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Excellence in Taxation December 2021

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TAXAdviser

Let me entertain you!

Neil Warren considers the VAT treatment of hosting Christmas parties and giving gifts to staff, page 11

PLUS Renewables – Company cars – Tax treaties – Limited liability partnerships – Tax charities

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SCAN ME

CONTENTS

President's page

president@ciot.org.uk
Peter Rayney

It was a very good year

As I write this article, I will have been exactly 12 months in post as your CIOT President. Normally, they would have 'kicked' me out by now but I am serving another six months under the *CIOT Presidential (Transitional Covid-19 Regulations) Order 2020*! In this month's page, I provide some 'highlights' of my President's Page throughout this year.

January 2021: Love Is All Around (Low Incomes Tax Reform Group)

'I think we can justly be very proud of the great work of our Low Incomes Tax Reform Group (LITRG). LITRG has worked tirelessly this year to help the public – especially the vulnerable – to understand and navigate through the complex web of Covid-19 assistance measures.

Update: So far this year, LITRG has had a staggering number of over 5.3 million visitors across its two websites.

February 2021: Empty Chairs at Empty tables (CTA Examinations Team)

'Given the uncertainties faced with the Covid-19 disruption, we had to accelerate our plans to use computer-based exams. The maintenance of our exam system is one of the many difficult Covid-related challenges that our Institute has faced and we have passed with flying colours. We are very proud of the dedication and commitment shown by all our examination teams in delivering this important milestone in our CTA exams.'

March 2021: A Hard Day's Night (CIOT Technical Committees and Team)

'We are particularly delighted with our increased technical engagement throughout the Covid-19 pandemic. This has been substantially assisted by the ability to hold virtual meetings (without the need to travel). This has resulted in an increased number of meetings and greater input from our network of expert technical volunteers. These factors have certainly increased the technical quality of our ideas and submissions.'

May 2021: Heroes (including CIOT volunteers and Baroness Tanni Grey-Thompson)

'Thanks to the imagination and determination of our events team, we were able to deliver another CIOT "first" during Covid-19 – our first virtual President's lunch. I was very impressed that we were able to deliver individual buffet lunches to our 50 or so guests across the breadth of the country – a huge logistical challenge. And continuing my theme of heroes, we were absolutely thrilled and delighted to have Baroness Tanni Grey-Thompson deliver our keynote address and take part in an enjoyable Q&A.'

June 2021: True Colours (new CIOT website and logo)

'Our Institute now has a totally revamped website and new modern branding. We have spent a considerable amount of time on this worthy project.'

July 2021: All Around The World (ADIT)

'With some 5,000 Affiliates and students, ADIT is our fastest growing qualification. ADIT Affiliates and students work in many different organisations, including Big Four firms, in-house tax teams, legal and accounting practices and Revenue authorities. Some people also choose to do ADIT at the same time as their degree courses.'

August 2021: Magic Moments (volunteer 'thank you' event)

'In 2020, some 680 volunteers across CIOT and ATT Committees, Steering Groups and Councils together contributed 19,922 hours. I was so pleased that we were able to put together a fantastic online evening event on 1 July for our volunteers to show our sincere appreciation of their valuable contributions. We had over 80 members joining us on the night and our enthusiastic blue-badge guides offered a choice of one of four fascinating virtual tours.'

September 2021: Heart and Soul (CIOT/ATT Branch events)

'Since the start of the lockdown in March 2020, we have aired 158 webinar events. In total, we have registered over 39,600 attendees. We've been proud to have delivered a diverse range of online content, often chaired by your local branches.'

November 2021: The Wind Beneath My Wings (TaxAid and Tax Help for Older People)

'Many people with tax problems also need bespoke personal advice. And if they can't afford to pay for it, where do they turn? This is where TaxAid and Tax Help for Older People provide much needed support and advice. Each year, these two sister charities help around 17,000 vulnerable people.'
If you are thinking of making a seasonal charitable donation, please read more about these tax charities in the article by Glyn Fullelove on page 38.

May I take this opportunity of wishing you and your families a wonderful and restorative festive break. Take care.

Peter Rayney
President, CIOT
president@ciot.org.uk

"In this month's page, I provide some 'highlights' of my President's Page throughout this year.

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Scott Davenport,
Finance Director,
Davenports Accountancy

ATT Welcome

page@att.org.uk
David Bradshaw

The new dawn of Budget Day

My lack of Budget predictions in my last Welcome page turned out to be absolutely spot on: nothing much happened in the Budget and most of that was leaked beforehand anyway.

While last month's Budget might have been light on headline grabbing tax announcements, there was still plenty of detail for the ATT, CIOT and LITRG technical teams to work through, with all three bodies publishing press releases on Budget Day. The Finance Bill has already been published and our technical teams are hard at work providing feedback and guidance.

We will be having our usual meeting with the HMRC and HMT Budget teams. If you have any feedback on the documentation or communications from last month (not technical detail on the measures themselves), please let our technical team know.

Whatever happened to the Budget Day that we all knew and loved? The internet has spoilt the fun, hasn't it? All of the big firms used to hurry to be the first to deliver their Budget briefing documents and breakfast seminars to clients in a race against time. The firm that I was employed by was no different.

In 1985, I was dispatched to London to join a team tasked with listening to the Budget speech as it was delivered, and then assist in the production of the Budget Briefing Bulletin to be mailed to all clients, including those in Newcastle, the next day. At around 11pm, I was presented with a box of 200 copies and 'taxied' to King's Cross to catch the midnight train to Newcastle. I remember that Budget particularly well because one of my London colleagues was reduced to near tears as the subject that he had specialised in since its inception, development land tax, was abolished. More on that later…

What followed was the golden era of the Breakfast Budget Presentation. By now, the scripting was down to our local teams who received the press releases by email at around 5pm on Budget Day. They frantically spent the evening – ably assisted by our admin teams – producing slides and scripts for the next morning and ordering pizzas from the local take away, until the print room could run off copies of the Budget briefing packs. Not even the strong coffee and cold bacon sandwiches the next morning could revive the speaker (yours truly):

> *'David's performance lacked the usual sparkle as he drifted off the subject more than once during his announcement that mainstream corporation tax was to be stepped down from 52%!!' (*Newcastle Journal, 1984)

By the mid 1990s, I had become a touring artist performing as far afield as Leeds and Grimsby – the latter because of an invite by a local firm of accountants to speak after a lavish client lunch held immediately prior to our presentation. Unfortunately, the drink-fuelled audience were decidedly restless and I was roundly booed and heckled when I announced from the podium that I knew nothing of the newly created landfill tax: big in those parts apparently.

But my biggest triumph or greatest failure – I do not know to this day which is applicable – was the joint Anglo/Japanese Budget presentation that my Newcastle office thought would be a good idea back in 1989.

There had been a significant influx of Japanese investment in North East England in that period, spurred by the arrival of Nissan and a plethora of second-tier suppliers to the automotive market. Given this, two members of the Japanese client development team were dispatched north to drum up an audience of clients and targets. The revolutionary idea was that I was to present my slides as normal, while my Japanese colleagues would translate my presentation to the mainly Japanese audience.

Well, it seemed like a good idea at the time. I knew something was amiss when the Japanese audience regularly burst out laughing, swivelling around in their seats to look at me. The exercise was never repeated.

And, finally, we return after all these years to a residential developer land tax. My colleague from 1985 will be screaming 'I told you so!'

David Bradshaw
ATT Deputy President
page@att.org.uk

"Whatever happened to the Budget Day that we all knew and loved? The internet has spoilt the fun, hasn't it?

Look at the numbers

Bill Dodwell considers the changes announced in the October Budget and Spending Review

Chancellor Rishi Sunak delivered his third Budget on 27 October, combining it with announcing the results of Spending Review 21, which sets departmental budgets for three years up to 2024/25. This article highlights some of the changes.

Investing in HMRC

HMRC will see a significant increase in its departmental budget under the Spending Review. The outturn for 2020/21 was £4.7 billion and the baseline for 2021/22 is £4.8 billion. The amounts for the following three years are £5.9 billion; £5.5 billion and £5.2 billion, which represents real growth (i.e. after inflation) of 1.2% over the 2019/20 to 2024/25 period. Capital expenditure, which is included in the total budget, is set at £700 million in 2022/23, dropping to £600 million and then £500 million. This includes money for HMRC's digital systems:

> 'HMRC's settlement also continues the government's ambition to build a modern, digital tax system fit for the 21st century, by:
>
> - extending Making Tax Digital, as previously announced, helping to make tax simpler for businesses and reducing the scope for errors. This is forecast to generate up to £1.6 billion in additional tax revenues by 2026/27; and
> - providing a further £136 million investment over the SR21 period to deliver the Single Customer Record and Account. This will create a simpler, faster and better customer experience, allowing taxpayers to see and manage all their tax affairs in one place.
>
> 'SR21 delivers significant levels of investment to modernise HMRC's IT systems and improve the quality, resilience and security of its digital services, by providing £468 million over the next three years, building on the £98 million allocated in 2021/22, to reduce the risk of system failures, enhance the department's ability to defend against cyberattacks and support the continued digitisation and modernisation of the tax system.'

Tax advisers will note that Making Tax Digital is forecast to bring in an additional £1.6 billion over several years, which highlights the importance of the programme to HMRC and the government. This yield is thought to come from reducing the element of the Tax Gap attributable to taxpayer error. Delaying Making Tax Digital by a year 'costs' over £400 million.

The investment in the Single Customer Account and its enabling technology, the Single Customer Record, builds on £68 million awarded in 2021/22. The Office of Tax Simplification is a cheerleader for the new account, which should be the hub for all taxpayer/HMRC communication and reporting – and allow agent access to the same data. The account will start by combining the personal and business tax accounts, which should help anyone with a mixture of income from employment, self-employment or rental income. We hope that HMRC will be able to announce next year when it will start to make the account available and then have a roadmap for planned additions in functionality.

Budget numbers

In some ways, the best way to understand the Budget is to look at the numbers, which give us a sense of where taxes are being increased or reduced. Overall, the Budget (and other announcements since the March Budget) increases taxes by some £12-14 billion every year.

The big cost here is the new health and social care levy, which manifests in 2022/23 as an increase in national insurance and dividend taxation, before turning into the levy in 2023/24, when it is extended to earnings of those above state pension age. One of the fascinating numbers published is the reduction in yield as employers pass some of the costs on to employees. This is estimated at £2.5-2.8 billion annually, which reflects the obvious point that employers do pass on costs to employees in the form of reduced wages (probably reduced increases and/or bonuses) but also that employers in general have greater capacity to absorb an initial cost and spread the effect over several years.

Continuing Covid costs in the form of business rates relief were announced in the Budget. The increases in the annual multiplier will be frozen in 2022/23, which costs about £900 million annually. Additionally, increase due to property improvements will also be frozen from 2023/24, thus removing any disincentive to improve buildings. There will also be 50% rates relief for smaller retail hospitality and leisure businesses for 2022/23, costing £1.9 billion.

Basis period reform

Rather out of nowhere, HMRC issued a very short consultation on its plans to change the way in which self-employment income is taxed. The current year basis system was introduced in 1997 and provides that the results of the accounting period which ends in the tax year are the basis of the taxable profits (or loss) for that year.

From 6 April 2024, this simple rule will no longer apply. The change will not affect anyone who uses 5 April or 31 March as

Nicolas Economou/NurPhoto/Shutterstock

PROFILE

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Profile Bill is Tax Director of the Office of Tax Simplification and Editor in Chief of *Tax Adviser* magazine. He is a past president of the Chartered Institute of Taxation and was formerly head of tax policy at Deloitte. He is a member of the GAAR Advisory Panel. Bill writes in a personal capacity.

their accounting date – the majority of self-employed people. However, those using another accounting date – estimated at 570,000 – will need to apportion their profits to arrive at the amount taxed in a particular year. For example, a 30 June accounting date will mean that the taxable profits will be 3/12 of the profits in one year and 9/12 of the following year. 2023/24 will be a big transitional year, where the full profits of the accounting year ending in 2023/24 will be taxed (say, 30 June 2023 in our example) together with 9/12 of the profits for the year to 30 June 2024. Overlap relief will be offset against the apportioned profits and the excess will be taxed over five years, subject to an election to opt out of spreading.

