

NIC on rental profits? (Lecture B1280 – 11.05 minutes)

Background

Individual taxpayers who are landlords are not normally liable to National Insurance contributions (NICs) on their rental profits, unlike self-employed individuals carrying on a trade. However, there are certain exceptions to this general rule.

What would be the NICs position of (say) a UK resident landlord who is 40 years old and owns a portfolio of buy-to-let properties located in North-West England?

Class 4 NICs

Self-employed individuals living and working in the UK are generally liable to Class 2 and Class 4 NICs. There are separate rules that establish liability to Class 2 and Class 4 NICs respectively.

Self-employed individuals whose net profits or gains are chargeable to income tax (i.e., under the trading income provisions in ITTOIA 2005, Pt 2, Ch 2) are generally liable to Class 4 NICs (if those profits are not from a trade, profession or vocation carried on wholly outside the UK). This general rule is subject to certain exceptions, such as people under the age of 16 or over state pension age at the beginning of the tax year.

The Class 4 NICs legislation (SSCBA 1992, s 15(1)) refers to profits immediately derived from carrying on a trade, profession or vocation. An individual's rental income (e.g., from a conventional buy-to-let property business) is not trading income, so no Class 4 NICs liability should arise on the landlord's profits.

Furthermore, although furnished holiday accommodation is deemed to be a trade for certain tax purposes, HMRC accepts that although the income is treated in many ways as if it were from a trade, it remains assessable as property income, so Class 4 NICs are not applicable (see HMRC's Property Income manual at PIM4115).

Class 2 NICs

However, for Class 2 NICs purposes, the position of individual landlords is rather less clear. The Class 2 NICs legislation (SSCBA 1992, s 11) states that Class 2 contributions potentially apply if a self-employed earner is a person who is gainfully employed in the UK, other than in employed earners employment.

A 'self-employed earner' is defined as 'a person who is gainfully employed in Great Britain otherwise than in employed earner's employment (whether or not he is also employed in such employment) (SSCBA 1992, s 2(1)(b)). For these purposes, 'employment' includes 'any trade, business, profession, office and vocation...' (s 122(1)).

It should be noted that the Class 2 NICs legislation does not require a self-employed person to be carrying on a trade; it simply requires a self-employed person to be 'gainfully employed' otherwise than in an employment. This effectively brings within the scope of the term 'self-employed earner' anyone carrying on a business activity, and it broadens the ambit of Class 2 NICs compared to Class 4 NICs.

Is there a 'business'?

However, whether the activities of a buy-to-let landlord necessarily amount to a 'business' such that landlords become liable to Class 2 NICs will depend on the particular circumstances. HMRC's guidance in its National Insurance manual (at NIM23800) states:

'...a person who is liable to Income Tax on the profits arising from the receipt of property rental income will only be a self-employed earner for NICs purposes if the level of activities carried out amounts to running a business.'

HMRC's view is that for a property owner to be a 'self-employed earner' their property management activities must extend beyond those generally associated with being a landlord. Possible pointers towards there being a 'business' for Class 2 NIC purposes include the ownership of multiple properties, actively looking to acquire further properties to let, and the letting of property being the individual landlord's main occupation.

Property agents

Some landlords engage an agent to manage the properties for them. The agent might be a professional managing agent, or even a friend or member of the landlord's family.

HMRC's approach in such circumstances is generally to attribute what the agent does to the landlord. However, the landlord will only be treated as a self-employed earner on this basis if the tasks the agent performs for them are sufficient to constitute a business.

HMRC's guidance at NIM23800 includes four examples of what does and doesn't constitute a business for NICs purposes.

In *Rashid v Garcia* [2003] SpC 348 (a NICs case), the appellant sought to pay Class 2 NICs in respect of earnings from property letting. The Special Commissioner held that, whilst it wasn't free from doubt, the arrangements didn't amount to a business, but there was an investment which, by its nature, required some activity to maintain it.

Non-NICs case law

It may sometimes be instructive to look at case law involving other taxes when considering what constitutes a 'business' (albeit that such cases might not set legally binding precedents for NICs purposes).

For example, the decision in *Ramsay v Revenue and Customs* [2013] UKUT 226 (TCC) concerned the meaning of 'business' in the context of rental property activities and capital gains tax incorporation relief. Following *Ramsay*, HMRC amended its guidance in the Capital Gains manual. It now states (at CG65715):

'Mrs Ramsay was found to have worked on the property for about 20 hours per week which was found to be sufficient to indicate the carrying on a business. You should accept that incorporation relief will be available where an individual spends 20 hours or more a week personally undertaking the sort of activities that are indicative of a business. Other cases should be considered carefully.'

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