

## **Business tax round up**

**(Lecture B1126 – 25.43 minutes)**

### **Spring Statement 2019: 13 March**

The chancellor confirmed that, following the introduction of making tax digital (MTD) for VAT in April 2019, the government's focus will be on supporting businesses through the transition to digital reporting and record-keeping and it will not make MTD mandatory for any new taxes or businesses in 2020.

They also published papers on:

- Tackling tax avoidance, evasion and other forms of non-compliance setting out the government's approach and achievements in tackling tax non-compliance since 2010;
- Offshore tax compliance strategy following up developments since the previous 'no safe havens' strategy was published in 2014. It summarises HMRC's approach towards offshore tax compliance and is concerned with tackling multinational tax avoidance through international cooperation;
- A consultation running until 24 April 2019 on the structures and buildings allowance (SBA) draft secondary legislation that was published. Following comments made on the technical note changes have been made that include no withdrawal of relief for periods of disuse, demolition to be treated as a disposal event for CGT purposes, rather than claimed as 'shadow' SBA; and separate rules for wasting and non-wasting leases;
- An aggregates levy review on the way in which the aggregates levy is structured and currently operates.

Other a number of areas were highlighted where the government plans to either consult, feedback findings or publish draft regulations including:

- A consultation on lettings relief and the deemed final period exemption for PPR;
- Publication in the coming months of draft legislation on the knowledge-intensive fund structure within the enterprise investment scheme rules, expected to be introduced from 6 April 2020.

[www.gov.uk/government/publications/spring-statement-2019-written-ministerial-statement](http://www.gov.uk/government/publications/spring-statement-2019-written-ministerial-statement)

### **Lorraine, an entertainer**

*Summary – Services provided by Lorraine Kelly to ITV were provided under a contract for services and did not fall foul of the IR35 legislation.*

Albatel Ltd is the personal service company of Mr and Mrs Smith, with the appeal concerned with Mrs Smith, otherwise known as Lorraine Kelly.

Albatel Ltd contracted to provide the services of Lorraine Kelly to ITV Breakfast Ltd as a presenter in connection with the television programmes “Daybreak” and “Lorraine”.

“Lorraine” is an entertainment show that is taken off air if a news story breaks overnight or early in the morning. Lorraine Kelly claimed that she decides on guests, content and running order. There have been many occasions over the years where she has dressed up and re-enacted movie scenes in skits and sketches, the aim of which is to set up the guests in an entertaining way and keep people watching. She explained that she will often go to movie screenings, previews of plays or read books in order to prepare for guests on the show; this is entirely Ms Kelly’s choice. Other presenters often rely on members of their team to prepare a brief and questions whereas Ms Kelly carries out her own research and prepares the interview. Ms Kelly supplies her own phone and iPad and ITV contacts her via a personal email address or mobile phone number. She undertook an expedition to Antarctica in 2017 for which she was absent from the show for 4 weeks in addition to the 10 weeks holiday specified in the contract.

In respect of “Daybreak” Ms Kelly explained that it was a magazine show with ‘soft news’ content and human-interest stories. She believed that her role and involvement was the same as for “Lorraine”. The screen tests for a co-presenter took place in Dundee for her convenience and she chose the co- presenter, Aled Jones. She agreed that “Daybreak” was not classified as entertainment but stated that her role on the show was that of an entertainer with features of dressing up and doing sketches with Aled Jones. She stated that she viewed the term “theatrical artist” widely and that she acted everyday as a version of herself.

She explained that she can work for any other broadcaster, having recently filmed a documentary on penguins in South Africa for Channel 5. ITV are under no obligation to pay her if she is unable to present the show.

HMRC submitted that she fell into the category of persons who can have both an employment and separate self-employed income. HMRC compared this case with the Christa Ackroyd case (see our March 2018 notes) in which the Tribunal accepted that Christa Ackroyd was expected to drive ratings, was involved in the look, feel and approach of the programme, was a very successful television journalist and presenter, was more than just a newsreader and had a high degree of autonomy. Nevertheless the Tribunal found that the BBC retained the contractual right of control, consistent with employment.

HMRC submitted that what matters is where the right of control lies, which they believed would be with ITV under this hypothetical contract. ITV is ultimately responsible for the output, it has the right to reject any editorial suggestions made by Lorraine Kelly, for example as to which stories to run or people to interview. The fact that a situation has not arisen where ITV has exercised that right does not mean that the right does not exist.