The response document explains that any excess profits arising during the transition year will be as a one-off separate item of taxable income. This treatment will minimise the impacts on allowances and means-tested benefits – issues raised during the consultation. Loss relief arising due to excess overlap relief in the transition year may be carried back for three years, instead of the usual one, mirroring the rules on cessation.

Some businesses will need to submit estimated figures, since their year-end will mean that they will not have final accounting figures in time for the 31 January self-assessment filing deadline. This is likely to affect businesses with year-ends from 30 September onwards but will actually depend on the complexity of the business and the potential need for an audit. The government will explore whether to introduce administrative or policy easements to minimise burdens caused by having to submit tax returns containing provisional figures, ahead of the transition year in 2023/24. The options being considered are:

- allowing taxpayers to amend a provisional figure at the same time as they file their return for the following tax year;
- allowing an extension of the filing deadline for some groups of taxpayers, such as more complex partnerships or seasonal trades;
- allowing taxpayers to include in the next year's tax return any differences between provisional and actual figures in the previous year; and
- leaving the current rules on provisional figures unchanged, whereby profits can be estimated in a return and amended as soon as final figures become available.

It will be important for taxpayers and their agents to make sure they have details of overlap relief in advance of the transitional year. HMRC has not yet announced whether it will have a central facility for making figures available, where they have not been included on tax returns. Some people may wish to change their accounting year to 31 March, so as to avoid future apportionments, adding to complexity and workload over the next couple of years.

This change is estimated to accelerate tax payments of about £1.7 billion and will also mean that HMRC and software providers will not need to include overlap relief in their Making Tax Digital software.

OTS-recommended reforms

It is pleasing that two of the recent recommendations from the Office of Tax Simplification have been taken forward by the government in the autumn Budget.

The most important is extending tax relief for pension contributions made by low earners under the 'net pay' basis. As many will be aware, the employer's choice of method for giving tax relief for employee pension contributions affects the amount arriving in the pension savings account. Individuals not paying tax – mainly because their earnings are below the personal allowance – get a basic rate top-up if the relief at source scheme is used. From 2024, that benefit will also be given to those on net pay arrangements. The delay appears to be due to the need to put systems in place and the top-up is not backdated.

The second recommendation turning into new law is extending the period for submitting the capital gains tax return on taxable sales of residential property from 30 days to 60 days, at a one-off cost of £60 million and an annual cost of £5 million. This change applies from Budget Day – 27 October 2021.

More simplification

The government has announced the reform of alcohol duty so that all drinks will be taxed in direct proportion to their alcohol content. To simplify the regime, the government intends to reduce the number of main rates from 15 to six, with common thresholds for each set of bands across product categories, and rates will be harmonised for drinks at 8.5% ABV or above. To encourage innovation, the government intends to introduce reduced rates for products below 3.5% ABV. The government also intends to introduce a common small producer relief, so as to reduce the tax burden on smaller producers of wine, cider, spirits and made-wine below 8.5% ABV. Alongside this, a new relief that recognises the importance of pubs and supports responsible drinking will be introduced, with duty rates on draft beer and cider being cut by 5%. The reforms are subject to consultation and discussion with the EU in relation to Northern Ireland.

And finally…

The Department for Business, HMRC and the Treasury have launched a consultation on allowing foreign companies to re-domicile in the UK (see bit.ly/3oTsLzU). Several countries already allow this – and others are introducing this change to company law. Moving domicile is only effective when both the outgoing and receiving countries include the necessary legal provisions.

Autumn Budget 2021

A review of the key points from the Autumn Budget 2021

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Personal tax

Tax rates and allowances for 2022/23

As already legislated for, the personal allowance of £12,570 and the basic rate limit of £37,700 are frozen up to and including 2025/26. Basic rate, higher rate and additional rate income tax will remain at 20%, 40% and 45% respectively for 2022/23. The additional rate threshold will remain at £150,000. The capital gains tax annual exempt amount will remain at £12,300 up to and including 2025/26. Capital gains tax rates are unchanged for 2022/23.

The main income tax rates and bands apply equally across the UK, except that Scotland has its own rates and rate bands, to be set for 2022/23 by the Scottish Parliament at its Budget on 9 December 2021, and the Welsh Parliament could also modify income tax rates for Welsh taxpayers at its Budget on 20 December 2021.

The starting rate for savings limit (applicable throughout the UK) will remain at £5,000 for 2022/23, and the starting rate itself at 0%. The personal savings allowance also remains unchanged.

Inheritance tax thresholds and rates are unchanged, and the nil rate band is fixed until April 2026.

Dividend tax rates

The three income tax rates applied to dividend income will each increase by 1.25 percentage points for 2022/23 onwards to 8.75% (basic rate band); 33.75% (higher rate band); and 39.35% (additional rate band). These rates have effect throughout the UK. The dividend allowance will remain unchanged at £2,000.

It is now confirmed that the dividend trust rate will also increase from 38.1% to 39.35%. The main trust rate is unchanged at 45%. It is also confirmed now that the increased dividend upper rate will apply for charging tax under Corporation Tax Act 2010 s 455 on loans to participators in close companies.

NICs rates and thresholds

The government will use the September Consumer Price Index (CPI) figure of 3.1% as the basis for uprating National Insurance limits and thresholds, and the rates of Class 2 and 3 National Insurance contributions, for 2022/23. However, as previously announced, the upper earnings limit and upper profits limit will be maintained at 2021/22 levels, in line with the higher rate threshold for income tax.

The government has already legislated for a 1.25% health and social care levy from 6 April 2023, which will apply to all income to which Class 1 (both primary and secondary), Class 4, Class 1A and Class 1B NIC is charged, as well as to earnings of those over the state pension age. For 2022/23, the relevant NIC rates will be raised by 1.25% for one year, except for those over the state pension age.

Van benefit charge and fuel benefit charges for cars and vans

The van benefit charge will increase to £3,600 and the van fuel benefit charges will increase to £688 for 2022/23. The multiplier for the car fuel benefit will increase to £25,300.

Income tax treatment of household support fund payments

Household support fund payments will help vulnerable households with essentials over the coming months, as the country continues its recovery from the coronavirus pandemic. The government will legislate in Spring 2022 by Statutory Instrument to clarify that payments made through the fund, and through similar schemes in the devolved administrations, will be exempt from income tax. No income tax will be collected on payments made from October 2021.

Increase in normal minimum pension age

Legislation to be included in Finance Bill 2022 will increase the normal minimum pension age, the earliest age at which most individuals can access their pensions without incurring an unauthorised payments tax charge, from 55 to 57. The increase will have effect from 6 April 2028.

Business tax

Residential property developer tax

The government had previously announced a new residential property developer tax as part of its measures to address unsafe cladding on high-rise buildings. It will apply with effect from 1 April 2022 to the relevant profits arising on or after this date of companies undertaking residential property development activities. It was confirmed in the Budget that the tax will be charged at 4% on profits exceeding an annual allowance of £25 million.

Capital allowances
The annual investment allowance (AIA) had previously been increased temporarily from £200,000 to £1 million, but this was due to end on 31 December 2021. The increase will now extend for a further 15 months until 31 March 2023 for both income tax and corporation tax. As always when the AIA changes, there will be transitional rules to determine the AIA available for accounting periods spanning the date of change, now 1 April 2023.

Research and development
From April 2023, research and development tax reliefs will be reformed to support modern research methods by expanding qualifying expenditure to include data and cloud costs. These changes will be legislated for in Finance Bill 2023 and take effect from April 2023. Further details of these changes and the next steps for the review will be set out in due course.

Corporate loss relief
Legislation will be introduced (to apply retrospectively for accounting periods beginning on or after 1 January 2019) to ensure that companies adopting IFRS 16 continue to benefit from the exemption from the loss carry forward restriction for companies in financial distress.

Cross-border group relief
For accounting periods ending on or after 27 October 2021, the existing cross-border group relief rules relating to EEA-resident companies are repealed. Group relief rules relating to UK permanent establishments of EEA-resident companies are to be brought into line with those for non-UK companies resident elsewhere in the world.

Transitional arrangements will apply for straddling periods.

Diverted profits tax
Two changes relating to the administrative aspects of the diverted profits tax will have effect from 27 October 2021. First, DPT will now be included as a tax covered by the UK's double taxation treaties, and so mutual agreement procedure (MAP) outcomes will be able to be implemented for companies that have sought relief from diverted profits tax under this procedure.

The interaction between the diverted profits tax review period and company tax return enquiries will also be rationalised by extending the period in which a company tax return can be amended where there is a diverted profits tax review to cover the whole of the review period, other than the final 30 days. It will also not be possible for a closure notice for an enquiry into a company tax return to be given until the end of the review period.

Real estate investment trusts
From 1 April 2022, changes will be introduced to enhance the attractiveness of the UK Real estate investment trusts (REIT) regime. Key changes include:

- removal of the requirement for REIT shares to be admitted to trading on a recognised stock exchange where institutional investors hold at least 70% of the ordinary share capital in the REIT;
- amending the rules requiring that at least 75% of a REIT's profits and assets relate to property rental business (the 'balance of business test') to disregard non-rental profits arising because a REIT has to comply with certain planning obligations, and to ensure the items currently specified as excluded from the profits part of the test are disregarded in all parts of the test; and
- introduction of a new simplified balance of business test so that, if group accounts for a period show that property rental business profits and assets comprise at least 80% of group totals, a REIT will not have to prepare the additional statements that would be required to meet the full test.

Creative industries
A range of measures were announced in relation to the three 'cultural' tax reliefs (theatre tax relief, orchestra tax relief and museums and galleries exhibition tax relief) to increase the rates temporarily from Budget Day until 31 March 2024 and extend museums relief until 31 March 2024. From 1 April 2022, film productions qualifying for film tax relief that change during production to instead meet the criteria for high-end television tax relief will be able to continue claiming film relief without losing their right to access tax relief.

Bank surcharge
The bank surcharge rate will be reduced to 3% (from 8%) from 1 April 2023 and the surcharge allowance will be increased to £100 million (from £25 million).

Asset holding companies
From 1 April 2022, a new tax regime for qualifying asset holding companies and some of the payments they make will be introduced. The regime will apply to certain asset holding companies that are used in a range of collective and institutional investment structures to hold investment assets. It will also apply to investment funds, institutions and individuals that invest in these structures.

The broad intention behind this regime is to ensure UK competitiveness as a location for asset management and investment funds. It operates so that investors are taxed broadly as if they had invested in the underlying assets and the intermediate holding companies pay no more tax than is proportionate to the activities they perform.

The regime will exempt from tax gains on share disposals and overseas property disposals and profits of an overseas property business, where they are subject to tax in an overseas jurisdiction. The share capital buy-back rules will treat premiums paid when a qualifying asset holding company repurchases its share capital from an individual, as capital rather than as income distributions.

VAT and indirect taxes

Implementation of VAT rules in free zones
This measure, which is to take effect from 3 November 2021, will affect VAT-registered businesses authorised to operate in the customs site (free zone) of a freeport. The main VAT benefit of operating in a free zone is that businesses selling goods within free zones can zero-rate their supplies, and services carried out on goods in those zones may also be zero-rated subject to conditions, which provides a cash flow advantage.

This measure will ensure that where goods leave a free zone and there is no qualifying onward supply of the goods, or where there is a breach of the rules of the free zone customs procedure, VAT will be due.

VAT treatment of fund management fees
Autumn Budget 2021 included an announcement that there will be a consultation on options to simplify the VAT treatment of fund management fees in the coming months.

Air passenger duty
A new domestic band for air passenger duty covering flights within the UK will be introduced from 1 April 2023 with rates of £6.50 (economy) and £13 (other). There will also be a new ultra-long-haul band, covering destinations with capitals located more than 5,500 miles from London with rates of £91 (economy) and £200 (other).

