the money received by the service provider, an economic activity was established. There was no exception for activities carried out for the benefit of the public.

Comments - This important judgment serves to bring domestic VAT law into line with EU law. Going forward, the concept of 'economic activity' will be a test based primarily on the direct link between the goods or services supplied and the consideration received by the person making the supply. This judgment will provide ammunition for HMRC to challenge the non-business status of charities and non-profit making bodies making supplies below market value.

Longridge on the Thames v Revenue and Customs Commissioners [2016] BVC 33

VAT treatment of services provided by a dental payment plan

Summary – The Upper Tribunal (UT) referred questions to the ECJ for a ruling on whether exemption applies to certain payments and transfers relating to a dental plan.

DPAS designed, implemented and managed dental plans under which the private patients of dentists who were registered with it could spread the cost of treatment throughout the year. As a result of the Court of Justice of the EU (CJEU) decision in *CRC v AXA UK plc* (C-175/09) [2010] STC 2825, DPAS's supplies would have been standard rated with effect from 1 January 2012 as debt collection services supplied to the dentists. DPAS therefore changed the contracts in January 2012 to create two supplies: a taxable contract with the dentist and an exempt payment handling contract with the patient.

HMRC ruled that supplies of services for the administration of dental plans from 1 January 2012 were either a single, standard-rated supply of services to the dentists or a mix of standard-rated supplies of services to patients.

The First-tier Tribunal allowed the taxpayer's appeal. The Upper Tribunal decided the case in part in November 2015. But, on the VAT liability of the supplies made to patients, it reserved judgment in anticipation of the CJEU's decision in *Bookit Ltd* and *National Exhibition Centre Ltd v CRC* . These were handed down in May 2016.

Decision:

The Upper Tribunal noted that, in those cases, the court said the focus was on the effect of what was done and not solely on what the supplier did. The judge conjectured that the CJEU might adopt two possible courses of action on *DPAS*. It could say that *AXA* was determinative and limit the reasoning in *Bookit II* and *NEC* to card services and not direct debit payments. Or it could say that the latter cases applied, on the basis that the service was provided to the patient rather than the dentist.

The tribunal decided that, although it had a view about the answer, it was not clear. It therefore referred the case to the CJEU for guidance on the meaning of debt collection and the scope of the payment exemption.

Comments - The UT will decide HMRC's appeal when the ECJ has provided some guidance. In its first decision, the UT had declined to make a reference to the ECJ primarily because it considered that it was highly likely that the rulings of the ECJ in *Bookit II* and *NEC* would determine one or both of HMRC's second and third grounds of appeal.

CRC v DPAS Ltd, Upper Tribunal

Reasonable excuse for late VAT returns and payments

Summary – The tribunal cancelled the surcharge for one of the periods but confirmed the others

A solicitor incurred default surcharges of £4,185 because she had not read letters from HMRC telling her that she had been taken out of the annual accounting VAT scheme and had to file quarterly returns.

HMRC sent the taxpayer the surcharge notices but it was not until January 2014 when her accountant contacted her that she realised the problem. She then instructed her accountant to file the outstanding returns.

HMRC imposed surcharges, against which the taxpayer appealed. She said she had not received the letter from HMRC informing her she had to complete quarterly returns.

Decision:

The First-tier Tribunal accepted that she had not received the letter and said this would constitute a reasonable excuse for some of the late payments, particularly because a subsequent letter from HMRC stated the taxpayer was on the annual accounting scheme.

However, she received assessments and surcharge notices from HMRC after that but did not read them thoroughly. Given she was a solicitor, the tribunal said it would 'expect a fairly high standard of care and probity towards such matters'.

Further, 'simply filing them to be dealt with when she prepared her annual VAT return' did not constitute the reasonable behaviour to be expected of someone in her position. The letters headed 'VAT notice of assessment of tax and surcharge and surcharge liability notice extension' should have led her to realise there was a serious problem that should be addressed urgently.

The tribunal cancelled the surcharge for one of the periods but confirmed the others. The taxpayer's appeal was allowed in part.

Comments - Neil Warren, independent VAT consultant, said: 'This case is a lesson that correspondence from HMRC should never be ignored. If the taxpayer was too busy to read the notices issued by HMRC, she should have forwarded them to her accountant instead of filing them. The fact that she was a solicitor worked against her because legal professionals are used to dealing with a high volume of paperwork.'

Angela Spence v HMRC TC5256