HMRC accepted that in other work Lorraine Kelly was self-employed but, viewed as a whole, Ms Kelly’s situation here was one of substantial part time employment. HMRC concluded that had there was a direct contract between Lorraine Kelly and ITV Breakfast Ltd it would have been a contract of service, meaning it fell foul of the intermediaries legislation, resulting in the need to account for income tax and NICs totalling £1.2 million.

If this was the case, HMRC also argued that agency fees paid by Albatel Ltd to Roar Global Ltd (Lorraine Kelly's agent) for negotiating the agreement between Albatel Ltd and ITV were not deductible as an expense of the employment. They argued that, to be deductible, the expenses needed to be paid by Lorraine Kelly and not Albatel Ltd. Further, HMRC argued that the expenses needed to relate to an "entertainer" so "an actor, dancer, musician, singer or theatrical artist". HMRC submitted that it is not enough for an individual to be a performer or entertainer; it must be shown that the individual is performing "with a theatrical bent" or "in a manner of acting or theatre".

Albatel Ltd appealed arguing that it was a contract for services and the IR35 rules did not apply. Although the decision on the deductibility only arises if the intermediary rules apply, the Tribunal were asked to set out their findings on this issue irrespective of their decision.

### *Decision*

The Tribunal concluded that Lorraine Kelly was very much in control. She had little supervision; she decided the running order of the programme, the items to feature and the angle to take in interviews. It was her decision to stay on site after each show and lead meetings about the following day's show; She was hired to lead a team and was engaged to use her skills as she saw fit and with a free rein. The Tribunal were satisfied that she was free to carry out other work and activities without any real restrictions.

Although there was no scope for her to increase profits, she was exposed to the type of risk that would be found in self-employment, such as the programme being dropped or long-term sickness rendering her unable to provide her services.

Lorraine Kelly carried out a variety of other work from writing to designing and advertising a fashion line. She also appeared on other television shows. These considerable and varied activities were strong indicators that she was providing services in business on its own account. The Tribunal concluded that ITV was not employing a "servant" but rather purchasing a product, namely the brand and individual personality of Lorraine Kelly. A number of other factors only served to strengthen the argument. She was not entitled to sick pay, holiday pay or other employee benefits; she received no training or appraisals and was under no obligation to provide other services to ITV unrelated or ancillary to the show. In looking at the overall picture the Tribunal concluded that the relationship between Ms Kelly and ITV was a contract for services and not that of employer and employee.

As requested, the Tribunal went on to consider the ancillary issue relating to the deductibility of agency fee, despite it having no bearing on the outcome of this case. The question was whether the contract related to Ms Kelly or Albatel Ltd or both. All parties considered that Ms Kelly and Albatel Ltd were one and the same. The Tribunal took the view that a contract existed between ROAR Global and Ms Kelly and the fact that the invoices were paid through Albatel Ltd did not matter.

Secondly, it was clear to the Tribunal that neither the programmes nor her role in them could be viewed as current affairs or programmes of a similar nature but rather:

"for the time Ms Kelly is contracted to perform live on air she is public "Lorraine Kelly"; she may not like the guest she interviews, she may not like the food she eats, she may not like the film she viewed but that is where the performance lies, as no doubt with other entertainers such as Ant and Dec or Richard and Judy."

On this basis the Tribunal concluded that she is a “theatrical artist” making her expenses tax deductible.

*Albatel Limited v HMRC (TC07045)*

## **Under-declared trading profits**

*Summary – HMRC’s discovery had not become stale when assessments were eventually issued following the failure of negotiations with the taxpayer.*

Osman Chaudhary carried on a second-hand car sales business between 2008 and 2013.

HMRC opened an enquiry into his self-assessment tax return for the tax year ended 5 April 2011 and concluded that the profits from the business were understated. Consequently, HMRC amended his self-assessment for the tax year ended 5 April 2011 and issued discovery assessments for each of the tax years ended 5 April 2009, 5 April 2010 and 5 April 2012. The total amount of additional tax assessed was just under £75,000. In addition, HMRC imposed penalties of just over £57,000 on the basis that the inaccuracies in the returns were deliberate and concealed.