Tax administration

Discovery assessments
Finance Bill 2022 will put beyond doubt with immediate and retrospective effect the fact that HMRC can raise valid discovery assessments in relation to the high income child benefit charge, or to recover gift aid and for certain pensions tax charges.

Produced by Tolley

It's time to complete your

2020 Annual Return.

Don't get caught out.

Stay compliant.

All members* are required to complete an Annual Return confirming their contact, work details and compliance with membership obligations such as:

- continuing professional development
- anti-money laundering supervision
- professional indemnity insurance.

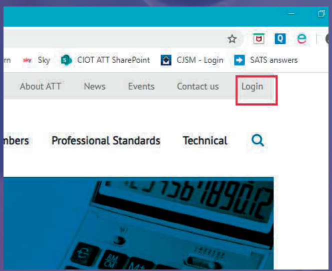
Please check that you have completed yours by logging on to the Members Portal (https://pilot-portal.tax.org.uk) then going to Secure area/Members Area/Compliance/Annual Return where you will be able to complete any outstanding form.

*Excludes those who are fully retired and students.

STEP BY STEP GUIDE TO COMPLETING YOUR 2020 ANNUAL RETURN

1. Login

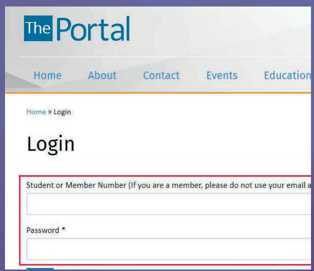
On the ATT website click login located in the top right.
On the CIOT home page please refer to the advert on the right hand side.



2. Portal

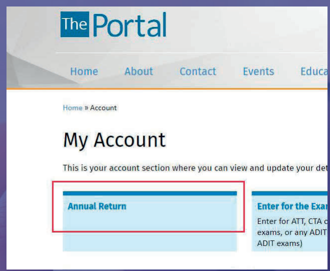
To access your account on the portal please use your:

- **member number**
- **email address**



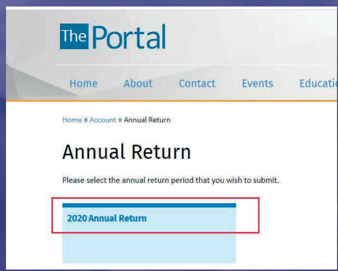
3. Account

Select Annual Return option



4. Period

Select 2020 Annual Return period



Failure to complete an Annual Return is contrary to membership obligations and may result in referral to the Taxation Disciplinary Board (TDB).

Let me entertain you!

The festive season means that many businesses will either be hosting Christmas parties or giving gifts to staff and clients. *Neil Warren* considers the VAT treatment of these expenses

KEY POINTS

- **What is the issue?**

Input tax can be claimed on the costs of entertaining employees because it is classed as a business expense. But input tax cannot be claimed on the costs that relate to non-employees, including shareholders, retired employees and partners/spouses of staff. Input tax apportionment will be needed for Christmas parties where both employees and non-employees attend.

- **What does it mean for me?**

Input tax can be claimed on business gifts given away for business purposes. But output tax will be due if the total cost of gifts given to the same person exceeds £50 excluding VAT in any 12 month period.

- **What can I take away?**

A token charge to non-employees attending a Christmas party removes the input tax block under the business entertainment rules but the charge must be compulsory and will be subject to output tax. Finally, make sure that venues charge 12.5% VAT for your Christmas meals, the reduced rate which applies to most hospitality supplies until 31 March 2022.

The relaxation of the lockdown rules hopefully means that staff and customers will be able to get together for a decent Christmas party this year. Hurrah! And for those businesses that have traded profitably, there will probably also be some decent gifts given away to reward hard work and customer loyalty. In this article, I will consider the VAT treatment of entertaining expenses and business gifts.

Entertaining costs

The starting point with business entertainment expenditure is that input tax can only be reclaimed on the cost of hospitality provided to staff. Entertainment given to non-staff members, such as customers, suppliers or the spouses of staff, is blocked and the input tax cannot be recovered. For example, imagine that the partners in a firm of lawyers have decided to host a big Christmas party at a local restaurant. The guest list will comprise 20 staff plus one guest each, plus some important suppliers and clients. The total party will comprise 50 people. The company can claim 40% of the VAT on the final bill as input tax; i.e. 20/50 based on the ratio of staff to total guests.

As a topical VAT saving tip, it would be sensible to agree a meal price with the restaurant that excludes alcohol and separately pay for the alcohol on the night. The charge by the restaurant of, say, £60 plus VAT per head will then be subject to 12.5% VAT, the rate that applies until 31 March 2022 to most hospitality sales, including catering supplies. Alcohol has always been subject to 20% VAT. The lower rate reduces the loss of input tax on the guest meals in my example.

Hosting role?

Hopefully the message from business owners will be for everyone to have a good time at the Christmas party. In other words, staff will be focusing on dancing and singing and not carrying out a hosting role to look after the non-employees. This is because a condition of reclaiming input tax on the staff meals is that the staff must not be acting as host to the guests. If that is the case, then input tax on their costs is blocked as well. (See VAT Notice 700/65, para 3.3.)

In some situations, there can be a problem with claiming input tax on the cost of directors' meals, or sole trader and partner meals in the case of an unincorporated business. But there is no problem if an event is open to all staff, such as the Christmas party. (See VAT Notice 700/65, para 3.2.)

Unfortunately, however, exclusions from the definition of an employee include pensioners – even if they are being paid a company pension as a retired employee – and former employees, as well as shareholders who are not also employees. And although a business can often reclaim input tax on the costs of providing subsistence to a subcontractor, this would not apply to the office Christmas party.

As a separate tip, there is no monetary limit on the cost of hospitality provided to employees to enable input tax to be claimed. The annual limit of £150 per head including VAT is only relevant in the mysterious world of direct tax and means that the whole amount will be assessed as a benefit in kind for the employee if the £150 limit is exceeded. How mean is that!

Overseas customers

What would be the situation if our imaginary firm of lawyers also invited some of their prestige international clients to the party? Is there scope to claim input tax on the cost of their meals and also the hotel rooms being paid for them as an extra treat?

To give some background, there used to be an input tax block on the cost of entertaining overseas customers but then a couple of ECJ judgments meant that UK VAT law had to be amended back in 2010.

However, there is a big downside to this opportunity. Even though input tax can be claimed on the cost of entertaining overseas customers, there will be an output tax charge as a private benefit unless the expenses relate to a business meeting, and the hospitality provided is not deemed to be excessively lavish. The output tax charge will cancel out the input tax gain. There is no scope to claim input tax on hospitality provided to other international business contacts, such as suppliers or auditors. But the business meeting opportunity is not relevant to a Christmas party, which is clearly a social function, so there is no potential VAT saving here.

As a general comment, now that the UK is able to make its own VAT rules following our EU departure, it would be a useful piece of tax simplification work if the government could either allow input tax to be fully claimed on the cost of entertaining overseas customers without an output tax charge or, more likely, block it completely. This would remove the need to consider whether any hospitality is 'reasonable in scale and character' – a phrase used in VAT Notice 700/65, para 2.6.

Payment by guests

To put on my Scrooge hat, there are decent VAT savings to be made if a token charge is made to the guests. This is because a charge to guests means that the input tax block on entertaining is no longer relevant because there is no longer a supply of 'free' hospitality. The charge can be less than the cost of the food and drink provided to the guests. See ***ABC Accountants: Christmas party.***

Service charges

Readers acting for restaurants and similar hospitality businesses might want to alert their clients to a potential VAT saver with service charges. If a service charge is a compulsory addition to the bill, it will be subject to VAT.

However, if it is an optional payment for the customer, described for example as a 'discretionary service charge', it is outside the scope of VAT as a voluntary payment. However, the restaurant staff must not insist on payment if the customer chooses not to pay because discretionary means there is a choice.

Business gifts

Imagine that ABC Accountants from my example has decided to celebrate an excellent trading year by giving bottles of champagne and wine as Christmas gifts to its best customers. Can input tax be claimed on the purchases of the goods from the wine merchant, without accounting for output tax on the onward supply to the customers?

The VAT rules allow a business to claim input tax on goods that will be given away for business purposes. And no output tax will be due on the VAT return that coincides with the date of the gift as long as it cost less than £50 excluding VAT. However, the £50 figure is an annual limit per person, so it is important to keep a record of who is receiving the gift, its total value and the date it was given.

If the £50 limit is exceeded in any rolling 12 month period, then output tax is payable on all of the gifts given to that person as if they had been sold, effectively disallowing the input tax claimed on the original purchase. See ***Maria's Christmas dilemma.***

In terms of the definition of a 'business gift', it must relate to a gift of goods that is made in the course of promoting a business. HMRC confirms that the definition includes 'goods given to customers as a thank you' (see VAT Notice 700/7, para 2.2). The goods don't need to include the business name or logo.

If goods are purchased for non-business purposes, perhaps to give away to the business owner's friends or relatives, then input tax is blocked on the purchase of the items because they are not being used for the purpose of the business.

A final bit of good news: if a business gives gifts to different employees who work for the same organisation, each natural person is entitled to receive £50 worth of gifts under the VAT rules. The threshold is not capped at £50 per business. Happy Christmas!

PROFILE

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ABC ACCOUNTANTS: CHRISTMAS PARTY

ABC Accountants has booked its Christmas party at MTD Restaurant for 70 staff and 50 customers. The meal cost is £75 per head plus VAT. The partners have decided to charge the guests a token amount of £6.25 each.

The company will account for output tax of £34.72 on the money collected from the guests; i.e. £6.25 x 50 guests x 1/9, the VAT fraction for the 12.5% rate.

ABC Accountants can then claim all input tax on the cost of the meals; no apportionment is needed for the entertaining of non-employees.

MARIA'S CHRISTMAS DILEMMA

Maria is VAT registered as a hairdresser and is unsure whether to give her customers a bottle of vintage wine costing £55 including VAT, or a bottle of quality champagne costing £65.

From a VAT perspective, it makes sense to choose the wine because the VAT exclusive cost is less than £50, so it is within the business gift limits. This assumes, of course, that the same customers have not received other gifts from her business within the previous 12 months that mean the annual limit is exceeded.

She can therefore claim input tax on the purchase of the wine without accounting for output tax.

Note: The £50 business gift limit has been in place for over 20 years and never been increased to reflect inflation. An increase in the threshold is perhaps long overdue!

monitoring

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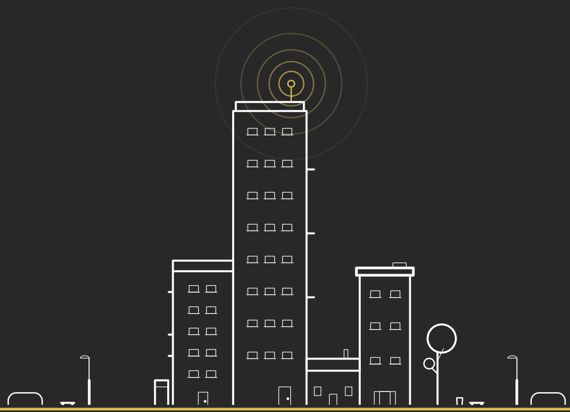


verb

1. observe and check the progress or quality of (something) over a period of time; keep under systematic review.

2. more game-changing innovation in the IR35 space.

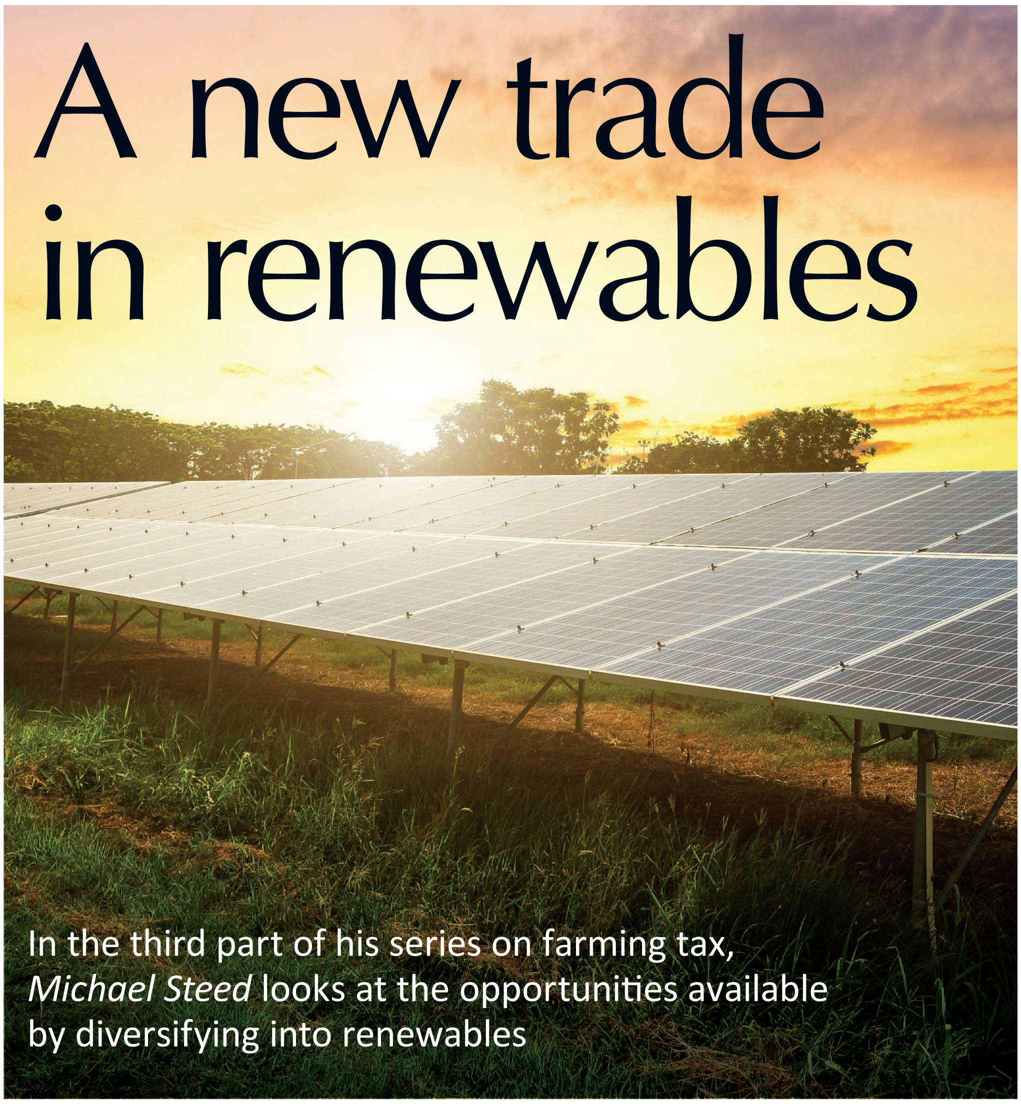
IR35 SHIELD

THE IR35 COMPLIANCE STANDARD

KEY POINTS

- **What's the issue?**
Farmers will be looking anew at diversification into renewables in the light of the COP26 Glasgow Climate Change Conference.
- **What does it mean to me?**
That as advisers we need to be able to look at the whole landscape, tax and non-tax, to properly advise our clients on renewables.
- **What can I take away?**
That the 'green tide' comes in and offers us incentives and then, perhaps inexplicably, it goes out again, so careful checking of what's on offer is essential.

A new trade in renewables



In the third part of his series on farming tax, *Michael Steed* looks at the opportunities available by diversifying into renewables

This is the third and final part of my Back to Basics articles on farming tax and I want to review some of the tax effects of farmers diversifying into renewables. So what's on offer for farmers seeking diversification into renewables? Let's start with some bad news. There have been some UK government incentives for producers of renewable energy in the near past, but these have now reduced to a trickle.

We have seen the Non-domestic Renewable Heat Incentive for non-domestic heat producers closed to new applicants in March 2021. The Green Homes Grant, designed to help people increase the energy efficiency of their homes, closed in March 2021. We still have the Domestic Renewable Heat Incentive for small scale heat generation at the domestic level and even this is closing in March 2022. The Boiler Upgrade Scheme is being introduced in the spring of 2022, to offer capital grants of £5,000 for home owners to install heat pumps in their properties, as an alternative to older fossil fuel boilers.

The Domestic Renewable Heat Incentive

This is a domestic subsidy, designed to subsidise biomass boilers, solar water heating and certain heat pumps, so it is a subsidy towards renewable heating costs in your home. Under the Domestic Renewable Heat Incentive, payments are made for seven years and are based on the amount of renewable heat made by your heating system.

If the renewable heating system heats only a single property which is capable of getting a domestic Energy Performance Certificate (EPC), then you can apply for the Domestic Renewable Heat Incentive. The Energy Performance Certificate is the proof needed that a property is assessed as a domestic dwelling. Without one, you can't join the scheme. The scheme is essentially for one dwelling, although it will cover home offices and annexes in some circumstances.

Note that some older farmhouses will not have an Energy Performance Certificate, but it is still possible to join the domestic Renewable Heat Incentive scheme with an exemption certificate (commonly used for listed dwellings).

From a tax perspective, Domestic Renewable Heat Incentive payments made to an individual are outside the scope of income tax and VAT.

Solar farms

There's been a lot of interest in solar farms in recent years, notwithstanding that the UK government withdrew large-scale support for solar in 2015. The cost of solar photovoltaic (PV) panels has dropped and reliability and longevity has improved. The key issue for a farmer is whether to lease land to a power generation business or self-invest and build and sell the electricity.

It's a long-term project either way. Farmers may conclude that renting land to a solar generator is a better option, as this does not require capital outlay or specialist technical skills. Developers typically seek a lease term of at least 35 years, paying an annual (index-linked) rent and in some cases a percentage revenue share, with the land restored to its previous condition at the end of the term. The rents offered to landowners vary significantly depending on the site; flat sunny sites with good grid access will be of interest.

Some developers may also look to install battery storage systems into their solar farm designs, which should attract an additional rent.

Other benefits of a solar farm include maintenance and grazing rights, with most developers allowing sheep grazing around the solar PV panels – they may even pay for this.

From a tax perspective, this is income from land and not farming. As we discussed in the last article, the trick with any diversification project is to balance risk-free income now and in the future, against a possible loss of long-term inheritance tax reliefs later (on retirement

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or death). For agricultural property relief, for example, the farmer needs to be in occupation of the land for the purposes of agriculture. Certainly having sheep graze fields under solar panels will help that argument.

The farmer will also have to consider the VAT aspects. Will the land be opted or will the supply of land be an exempt supply, with possible partial exemption issues?

If a farmer chose to run the project in-house, then the tax aspects include:

- capital allowances on the panels and frames (normal capital allowances, trumped by the annual investment allowance, but no stand-alone first year allowances);
- possible 3% structures and buildings allowances on roads and hard standings (such as pavements); and
- non-farming (trading) income from the export of the electricity.

The VAT on exported electricity will be at 20%, unless the customer qualifies for the 5% domestic rate. Again, the long-term inheritance tax angles will need to be considered.

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Selling renewable electricity

As far as income from a solar installation is concerned, the Smart Export Guarantee is the new mechanism to pay people for excess electricity that they export to the national grid. This is a government initiative that offers a route to market for small scale renewable plants up to a capacity of 5MW or up to 50KW for micro Combined Heat and Power Stations. It is designed for solar PV panels, wind, micro Combined Heat and Power, hydro and anaerobic digestion.

Anyone with solar PV panels whose system is linked to the grid will export the energy they don't use. Until March 2019, people installing solar PV panels were eligible for the Feed in Tariff, which paid a subsidy for each kilowatt hour of electricity generated and a fairly generous export tariff for electricity fed into the grid.

The Feed in Tariff has now gone and the Smart Export Guarantee has replaced it. From an investment point of view, there is no guaranteed income as there was from the Feed in Tariff. Instead, the Smart Export Guarantee does guarantee a route to market for producers. Income is likely to be lower, but energy companies are obliged to source some green electricity, so farmers should shop around.

Wind turbines

The same issues that apply to solar panels above, also apply to wind turbines.

Anaerobic digestors

There has been quite a lot of interest in anaerobic digestors, especially from dairy farmers with a big slurry problem. Many of the issues above will apply, although self-construction may be more popular.

Material suitable for the anaerobic digestion process includes:

- animal manure and slurry;
- energy crops such as maize, ryegrass, silage and fodder beet;
- food processing by-products;
- food waste from retailers; and
- biodegradable household waste.

Anaerobic digestors have potentially two outputs: green gas; and, where the gas is used to drive gas turbines, electricity. The government is introducing a new Green Gas Support Scheme in the autumn of 2021 for four years for incorporating new green gas (bio-methane) into the grid. The gas may be of interest to green transport providers for, say, buses. The Green Gas Support Scheme will provide quarterly payments for 15 years. The electricity generated may be eligible for the Smart Export Guarantee (see above).

The equipment purchased should attract capital allowances, but not first year allowances. Roads and hard standings may be eligible for the 3% structures and buildings allowance. The income will clearly not be farming income, although it will be income from a trade.

Any diversification project will require significant input of time and investment. Many farmers underestimate this.

As ever, it's not just the tax that needs to be considered: new skills will be needed, which may have to be brought on from off the farm. Also, anaerobic digestor operators will need to ensure the security of feedstock and dealing with the digestate at the end of the process.

Using self-generated renewables

Some farmers may enquire about using renewables on the farm only (i.e. without the export element), so some of the above discussion will apply (say, for capital allowances). In-house energy generation will cut external energy bills.

Conclusion

Any diversification project will require significant input of time and, where appropriate, investment. The hard facts are that many farmers underestimate this point. These projects require new skills and all of this may well detract from the core business of farming. Farmers will need to get their ducks in a row and tax is but one aspect of this.

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A private matter

Nick Bustin and *Dinesh Pancholi* review the impact of extending IR35 to the private sector

KEY POINTS

- **What is the issue?**
The introduction of the off-payroll working legislation in the private sector from 6 April 2021 meant that medium and large businesses became responsible for determining the deemed employment status of workers engaged via an intermediary.
- **What does it mean for me?**
It was anticipated that 60,000 private end client businesses would be in scope of IR35 rules, as would 20,000 agencies providing workers to medium or large businesses.
- **What can I take away?**
It is imperative that businesses have robust controls, processes and governance in place to demonstrate that reasonable care has been taken in any employment status review of a contractor.

The introduction of the off-payroll working legislation in the private sector from 6 April 2021 meant that medium and large businesses became responsible for determining the deemed employment status of workers engaged via an intermediary. As a result, businesses need robust controls, processes and governances in place to comply with their new responsibilities. Businesses need to understand the steps they should take to remain compliant and how HMRC is likely to police these rules.

Background

The legislation popularly known as IR35 was introduced in 2000 to counter the rise of workers providing their services through an intermediary, typically a limited company (personal service company), instead of being employed by the engager. Its aim was to ensure that where a deemed employment relationship was present, income tax and Class 1 NICs would be deducted from the fees payable to the worker.

When IR35 was first proposed, the onus was to be placed on the engager to abide by the legislation, but this promptly changed to the personal service company before the legislation within the Finance Act 2000 was enacted. Over 20 years later, we have gone full circle. Where the engager is a medium or large business, they are now responsible for considering whether the legislation needs to be applied.

IR35 is hugely unpopular with contractors, and many have felt that it should be abolished. Although its operation has been reviewed multiple times, the government contends that abolishing IR35 would pose too great a risk to the Exchequer. HMRC figures showed that up to 90% of personal service companies were non-compliant before the extended legislation was introduced. Furthermore, the use of personal service companies by senior staff in the public sector was one of the factors which prompted the government to introduce the updated IR35 legislation within the public sector in 2017, with the latest changes, effective from 6 April 2021, applying to all medium and large private sector businesses.

Private sector changes

HMRC collected £550 million in the first two years of IR35 being extended within the public sector, including significant sums from various departments throughout Whitehall. HMRC expects to collect a further £2.9 billion by 2024, so it is unsurprising that IR35 was extended into the private sector too.