Mr Chaudhary accepted that the figures shown in his tax returns were incorrect but he appealed against the discovery assessments and the amendment to his self-assessment on the basis that the figures for his profits/losses should be in accordance with accounts that he provided to HMRC during the course of the enquiry. He also claimed that HMRC should have used a lower penalty percentage to take into account his co-operation during the enquiry.

It is worth noting that:

- During the course of this enquiry, HMRC issued six taxpayer information notices requiring Mr Chaudhary to produce information which had previously been requested by HMRC but which Mr Chaudhary had failed to provide.
- On numerous occasions during the enquiry HMRC pressed Mr Chaudhary to confirm that he had disclosed to them all of his bank accounts including asking him several times to sign a “certificate of bank accounts operated”. Mr Chaudhary failed to sign the relevant certificate until 17 January 2015 and, in the meantime, gave answers to HMRC which inferred that he had disclosed all of the relevant bank accounts.
- In January 2014, HMRC issued third party information notices to Santander and to HSBC. As a result of this, they became aware of six bank accounts with HSBC in Mr Chaudhary’s name into which in excess of £1.5 million had been deposited during the period 2008 – 2011.

HMRC said that the discovery of an under assessment to tax took place when they reviewed the HSBC bank statements in the summer of 2014. Had this become stale by the time the assessments were made in January 2017?

## *Decision*

The Tribunal accepted that the discovery had not become stale as a result of the time that elapsed between the making of the discovery and the making of the assessments. HMRC could not be required to make discovery assessments while they were actively pursuing their enquiries with a view to trying to reach a settlement with the taxpayer.

The First Tier Tribunal concluded that Mr Chaudhary's failure to disclose the bank accounts had been deliberate and concealed but they did allow an adjustment in respect of some of the assessments as it disagreed slightly with HMRC's calculations.

*Usman Chaudhary v HMRC (TC06982)*

## **Flat Rate Scheme withdrawal**

*Summary – The Tribunal was unable to conclude as to whether the company should be allowed to withdraw retrospectively from the Flat Rate Scheme and recover input tax on the purchase of leased vehicles.*

Apex Vehicle Management Limited's main activity was to provide courtesy cars following car accidents, so it effectively leasing cars. The company registered for VAT with effect from 1 June 2012 and on 15 July 2013 it applied to join the Flat Rate Scheme with effect from 1 March 2013. HMRC confirmed this. The rate applicable to such activities was 9.5 per cent with a 1 per cent reduction for the first 12 months.

Later the company looked to reclaim just over £40,000 of input VAT suffered on a number of vehicles bought to be used in the business but HMRC advised that this was not possible. Input tax can be reclaimed on capital goods costing £2,000 or more including VAT but, referring to Section 15 of VAT Notice 733 Flat Rate Scheme for small businesses, HMRC advised that this does not apply to capital goods that are leased, let or hired out by the business.

Subsequently, the company tried to withdraw retrospectively from the Flat Rate Scheme to enable it to claim the input tax on the vehicles through normal VAT accounting.

The company claimed that, based on their invoices raised, it had never been eligible to enter the Flat Rate Scheme because the value of its taxable supplies exceeded the relevant £150,000 threshold. The company produced invoices for the relevant period showing with total sales of £1.3 million, sought to cancel use of the scheme and return to the normal cash accounting VAT from 1 March 2013. It could then recalculate its VAT liability based on normal VAT accounting and claim the input tax on its vehicles.

However, HMRC refused the request. The invoices raised by the company were not relevant to its VAT returns because it had adopted the cash accounting scheme. Roughly three quarters of the invoices were unpaid with no explanation and there were also unexplained amounts on the invoices. This explained why the VAT return figures based on payments received were within the scheme threshold of £150,000, despite the sales invoices indicating that a much higher turnover had been achieved.

HMRC's policy on retrospective withdrawal from the Flat Rate Scheme is to allow it only if there are exceptional circumstances. They submitted that the request to backdate the operation of standard accounting to the 1 March 2013 was solely designed to reduce the VAT liability, which was not the purpose of the scheme or of the option to withdraw from it.

The effective date of withdrawal should therefore be 30 June 2015, the date at which the company opted to withdraw from the scheme.