The private sector version of the legislation was founded on the rules already in place within the public sector. However, the exclusion of small businesses from the need to operate the legislation is helpful but does present several challenges.

The small employer criteria for IR35 purposes are taken from the Companies Act 2006, and a company is considered a 'small company' if it satisfies two of the following conditions:

- an annual turnover of no more than £10.2 million;
- a balance sheet total of no more than £5.1 million (the total amounts shown as assets in the company's balance sheet before deducting any liabilities); and
- no more than 50 employees.

The key features of the extended IR35 legislation include:

- The end client is required to review the employment status of the worker.
- The engager (the fee payer) is responsible for accounting and paying the income tax and NIC via PAYE if the contract is inside IR35.
- The end client must provide a Status Determination Statement to the worker and the intermediary, setting out its conclusions for the decision and that it has taken reasonable care in reaching that decision. *Unless and until* the Status Determination Statement has been given to all relevant parties in accordance with the statutory requirements, the end client rather than the fee payer remains liable for any income tax and NIC liabilities.
- There is an appeal process should the worker or the fee payer not agree with the client's decision.
- The end client then has 45 days to address the appeal and notify the worker and/or the fee payer. If the end client fails to comply, then after the end of 45 days, the end client rather than the fee payer becomes liable for any income tax and NIC liability.

However, HMRC can recover unpaid tax and NIC from any 'relevant person', including anyone in the payment chain above the fee payer. Consequently, everyone in the labour supply chain has compliance responsibility. In our experience, identifying the underlying facts connected with the engagement will help to resolve any disputes within the resolution process.

Anticipated impact on businesses and contractors

In the policy paper 'Off-payroll working rules from April 2021' (see bit.ly/3k20hCs), published on 3 March 2021, the government set out its assessment of the legislation's impact on individuals and businesses. No significant macroeconomic impact was anticipated. A one-off impact of £19.7 million was forecast, followed by a positive continued impact due to cost savings.

Measures would impact 180,000 contractors who would otherwise be employees if engaged directly rather than via a personal service company. It was anticipated that 60,000 private end client businesses would be in scope of IR35 rules, as would 20,000 agencies providing workers to medium or large businesses.

Where the engager is a medium or large business, they are now responsible for considering whether the legislation must be applied.

The impact on end clients could be significant, but experiences will be varied with some realising savings through reduced administration and compliance requirements, especially the 240,000 personal service companies that would no longer be required to determine status. In some cases, there would be savings on other compliance costs, such as preparing corporation tax returns and company accounts and filing these with Companies House.

How has this worked in practice?

According to the Association of Independent Professionals, since the introduction of the extended IR35 legislation in the private sector over 35% of UK contractors have either become permanent employees of the engager, or have retired, moved to work overseas or are 'simply not working' (see bit.ly/3mGQ5B3). Of those that remain, 34% are now working via unregulated umbrella companies, and another 36% are working through engagements deemed to be inside IR35.

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KEY POINTS

- Ensure that the process for undertaking employment status review is robust.
- Ensure that a valid Status Determination Statement is given to the contractor, agency or any other intermediary once the end client has considered all available facts.
- Monitor each contractor's status and re-run the determination at least every six months or when a new contract commences, or if there is a change to the engagement.
- When establishing whether the small company exemption applies, it is important to remember that turnover from all connected companies must be included for IR35 purposes.
- A fully contracted out service (exempt from IR35) should be based on the commercial reality of the arrangements and not on labelling the contract as 'contracted out service' or 'statement of work'.
- Overseas end-clients are required to perform an employment status review and issue a Status Determination Statement when there is a deemed employer in the UK.
- Ensure that payroll department is aware of the correct reporting and compliance requirements for those inside IR35.

Importantly, workers who fall within scope of the legislation do not automatically become employees of the engager or fee payer. However, as recent cases have shown, individuals could qualify for 'worker' status under employment law, which does bring some employment rights (see, example, *Uber BV v Aslam* [2018] EWCA Civ 2748). Furthermore, many contractors have seen their net income fall by 30% to 40%. The decrease in earnings could be attributed to, for example, non-tax deductible expenses, employee NIC and employer NIC costs being passed on by the umbrella companies via a reduced day rate.

The increase in those deemed to be inside IR35 could be attributed to engagers making blanket employment status determinations. We have also seen instances where end clients will either not engage with contractors or insist that they use an agency or an umbrella company if they continue working together. Fundamentally, this could be a consequence of insufficient resources to review all engagements, no central point of control to monitor all new engagements, a desire to minimise risk or insufficient awareness across the engager's business.

This may go some way to explain some of the labour shortages, especially in the logistics sector. This prompted a question in Parliament on how the government was addressing this issue. Its response was that it had commissioned an independent report into the short-term impacts of the reform in the private sector, inviting contributions by 15 November 2021 (see bit.ly/3GOEat2).

HMRC policing

HMRC issued a briefing on 15 February 2021 (see bit.ly/3COHYbq) where it stated that it will support organisations to comply with changes to IR35 rules. It also confirmed that a specialist team will carry out IR35 compliance activity. We have already seen businesses in the energy and finance sectors being targeted for IR35 compliance checks, which will no doubt be extended to other sectors.

HMRC has said that it would take a 'light touch' approach, including no penalties levied during the first year unless there is deliberate evasion – the focus being on helping businesses to comply.

All businesses should establish an employment status policy which clearly sets out the process, controls and governance.

Mitigation action points

All businesses should make sure that they establish an employment status policy which clearly sets out the process, controls and governance. In addition, organisations should ensure that all relevant stakeholders have employment status training so they understand the impact on the business should an incorrect status decision be made. Organisations must also complete due diligence on the labour supply chain compliance. They must also be aware that HMRC has the power to shift tax and NIC liabilities up and down the labour chain where there has been non-compliance. Typical checks could include the trade history of the agency or labour supplier, whether they are operating PAYE, etc.

If an umbrella company is used, it is worth having careful checking processes in place, including reviewing the contractor's payslip to ensure that the umbrella is being compliant. A regular review pattern is recommended. Organisations should also check how contracts work in practice. There can be a clear contract for services (i.e. self-employed) but the terms of the arrangement must be reflected in practice.

Contractors and businesses intending a self-employed relationship should consider whether it is appropriate to include the following within the contracts:

- there is no right of control over the contractor;
- there is a substitution clause (and if the contractor has provided a substitute during the contract, even better);
- the contract is with the personal service company, not the worker, and does not mention a named person; and
- there is no moving from task to task (any new tasks requested should be separately negotiated).

Contractors should not have any line management responsibility and should not appear on the business's organisation chart, have a company email address (unless there is a business need, such as for reasons of confidentiality) or business card, use company facilities or be invited to staff functions, and there should be no exclusivity. Furthermore, the contractors should provide their own equipment (unless they need to work on engager facilities) and pay for their own training.

Although the government has commissioned research into the impact of the legislation in the private sector, the cynics amongst us may think that nothing will change. This is due in part to the government's intention of ensuring equality between employees and those contractors who work like employees but via their personal service company, as well as the revenue generated by IR35 in the public sector and the large deficit in the government finances.

It is imperative that businesses have robust controls, processes, and governance in place to demonstrate that reasonable care has been taken in any employment status review of a contractor. Equally important is the education of all relevant stakeholders in the organisation, so the employment status review of the contractor population is undertaken correctly and all IR35 compliance requirements are met.

When the car stalls

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KEY POINTS

- **What is the issue?**
Smallman & Sons v HMRC is one of a long line of tax cases on company cars. Instead of employees leasing their own personal cars directly, those cars were leased by the company which onward leased them or recharged them to employees at full value.
- **What does it mean to me?**
The case serves to illustrate the draconian nature of ITEPA 2003 s 114 and the risks present if there is any commercial arrangement, arm's length or not, involving the employer.
- **What can I take away?**
The main takeout in this case is to obtain up to date expert advice. There are many instances where arrangements could have been better constructed, even when advice was sought.

John Messore and *Peter Moroz* consider the potential pitfalls of leasing company cars to employees, as demonstrated by the case of *Smallman & Sons*

On 24 August 2021, the First-Tier Tribunal released the decision in *Smallman & Sons Ltd v HMRC* [2021] UKFTT 300 (TC) (see bit.ly/3C4PvBH). This is one of a long line of tax cases on company cars and follows on from recent cases such as *Apollo Fuels v HMRC* [2016] EWCA Civ 157 and *Harrison Solway Logistics Ltd v HMRC* [2019] UKFTT 72.

The basic facts in these cases are very similar. Instead of employees leasing their own personal cars directly, those cars were leased by the company which onward leased them or recharged them to drivers at the same amount paid to the leasing company.

The cars in *Smallman* were all second hand, and no VAT was charged on their sale or claimed as input tax by Smallman. They were roughly three to five years old when acquired. The two directors, BG and LG, chose the cars they wanted and then those cars were financed by lease purchase agreements entered into between Smallman and Lombard. All costs in relation to the cars (including the cash deposits paid to Lombard, the servicing costs, the finance charges under the agreements with Lombard and the purchase option payments) were debited to the joint directors' loan account of BG and LG, which they maintained at all times with a credit balance. There was no marginal cost to the employer in the arrangement.

The judgment notes: 'The reason for doing things this way was to take advantage of the good finance rates offered by Lombard to SSL (presumably by reason of its financial standing and the established relationship with Lombard), which would not have been available to … private individuals. There was no evidence before us as to the actual amount of costs saved as a result of these arrangements (obviously the underlying purchase price of the cars was unaffected) but it was allegedly referred to by the appellants' accountants in correspondence as being "much cheaper".'

As there was no cost to the company, then you might be forgiven for thinking that there was no benefit in kind. Indeed, that is what was held in both *Apollo* and *Harrison Solway Logistics*. However, in *Smallman* the opposite was held. This is unpleasant for the directors/owners of Smallman, who now face a large potential tax bill; and also very unhelpful for the many other taxpayers who might inadvertently be doing something similar.

The law

Let us remind ourselves of some of the relevant legislation to be found in Income Tax (Earnings and Pensions) Act 2003 (ITEPA 2003). The general rule is that the cash equivalent of an employment-related benefit is the cost of the benefit less any part of that cost made good by the employee. However, there are special rules for cars.

The car benefit in kind rules are set out in ss 114 to 148 and commence:

Section 114: Cars, vans and related benefits

1. This Chapter applies to a car or a van in relation to a particular tax year if in that year the car or van—

> (a) is made available (without any transfer of the property in it) to an employee or a member of the employee's family or household…

In all the above tax cases, because the car was made available via the company, HMRC contended that the asset was within the punitive car benefit in kind rules. This thereby led to a significantly higher tax charge, as well as extra Class 1A and VAT recovery implications.

Other leading cases

In *Apollo Fuels*, the Court of Appeal agreed with the Upper and First-tier Tribunals that 'a charge to income tax arises under Chapter 6 only if the terms on which a car is leased to an employee confer a benefit on the employee in the ordinary sense of that word. The employees in this case received no such benefit'. Since the leases between the group and the employees were at arm's length, there was no benefit here.

A similar argument succeeded in *Harrison Solway Logistics*.

Following HMRC's loss at the Court of Appeal in *Apollo Fuels*, Parliament moved the goalposts in 2016 to ensure that bargains at arm's length would now be caught.

Legal change

Finance Act 2016 s 7(4) stipulated that the following text should be inserted in s 114 (cars, vans and related benefits to which Chapter 6 applies), after sub-s (1):

> '(1A): Where this Chapter applies to a car or van, the car or van is a benefit for the purposes of this Chapter (and accordingly it is immaterial whether the terms on which it is made available to the employee or member constitute a fair bargain).'

This change takes effect for the 2016/17 tax year onwards.

There is also no mention of grandfathering but if a fair bargain had already been struck before the 2016/17 tax year, then one should have sympathy for any taxpayer that had entered into an arrangement before the law changed.

The only exception to this new rule is where one has a leasing business and the car is provided to the employee on the same basis as a member of the public; otherwise any employee of Hertz or Europcar going on holiday to Spain for a week and hiring a car from their employer would be deemed to have a car benefit in kind for a week.

The 2016 changes also covered vans or living accommodation provided on an arm's length basis, such that those facilities would also be caught by the traditional benefit in kind rules, notwithstanding that there was a bargain at arm's length.

The *Smallman* case

The *Smallman* appeal covered 2011/12 to 2016/17 inclusive. Only one of those years is potentially affected by the new rules.

Smallman argued that if anything the cars were made available not by the employer but at the request and cost of the employees (who were also directors) themselves. The employer played no role other than administratively. Also, it might have been argued that the car was not made available by reason of employment.

Unfortunately, if any vehicle is made available to employees then under s 117(1) it is almost always automatically deemed to be made available by reason of employment. The judge also concluded that as the lease was in the name of the employer then, absent any other evidence, it had to be the employer that was making the car available.

Smallman's advocate argued that the employer was merely acting as agents of the directors, who were also shareholders. However, there was no evidence of this verbal agency agreement. Further, the judge confirmed that his view would have been the same even if there had been a formal agency agreement (i.e. that the company was acting only as agent for the individual directors). The car would still be regarded as being available by reason of employment.

Was there actually a benefit? This is the question that was addressed in the *Apollo* case. For periods after 2016/17, s 114(1A) renders the question irrelevant.

In *Smallman*, the period in question straddled the old and new rules. When considering the rules before 2016/17, the tribunal decided that there was some 'benefit' to the employees because HMRC argued that the taxpayers were able to get a better finance deal on the cars via the company than if they had leased the vehicle directly. The tribunal upheld the assessments for car benefit and associated Class 1A NICs. The tribunal did, however, rule that there was no carelessness on the part of the employer or employees. This meant that penalties were abated and the period of assessment was reduced from six years down to four years.

There was no discussion on whether the quantum of benefit was reduced by the amounts the employees had themselves paid in lease costs but one presumes that relief might be allowed as being a contribution for private use.

The case serves to illustrate the draconian nature of s 114 and the risks present if there is any arrangement, arm's length or not, involving the employer.

Obtain expert advice

The main takeout in this case is to obtain up to date advice from specialists – and not to assume that reimbursing costs eliminates the benefit in kind.

In some circumstances, there may be advantages in involving the employer in the commercial arrangement, namely where businesses implement salary sacrifice arrangements for cars with below 75g/km CO_2 emissions, so that the employee can avail themselves of preferential benefits in kind rates, particularly in relation to electric vehicles.

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Salaried partner, hidden tax charge

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Keith Gordon considers the Upper Tribunal's decision in a case looking at the employment status of a member of an LLP

KEY POINTS

- **What is the issue?**
The widely held view was that (at least until the introduction of a limited exception with effect from 6 April 2014) all LLP members are taxed as self-employed, even if (had the LLP been a traditional partnership) some of them would have been treated as employees for tax purposes.
- **What does it mean for me?**
The Limited Partnerships Act 2000 s 4(4) provides that an individual member of an LLP will not be regarded as employed by the LLP unless (assuming that the members of the LLP were in fact partners in a partnership) that individual would be an employee of the hypothetical partnership.
- **What can I take away?**
This case should focus the minds of those who advise partnerships and LLPs so as to ensure that, where there are different levels of partner within the organisation, the status of individuals at each level is as clear as it possibly can be.

It is probably a sign of my advancing years, but I still consider the advent of limited liability partnerships (LLPs) to be a relatively recent development in the world of work and the taxation of earnings. In fact, LLPs are just a few months short of their 21st birthday (April 2022), meaning that they will have been around for some 70% of my tax career so far. Despite the fact that LLPs are therefore an established and widely used form of business structure, some fundamental issues remain. This article concerns the question about the employment status of LLP members.

In what I tend to call 'traditional partnerships' (i.e. those governed by the Partnership Act 1890), there are broadly two classes of partner: the equity partner; and the salaried partner. Even though salaried partners are rarely entitled to a share of partnership surpluses, that does not necessarily preclude them from being sued by a creditor of the partnership. However, for tax purposes, it is generally accepted that only equity partners are taxed as self-employed. The mismatch might not always be too great, as an individual's true status will ultimately turn on the precise nature of the relationships. However, there remains the risk in practice that salaried partners are employees who might get sued for partnership debts.

It might be thought that the taxation of LLP members would operate on a similar basis. However, the widely held view was that (at least until the introduction of a limited exception with effect from 6 April 2014) all LLP members are taxed as self-employed, even if (had the LLP been a traditional partnership) some of them would have been treated as employees for tax purposes.

It is the correctness of this widely held view that lurks in the background of the case of *Wilson v HMRC* [2021] UKUT 239 (TCC).

The facts of the case

Mr Wilson qualified as a chartered accountant in Australia in 1975. In 2008, he was one of a number of individuals who set up a limited company which intended to acquire and operate London-based accountancy firms. In 2011, Mr Wilson and his fellow shareholders entered into discussions concerning the possible sale of the company to Haines Watts London LLP.

As a part of the sale negotiations, it was proposed to Mr Wilson that he continue to be employed via his limited company. However, Mr Wilson preferred a simpler arrangement going forward. Eventually, it was agreed that Mr Wilson should become a member of Haines Watts. Within Haines Watts, there were already two different classes of members, each with their own set of rights, responsibilities and rewards.

Mr Wilson initially became a member of the class who were 'required to devote the whole of their time and attention to client matters and the day-to-day management of the LLP business as requested by the [other class of] members'. Immediately afterwards (via a deed of variation of the LLP agreement), he then became what was known as a Fixed Income Member. By doing so, Mr Wilson lost a number of the voting rights otherwise available to his class of LLP members and also lost access to certain financial information relating to the LLP. He also became entitled to a basic income of £180,000 (subject to some potential adjustments), albeit not in any year in which Haines Watts made an overall accounting loss.

Initially, Mr Wilson completed his tax returns on the basis that he was liable to income tax on his share of partnership profits; however, in later years, he declared his income as employment income. HMRC determined that Mr Wilson was self-employed in respect of his work with Haines Watts. Mr Wilson appealed against the determination to the First-tier Tribunal and, when he lost that appeal, to the Upper Tribunal.

Before the Upper Tribunal, Mr Wilson advanced three grounds of appeal.

Ground 1 was an objection to the First-tier Tribunal's conclusion that the provision in the Income Tax (Trading and Other Income) Act 2005 s 863(1) acts as a deeming provision, so that all members of LLPs are taxed as if they were self-employed. In particular, Mr Wilson complained that the point had not even been aired before the First-tier Tribunal.

Ground 2 also concerned a point that Mr Wilson did not consider had been aired before the First-tier Tribunal. This was an objection to the First-tier Tribunal's conclusion that the Limited Liability Partnerships Act 2000 s 4(4) provides that a member of an LLP cannot also be an employee of the same LLP.

Ground 3 argued that the First-tier Tribunal had not given proper effect to the deed of variation which 'hollowed out' Mr Wilson's membership of the LLP, so that his relationship was in substance one of an employee.

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The Upper Tribunal's decision

The case came before Mr Justice Adam Johnson and Judge Jonathan Cannan.

In relation to Ground 1, the Upper Tribunal noted that there were conflicting pointers as to what the First-tier Tribunal actually thought about the effect of s 863(1). The decision under appeal certainly reads as if the First-tier Tribunal had considered that s 863(1) trumped everything else. However, when the First-tier Tribunal responded to Mr Wilson's application for permission to appeal (a necessary first stage before a case can progress to the Upper Tribunal), the First-tier Tribunal seemed to withdraw somewhat from that position and considered that s 863 applies only when there is 'substance' to an individual's membership of an LLP.

Despite the fact that LLPs are an established and widely used form of business structure, some fundamental issues remain.

However, ultimately, the Upper Tribunal considered Ground 1 to be academic. HMRC was seemingly not supporting the First-tier Tribunal's apparent view that s 863(1) trumps everything else and therefore the case turned on the substance of Mr Wilson's relationship with Haines Watts, which was the subject of Ground 3.

For similar reasons, the Upper Tribunal declined to resolve the dispute at the heart of Ground 2.

In relation to Ground 3, the First-tier Tribunal had recognised that Mr Wilson was not required to contribute to Haines Watts's capital and had no right to any surplus on a winding up of the LLP. However, the First-tier Tribunal also noted that Mr Wilson was not entirely disinterested in the LLP's profits (as his £180,000 fixed share was dependent on profits being made and he also had an underlying interest in the LLP's international tax practice which he was working in). For these reasons, the First-tier Tribunal had considered that Mr Wilson's membership of the LLP was not completely hollowed out.

Mr Wilson argued that the First-tier Tribunal had been swayed by the use of labels describing his position in Haines Watts, even though it had expressly acknowledged that the use of such labels is not determinative. However, the Upper Tribunal could see no evidence in the decision to suggest that the First-tier Tribunal had been influenced by the labels used when it proceeded to consider the substance of the relationship.

Furthermore, the Upper Tribunal refused to accept Mr Wilson's arguments that his status should be determined by reference to the usual *Ready-Mixed* test for employment (as discussed at length in my October 2021 article 'Our Mutual Friend'). Instead, the Upper Tribunal considered that, when addressing this point, the first question should be focused on the Limited Partnerships Act 2000 s 4(4).

Section 4(4) provides that an individual member of an LLP will not be regarded as employed by the LLP unless (now assuming that the members of the LLP were in fact partners in a partnership) that individual would be an employee of the hypothetical partnership.

The Upper Tribunal considered that there was sufficient basis for the First-tier Tribunal to have reached the conclusion that Mr Wilson was a 'partner' within that hypothetical partnership, carrying on a business in common with the other members of the LLP. In other words, despite the cut-down rights, Mr Wilson was more than a mere employee.

For these reasons, the Upper Tribunal dismissed the appeal.

Commentary

Given the dispute underlying Ground 1, the case illustrates how court and tribunal decisions can sometimes give a misleading impression of how facts and legal submissions were argued by the parties. Whilst judges invariably try to capture the flavour of the proceedings, it is inevitable that there is a slight mismatch between what actually happened and the picture that will be drawn from the decision. In my view, this will often occur when a judge is writing up his or her decision and starts to evaluate the legal position from a fresh perspective.

This might also explain the apparently different approaches taken to s 863(1) by the First-tier Tribunal. Indeed, I am not even sure that the differences are quite as stark as portrayed by the Upper Tribunal. Interestingly, the Upper Tribunal records HMRC as not arguing that s 863(1) determines the tax status of members of LLPs, even though I always understood that to be its position.

Reading between the lines, I think that the various positions can be reconciled. In cases where an individual's membership of an LLP is a sham (i.e. the LLP documentation is nothing short of fraud), s 863(1) will not bite. However, in all other cases (irrespective of the level of management participation by any particular individual member), s 863(1) will be determinative of the issue (at least until the 2014 changes came into force), meaning that the distinction between equity and salaried partners has no application in the case of LLPs.

However, because Ground 1 was not fully explored by the Upper Tribunal, we will probably have to await another case for a fuller analysis of the scope of s 863(1) (or at least hope that HMRC will issue a statement as to how it considers that s 863 operates).

Ground 2 concerned two conflicting decisions of the Court of Appeal and Supreme Court as to the meaning of the Limited Partnerships Act 2000 s 4(4). In *Tiffin v Lester Aldridge LLP* [2012] EWCA Civ 35, the Court of Appeal considered that the literal wording of s 4(4) led to an absurdity because partners cannot also be employees of their own partnership. However, in *Clyde & Co LLP v Bates van Winkelhof* [2014] UKSC 32, the Supreme Court resolved the apparent absurdity highlighted in *Tiffin* by noting that s 4(4) might have been worded as it is in order to deal with doubts as to the employment status of partners in a Scottish partnership.

However, once again, the point was not fully explored by the Upper Tribunal.

In Ground 3, the Upper Tribunal made useful reference to earlier cases that consider a partner's status, but making the necessary observation that each case turns on its own facts. Indeed, the Upper Tribunal's role is generally limited to ensuring that the First-tier Tribunal had correctly undertaken the evaluative exercise required to determine an individual's status; it is not necessary that the Upper Tribunal should reach the same conclusion had it carried out the exercise itself. Nevertheless, for good measure, the Upper Tribunal ended its decision by noting: 'Looking at the facts as a whole, we would have reached the same conclusion.'