#### *Decision*

The First Tier Tribunal stated that the Flat Rate Scheme application form required Apex Vehicle Management Limited to declare that it was eligible for the scheme. HMRC took the company at its word on this, presumably without knowing of the significant value of invoiced but unpaid supplies, given the use of cash accounting. The Tribunal accepted that admission to the Flat Rate Scheme may therefore have come about through a mistake on the part of both parties. Based on the evidence, the Tribunal was unable to say whether the company was never eligible for admission to the Flat Rate Scheme and entered the scheme by mistake. For most businesses this would not have been an issue as total invoice value would, given the passage of time, been pretty close to the cash actually received. As this does not appear to have been a factor that HMRC took into account, the Tribunal set aside HMRC's decision and directed that Apex Vehicle Management Limited should be entitled, within one month of the release of this decision, or such longer period as both parties agree, to submit to HMRC such further evidence regarding its taxable supplies and its financial position as it thinks appropriate. After that, HMRC could make a new decision about the taxpayer's request for retrospective withdrawal from the scheme.

*Apex Vehicle Management Limited v HMRC (TC06911)*

### **R&C Brief 1/2019: Personal contract purchases**

Previously HMRC regarded supplies made under such contracts as supplies of goods and a separate supply of credit. Following the CJEU's decision in Mercedes Benz Financial Services, HMRC has now revised its view of supplies involving personal contract purchases,

Businesses must adopt the correct treatment for all new contracts after 1 June 2019.

#### *Decision in Mercedes Benz Financial Services*

The CJEU concluded that a judgement must be made by the supplier at the outset of the contract as to what the customer, acting as a 'rational economic actor', would do when entitled to exercise a purchase option. If the customer could profitably sell the asset for more than the cost of the final optional payment, then if they act rationally it can be expected that they will buy the asset.

However if the optional payment is expected to be the approximate open market value of the asset at the time the option must be exercised, then the customer may equally choose to purchase the asset, or return it and so it cannot be expected at the outset that they will buy the asset. When considering this choice, additional circumstances that might impact individual decisions to purchase or not, such as access to funds, should not be taken into account.

The rules apply to contracts that provide for the customer to pay a series of lease payments and then make a choice whether to pay a substantive payment to acquire the asset, or to return the asset at the end of a period of hire without making such a final payment.

### *Deciding on the correct treatment*

The correct treatment of PCP and similar contracts depends on the level at which the final optional payment is set:

- if, at the start of the contract, it is set at or above the anticipated market value of the goods at the time the option is to be exercised, the VAT treatment of the contract will follow the MBFS judgment. It is a supply of leasing services from the outset and VAT must be accounted for on the full value of each instalment, there is no advance, or credit, so there is no finance;
- if, at the start of the contract, it is set below the anticipated market value, such that a rational customer would buy the asset when they exercise the option, it is a supply of goods, with a separate supply of finance. VAT is due on the supply of goods in full at the outset of the contract, the finance is exempt from VAT.

HMRC will generally accept that the optional payment is set below the anticipated market value if it is below the value expected based on historical depreciation rates in immediately preceding years for the same or similar assets, such as the same model of car.

Businesses may use another method to establish the anticipated open market value of the asset, providing it produces a credible assessment of future value, given information available at the time the assessment is made.

Businesses must maintain, as part of their business and accounting records, evidence which demonstrates how they have arrived at the figures they have used.

### *Correcting past VAT periods*

The Brief explains the action that taxpayers should take for contracts entered in to before 1 June 2019.

[www.gov.uk/government/publications/revenue-and-customs-brief-1-2019-change-to-the-vat-treatment-of-personal-contract-purchases](http://www.gov.uk/government/publications/revenue-and-customs-brief-1-2019-change-to-the-vat-treatment-of-personal-contract-purchases)

## **RORO Transitional Simplified Procedures**

In the event that the UK leaves the EU without a deal, many UK businesses will need to apply the same procedures to EU trade that apply when trading with the rest of the world. Under such import processes, goods are not released from customs control until you make a full import declaration and pay the duty you owe in full.

However, HMRC has put in place “transitional simplified procedures” to make it easier to import goods from the EU using roll on roll off locations like Dover or the Channel Tunnel by deferring:

- making a full declaration; and
- paying customs duty until after the goods arrive in the UK and then paying monthly by direct debit, rather than having to pay immediately each time goods clear customs.

These procedures can only be used for RORO imports from the EU; imports through other ports or airports will be subject to full customs declarations.

### *Registering*

An agent cannot register for transitional simplified procedures on the importers behalf but once registered, an agent will be able to submit customs declarations on their behalf.