What to do next

It is unlikely that this case will now progress to the Court of Appeal and, given the legal questions that remain unanswered, this is a shame.

However, the uncertainties that this case has highlighted should focus the minds of those who advise partnerships (and LLPs) so as to ensure that, where there are different levels of partner within the organisation, the status of individuals at each level is as clear as it possibly can be. Particularly in the case of a traditional partnership, such an exercise will be relevant not only for tax purposes.

The crypto revolution

Gary Ashford considers the various taxation issues that may arise in the fast evolving world of cryptocurrency

KEY POINTS

- **What is the issue?**
Since the introduction of bitcoin in 2009, there has been a proliferation of cryptocurrencies. Cryptoassets have grown by roughly 200% in 2021, from just under $800 billion to $2.3 trillion today.
- **What does it mean for me?**
Over the last year or so, a lot of work has been done by the UK and various other governments to determine what is necessary to 'regulate' a highly unregulated, and mushrooming, economic ecosystem.
- **What can I take away?**
HMRC has recently embarked on a new nudge campaign to advise some holders that it is aware of their crypto holdings, and that these may be taxable.

Many of those reading this article will have read about crypto and bitcoin, and may well have a strong opinion that this is a 'fad'. However, I believe that crypto is definitely not a fad, but will in fact form a very important part of the future fabric of our financial universe – although it may look quite different to the unregulated world we see at the moment.

Since the introduction of bitcoin in 2009, there has been a proliferation of cryptocurrencies. At a recent count, there are over 8,000! Sir John Cunliffe, Deputy Governor for Financial Stability at the Bank of England, confirmed on 13 October 2021 that cryptoassets have grown by roughly 200% in 2021, from just under $800 billion to $2.3 trillion today. Five years ago, the market was just $16 billion.

As someone who is doing a lot of work around the digital economy, including crypto assets, this article is drafted to provide a slightly broader perspective on the crypto landscape, whilst also, of course, focusing on some of the various taxation issues which are arising.

What is crypto?

Whilst the term 'currency' is often applied, most experts would confidently posit that none of the main currently recognised crypto amounts to a 'currency' or, indeed, digital money. Although it well predates crypto, one of the significant cases on this is *Moss v Hancock* [1899] 2 QB 111, which provides a definition of money as:

> '[T]hat which passes freely from hand to hand throughout the community in final discharge of debts and full payment for commodities, being accepted equally without reference to the character or credit of the person who offers it and without the intention of the person who receives it to consume it or to apply it to any other person other than in turn to tender it to others in discharge of debts or payment for commodities.'

Crypto assets, as we know them, still have some way to go to pass these tests, and so are not generally regarded as money. However, as many world central banks start to introduce their own digital currencies, I do think we will start to see some cryptos passing the tests of money.

Over the last year or so, a lot of work has been done by the UK and various other governments to determine this point, and what is necessary to 'regulate' a highly unregulated, and mushrooming, economic ecosystem. The UK government has introduced consultations on the regulatory approach to cryptoassets, including in the financial markets. The European Commission's Regulation of Markets in Crypto-assets (MiCA) proposal will soon introduce EU regulations on crypto.

In October 2018, the joint Bank of England, FCA and HM Treasury Crypto Assets Taskforce published a report in which

THE ORIGINS OF CRYPTOCURRENCY

Bitcoin was created by the elusive (or possibly non-existent) Satoshi Nakamoto, who in October 2008 issued a link to an online paper 'Bitcoin: A Peer to Peer Electronic Cash System'.

The main concept of Bitcoin when introduced was to create electronic money, and extinguish the risk of losing one's capital to financial institutions in distress. This was particularly relevant at the launch, given the backdrop of the Global Financial Crisis of 2007 and 2008.

Nakamoto released the Bitcoin code in January 2009. He did this 'open source', effectively giving the rights to use and distribute the code to anyone for any purpose.

Bitcoin was designed as a digital 'currency' and sits on a distributed ledger technology (DLT) blockchain. This effectively places it outside of the control of trusted third parties, such as banks, and relies on the 'proof of work' by peers in the network ('nodes'). Each time a transaction occurs, the nodes will essentially undertake a number of digital calculations. When complete, the transaction will be approved, by way of cancelling the previous 'blocks' and adding a new block (hence the name 'blockchain').

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they categorised crypto into securities tokens, exchange tokens and utility tokens, all with somewhat different features and roles. The report concluded that 'while distributed ledger technology is at an early stage of development, it has the potential to deliver significant benefits in financial services and other sectors in the future'.

Legal status of crypto

If advising on crypto, it is important to understand what it is, and its legal status. The digital economy and the role of intangibles is always complex, particularly when seeking to apply the correct tax analysis. Fortunately, various legal disputes have been addressed in the courts (mainly because bitcoin has significantly increased in value).

The UK Jurisdiction Taskforce has also published a 'Legal statement on the status of cryptoassets and smart contracts', which aimed to answer some of the critical legal questions regarding crypto and provide some certainty in its use. It concluded that cryptoassets have all of the indicia of property, and that the novel or distinctive features possessed by cryptoassets, such as intangibility or decentralisation, do not disqualify them from being property.

The recent proprietary injunction cases of *Robertson v Persons Unknown* (unreported) and *AA v Persons Unknown* [2019] EWHC 3556 in part sought to determine the nature of crypto, and whether the relevant legal rules for such injunctions could apply on the basis of whether crypto amounted to property. Applying the relevant historic case law, particularly *National Provincial Bank v Ainsworth* [1965] AC 1175, it was deemed to be the case that crypto (in the form of bitcoin) amounts to property, on the basis that it holds the characteristics of property in being definable, identifiable by third parties, capable in its nature of assumption by third parties, and has some degree of permanence or stability.

Taxation

And so to the taxation of crypto. This article mainly focuses on the role of exchange tokens and utility tokens, but in reference to the UK employment related securities rules, securities tokens are also in point.

HMRC issued its Cryptoassets Manual on the tax treatment of cryptoassets (see bit.ly/3cGQ5v3), and I have had the pleasure of assisting HMRC in this as part of my representative role for the CIOT. The Manual replaces less comprehensive HMRC guidance published in 2014.

As with everything digital, guidance will need to be updated on a regular basis due to ongoing and quick moving developments. In particular, decentralised finance (DeFi) will need to be incorporated, and most likely cross referenced with HMRC's other guidance manuals, in particular the Corporate Finance Manual.

Taking into account the complexity around intangibles, the writer feels that before applying any calculations around crypto, an understanding of the facts is particularly important. The 'substance over form doctrine' may well be important, and care should be taken to determine whether there is any associated contract. This is particularly important for utility tokens, such as non-fungible tokens.

Personal taxation

Currently, most tax advisers will be seeing individuals who are holding or disposing of crypto portfolios. The legal interpretation of crypto as property is extremely useful, particularly in the area of bitcoin (and many other cryptos, such as Ethereum) held for investment purposes, on the basis that the crypto amounts to a store of value.

The main tax head is capital gains tax, which many will already recognise charges by way of Taxation of Chargeable Gains 1992 s 21 'all forms of property … whether situated in the United Kingdom or not', which 'shall be treated as assets for the purposes of this Act'.

If within the sphere of capital gains tax, one also has to look at the computational mechanics. This may bring you to the share pooling rules, depending on the factual circumstances of the relevant crypto.

Section 104(3)(ii) extends the share pooling rules relating to company shares and securities to 'any other assets where they are of a nature to be dealt in without identifying the particular assets disposed of or acquired'. The effect of this is that if a client is holding one or more types of crypto for investment purposes, the pooling approach will be required. Each type of token will need its own pool, and acquisition and disposal activity for each will need to be matched to the same day rule, the 30 day rule and the 'section 104 pool'.

Often confusing is the concept that moving from one crypto to another will most likely (but not always) amount to a disposal and acquisition for capital gains tax purposes. Part of the challenge presented by crypto is the way it will sit within an individual DLT [blockchain].

Tax advisers will also be faced with a dictionary of many new terms, such as mining, staking, airdrops, forks and soft forks. I do not have enough space to consider the taxation implications of such matters, but the key is to fully understand the facts. HMRC's guidance is particularly helpful on many of these matters.

Income tax

As mentioned above, many will have read in the press about references to 'mining' and 'miners.' Due to the way in which bitcoin (and other similar coins or tokens) was originally constructed, the Proof of Work (PoW) mechanism is necessary for the creation of new crypto (via the cancellation of old and creation of new blocks). Digital 'work' therefore needs to be done as part of maintaining the ecosystem.

This again can cause confusion, on many sides. Tax advisers and tax authorities will often pick up on the word 'work' and start to think about trading and income tax. However, it is always important to remember that this is a phrase of those within the ecosystem, and doesn't automatically lead to 'work' in the more traditional sense.

That said, an analysis of the facts or a review of contractual obligations is important to determine whether work is being undertaken in the more traditional framework, as there may be a trading issue. It is worth always remembering the badges of trade as set out in the 1955 report by the Royal Commission on the Taxation of Profits and Income: profit seeking motive; the number of transactions; the nature of the asset; changes to the asset; the nature of sale; the application of finance, and so on.

It is also important to better understand some of the ways the crypto ecosystem and wider digital economy operates. For example, in an 'airdrop' an individual may receive a free allocation of crypto, perhaps as part of a digital marketing campaign. There could be circumstances in which airdrops are taxable, again dependent on historic principles.

One of the controversial tax aspects of crypto at present is HMRC's guidance on the location (or situs) of cryptoassets for tax purposes (see CRYPT022600 at bit.ly/3l0MCvK). For tax advisers with clients claiming the non-domicile remittance basis, this is a real challenge. HMRC's view is that the location of the cryptoasset will be determined by the residency of the beneficial owner (and thus will be in the UK where the owner is UK resident). This is essentially on the basis that the private keys (a security element necessary for users to access their cryptocurrency) are under the user's control wherever they are.

The writer has seen varying alternative analyses of this. Again, the important thing will be to fully understand all the facts. For example, if the UK resident has no access to or knowledge of the private keys, then the situs might well be different. However, an obvious challenge is how can one know 'what is in the head of another'! This is a challenge we will see more and more in the digital world. We may well need to have new rules for such matters.

Employment taxes

As the crypto market develops, some businesses will seek to pay their employees in crypto or even incentivise them with crypto. Depending on how the business or company is structured, there could well be employment related securities issues (ITEPA 2003 Chapter 7), and possibly PAYE and NIC implications, if the crypto amounts to a readily convertible asset. Whether or not there is an employment related securities point, simple payment of employees in crypto will simply trigger PAYE and NIC liabilities, as general earnings (ITEPA 2003 s 7).

Tax evasion

There has been much publicity surrounding the risk of crypto in terms of money laundering and the role it can play in tax evasion. While some non-compliance will be because holders of crypto not have been aware that certain crypto transactions are taxable, there will also be elements of tax evasion. Tax advisers must undertake the necessary precautions to identify this, and fully comply with the anti-money laundering obligations, and good ethical practice, in terms of their relationship with HMRC.

We are starting to see many digital businesses offering crypto tax calculations. It is important to be aware of the changes introduced to the UK anti-money laundering rules by virtue of the Money Laundering and Terrorist Financing (Amendment) Regulations 2019, which broadened the rules to those providing 'material aid, or assistance or advice, in connection with the tax affairs of other persons, whether provided directly or through a third party'.

If there is an element of deliberate behaviour and the risk of an HMRC criminal investigation, it may be appropriate to advise the client to avail themselves of the protective benefits of the Contractual Disclosure Facility (Code of Practice 9).

HMRC has been increasingly concerned about the tax lost on cryptocurrency, and very keen to counter the risk of non-compliance. Tax advisers will be aware that HMRC has recently embarked on a new nudge campaign to advise some holders that it is aware of their crypto holdings, and that these holdings may be taxable.