To be able to register the importer must:

- have an EORI number
- be established in the UK, as:
  - a UK resident sole trader
  - a company or partnership with a registered office in the UK
  - a company or partnership with a permanent place of business in the UK where they carry out their business activities
- be importing goods from the EU into the UK (including goods travelling through the EU from the rest of the world providing they've cleared EU customs formalities).

Registration will not be allowed where:

- The only goods imported are coming directly from outside the EU;
- the importer is using a customs special procedure for their goods;
- HMRC records show that in the past the importer has had overdue tax returns, has not paid tax or duties due or their business is insolvent.

Using on the link below will take you through the registration process

*<https://www.tax.service.gov.uk/submissions/new-form/transitional-simplified-procedures/nonagent>*

### *Standard goods procedure*

For most goods, importers will need to make a customs declaration within their commercial records when the goods cross the border. The information should include:

- the date and time the goods arrived in the UK
- a description of the goods and the commodity code and quantity imported
- purchase and (if available) sales invoice numbers
- the customs value
- delivery details
- supplier emails
- serial numbers of any certificates or licences



A supplementary declaration must be submitted by the 4<sup>th</sup> working day of the month following the arrival of the goods into the UK and then HMRC will collect the duty/ taxes due by direct debit on the 15th day of the same month.

#### *Controlled goods procedure*

Importers of alcohol, tobacco or goods requiring an export licence, do not have the option of making a simplified declaration in their commercial records.

To make a simplified declaration for controlled goods, the importer will need to:

- send a simplified frontier declaration before importing the transitional simplified procedures controlled goods into the UK;
- make sure that the goods are accompanied by full supporting documentation, for example the appropriate licence;

As with other imported goods, a supplementary declaration must be submitted by the 4<sup>th</sup> working day of the month following the arrival of the goods into the UK and then HMRC will collect the duty/ taxes due by direct debit on the 15th day of the same month.

#### *Reviewing transitional simplified procedures*

If HMRC decide to withdraw these procedures they will give a 12 month notice period, giving business times to sort out what needs doing, whether that be deciding to:

- use a third party (for example freight forwarder) to complete declarations;
- become authorised to use customs freight simplified procedures;
- complete full declarations themselves.

<https://www.gov.uk/guidance/register-for-simplified-import-procedures-if-the-uk-leaves-the-eu-without-a-deal>

### **Making Tax Digital (MTD) exemption**

Businesses do not need to sign up for MTD or apply for an exemption if either:

- they already exempt from filing VAT Returns online;
- their taxable turnover is below the VAT registration threshold.

In addition, we have known for some time that certain business will be exempt from MTD. HMRC has now published more details about who will be eligible for exemption and the procedures to follow in order to gain an exemption.

#### *Religious grounds*

If a business is run entirely by practising members of a religious society or order whose beliefs are incompatible with using electronic communications or keeping electronic records, then exemption should be available.

However, if such a business is already filing VAT returns online or use a computer or smart device for business or personal use, then exemption will not be granted.

#### *Insolvent business*

Where a business is subject to an insolvency procedure exemption will be granted.

#### *Age, disability, remoteness of location or for any other reason*

HMRC will take effort, time and cost into account in its overall assessment of whether it is practical for a business to follow the MTD rules but are clear that time and effort alone will not be enough to gain exemption.

Age alone will not be enough to gain exemption. HMRC will consider how an individual's age and circumstances impact their ability to follow the MTD rules. They will consider how much the individual uses or intends to use a computer, tablet, smartphone or the internet for other purposes and whether it's reasonable for them to learn how to use MTD software.

if the individual is unable to get internet access at home or business premises and it is not reasonable for them to get internet access at another location, then exemption is possible. This will be denied where a third party is supporting the business with accounting and tax related business. However, where such a party stops supporting the business and the business not think that they can follow the MTD rules without their support, they should approach HMRC for an exemption.

#### *Claiming an exemption*

To make a claim for exemption, the business or third party (agent, friend or family member) will need the businesses:

- VAT Registration Number;
- name and principal place of business;
- reason for exemption request;
- details about VAT Returns are currently filed;
- reasons why they would not be able to follow MTD rules for record keeping/filing.

#### *HMRC's decision*

HMRC will send out a letter stating that either the business is:

- exempt and that VAT returns should continue to be filed as before
- not exempt and that the business can appeal.

While waiting for HMRC's decision or an appeal decision, the business should continue filing VAT Returns as usual in the normal way.