HMRC has been using its bulk data information powers (FA 2011 Schedule 23) to secure personal information from a number of the crypto exchanges.

Corporate transactions

Crypto is also an increasing part of the corporate landscape, and it is always important to remember that the corporation tax rules contain various provisions which might apply.

Corporation tax incorporates corporate capital gains, but there are also special rules for loan relationships, intangible assets and derivatives, many of them introduced in 2002, well before crypto. As well as considering the legal and contractual substance to any crypto transactions or holdings, take into account the relevant accounting treatment. For example, how crypto is treated on the company balance sheet may well have a significant impact on the resulting tax position.

VAT

The substance and form of any crypto transactions is just as important for VAT purposes. Some non-fungible tokens, for example, will amount to utility tokens and amount to a provision or future of services, or possibly even trigger the VAT vouchers rules. It will be important to understand exactly what is being offered or provided, often set out in an associated contract or digital terms and conditions in a smart contract.

Decentralised finance

Decentralised finance (or DeFi) is growing very quickly. In the statement by Sir John Cunliffe referenced above, he said that in terms of value it was less than $10 billion at the start of 2020 and nearly $100 billion in September 2021. Currently around half of the DeFi market involves the offering and provision of debt, often where the holders of crypto offer some of their portfolio as collateral. One can see many new financial instruments being created, and we will need rules to fully account for these.

The majority of this market remains unregulated, so it does carry some risk to the health of the wider financial economy. I would expect the DeFi market to become very regulated quite soon.

Particularly in the case of corporation tax, DeFi debt or derivative type arrangements may well trigger some of the corporate tax provisions mentioned above.

In conclusion

We should anticipate significant change to the way financial services are provided in the next decade. Crypto is a part of this, and the term will likely develop, or even be replaced by another in the years ahead.

However, we are already seeing central banks looking to introduce their own digital currencies. This is clearly an indication that they see crypto, in some shape or form, remaining and growing in the years ahead.

Finally, I couldn't end this article without mentioning the environmental impacts of cryptocurrency. According to the Cambridge Bitcoin Electricity Consumption Index, the energy used is now equivalent to the annual carbon footprint of Argentina. If crypto is to become an integral part of our digital world, then the only answer is for clean technologies. I already see many blockchain companies moving from Proof of Work mining to greener Proof of Stake approaches, and also can see a desire of those in the crypto world to find wider clean solutions.

Here's to (the digital) revolution…

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A special relationship

Jonathan Schwarz considers the significance and idiosyncrasies of the US-UK tax treaties

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The importance of tax treaties between the UK and the United States cannot be underestimated. The US has been the single largest source of foreign direct investment into the UK for decades and the UK is similarly the second biggest direct investor into the United States. The US is also the UK's second largest trading partner.

As with all tax treaties, these treaties are best understood in the context of the tax and legal systems of the two countries. Double tax treaties between these two countries date back to 1945. The 1945 comprehensive income tax treaty was first replaced in 1975, and subsequently with the current treaty on income and capital gains that was concluded in 2001 and amended by protocol in 2002.

Very long gaps between the renegotiation of this important treaty relationship mean that the current treaty is applied in a very different tax environment of the domestic tax laws of the two countries from that which applied when the treaty was concluded. Some new taxes, such as the digital services tax, are designed to operate outside the treaty. The US is not a party to the OECD BEPS Multilateral Instrument. The US-UK treaty does not benefit from arbitration provided in Part VI of the Multilateral Instrument, despite the fact that both states favour arbitration as a dispute resolution mechanism.

That said, the US has frequently led the way in thinking about double tax treaties. For example, the treatment of fiscally transparent entities in Article 1(8) only appeared in 2017 in the Multilateral Instrument (as Article 3(1)) and the OECD Model (as Article 1(2)).

Despite this, difficulties continue in the UK with fiscally transparent US entities, such as limited liability companies, as demonstrated by the Supreme Court ruling in *Anson v HMRC* [2015] STC 1777, a decision which HMRC apparently still does not accept, other than in relation to the specific facts of that case. Fiscally transparent entities for US tax purposes were also at the heart of *Bayfine UK v HMRC* [2011] STC 717, one of the leading cases on treaty abuse.

Residence of entities

Where an entity, such as a company, is resident in both contracting states for purposes of the treaty, there is no tie-breaker mechanism to resolve that dual residence. Instead, the competent authorities of the two states must endeavour to agree on how the treaty should apply to the entity.

If they are unable to agree (as happened recently in *G E Financial Investments Limited v HMRC* [2021] UKFTT 210), then the entity is only entitled to credit for some tax paid, as well as access to the dispute resolution and non-discrimination provisions of the treaty (Article 4(5).

In cases of non-agreement by the competent authorities, the UK must give credit for US tax paid by the entity on US source income. Thus, any tax payable on such income will be paid in the US and the UK will always be required to give double tax relief.

Personal taxation

The treaty provisions relating to the taxation of individuals are among the most complex found in UK treaties. The first source of complexity is the fact that the US taxes its citizens and Green Card holders on worldwide income, even if they are resident elsewhere. The result is that US persons living in the UK, or simply falling foul of the statutory residence test in Finance Act 2013 Sch 45, are automatically dual resident and, in principle, liable to tax on worldwide income in both the UK and the US.

Special provisions in Article 4 (Residence) are required to address this situation. Similarly, detailed provisions of Article 24 that deal with UK credit for US tax paid limit the scope of this relief in the case of US citizens and others who are taxed in a similar way in the US.

The second area where specific provisions are required is in relation to the UK treatment of resident but non-domiciled individuals. These are addressed by way of restrictions on the availability of treaty relief for UK remittance-based taxpayers in Article 1(7) and clarification of the domicile of women married before 1974 in Article 4(6).

Pensions

The treaty follows a common pattern in taxing pensions only in the state of residence of the pensioner, apart from lump-sum payments which are taxable only in the state where the pension schemes are established. Article 17 applies this treatment to all pensions and not just to pensions from employment. It also extends to annuities.

Cross-border pension arrangements are facilitated by rules that explicitly exempt beneficiaries of pension schemes established in one of the contracting states from tax in the state of the beneficiary's residence until payments are made to the beneficiary and then only as pension income. In addition, deductions for contributions to pension schemes established in the state other than where the beneficiary is resident are generally deductible on the same basis as contributions to a scheme in the same state as the beneficiary.

Complex rules address the position of US citizens and UK resident but not domiciled individuals in relation to cross-border pension arrangements (Article 18).

Treaty shopping

The US-UK Treaty was one of the first to adopt the US style limitation of benefits article that restricts treaty benefits to qualifying persons. Although included at the request of the US, it also applies to exclude UK benefits. This is illustrated by the Court of Appeal decision in *Aozora GMAC Investment Ltd, R (oAo) v HMRC* [2018] STC 11, where a UK resident company was denied relief from US withholding tax and thus paid full US tax on interest. The company was also disqualified from claiming credit under the treaty in the UK for any US tax.

Departure from the EU by the UK meant that a UK person could not qualify as an 'equivalent beneficiary' under Article 23(7)(d)). As a result, while the derivative benefits test in Article 23(3) would permit certain UK companies controlled by residents of an EU member state to qualify for treaty benefits, the same UK companies controlled by UK residents would not qualify. However, on 28 July 2021 the UK and the US competent authorities agreed that UK residents would be treated as residents of an EU member state for this purpose.

This agreement allows those UK companies controlled by UK residents now to qualify for treaty benefits. The agreement does not apply to companies in the remaining EU member states which are controlled by UK residents that before Brexit qualified for US treaty benefits under treaties between those states and the US.

Treaty interpretation

An Exchange of Notes agreed concurrently with the conclusion of the treaty in 2001 sets out extensive agreement on the interpretation and application of the treaty. This agreement has not, however, always been helpful in casting light on the more difficult questions of interpretation. *Macklin v HMRC* [2015] STC 1102 is an example of where the Upper Tribunal found exchange of notes to be inconclusive.

Differences in the approach of the courts in the two countries to the interpretation of treaties may give rise to inconsistent views. In the UK, the Vienna Convention on the Law of Treaties is clearly the cornerstone of tax treaty interpretation even though the US has signed, but not ratified, the Convention (*Anson v HMRC* [2015] STC 1777). UK courts have also rejected decisions of the US courts where the US court has relied on statements made by the US Treasury (the so-called executive preference) on the basis that such statements are unilateral and do not reflect the agreement of the two contracting states (*IRC v Commerzbank AG* [1990] STC 285).

Dispute resolution

Presenting a case under the mutual agreement procedure in Article 26 follows the traditional OECD approach. This treaty does not, however, include the BEPS minimum standard that permits a taxpayer to present the case in either state. Thus, a case can only be presented in the state of residence or nationality. Latest OECD statistics on mutual procedure cases (2019) show that nearly 120 non-transfer pricing and nearly 20 transfer pricing cases between the US and the UK were presented in 2019. In contrast, only about 70 non-transfer pricing and fewer than five transfer pricing cases were concluded by the competent authorities in that year.

The absence of binding mandatory arbitration found in more modern treaties, which permits a taxpayer to require arbitration, if the case is not resolved within two years of being presented, may contribute to the significant inventory of open cases.

Inheritance tax

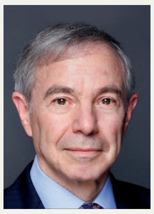
The United States is also a party to one of the few estate and gift tax treaties that the UK has concluded. The 1978 tax treaty on this topic limits the ability of the UK to impose inheritance tax and the US to impose federal estate and gift taxes, as well as providing for credit relief where such double taxation arises. This rather old atypical treaty contains its own particular provisions resolving fiscal domicile and allocating taxing rights between the two contracting states.

FATCA Agreement

The US-UK agreement to improve international tax compliance and to implement FATCA was concluded in 2014 to give effect to the US Foreign Account Tax Compliance Act of 2010. Many of its provisions have been replicated in the Common Reporting Standard given effect by other international instruments such as the EU Mutual Assistance Directive and the multilateral Convention on Administrative Cooperation.

The FATCA agreement is unique in that the detailed obligations on HMRC to exchange financial information and on financial institutions to collect and report such information are not reciprocated by the US.

PROFILE



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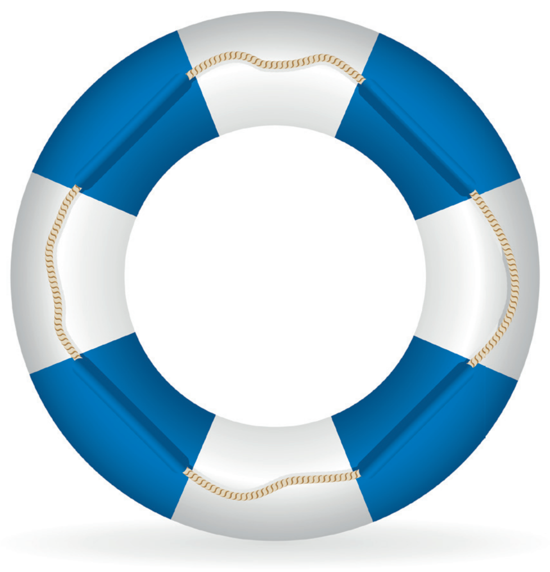

Decisions, decisions

Hui Ling McCarthy QC considers the different types of decision that can be made by a First-tier Tribunal, and whether advisers can benefit from unpublished decisions

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KEY POINTS

- **What is the issue?**
The First-tier Tribunal may issue a 'short decision', which simply records the decision and sets out any right of appeal. Otherwise, a decision notice must include either a summary of the findings of fact and the tribunal's reasons; or full written findings of fact and reasons.
- **What does it mean for me?**
As only full written findings are published, to what extent can parties rely on unpublished decisions?
- **What can I take away?**
Provided that your client agrees, and you are not contravening a privacy direction issued in the appeal, there are various options to make a summary decision more widely known.

A recent question from a CIOT member to the Tax Tribunal User Group prompted a discussion about the different types of decision that the First-tier Tribunal might release. This in turn raised issues about the publication of decisions, confidentiality and the extent to which others might rely on unpublished First-tier Tribunal decisions. This article addresses decisions which finally dispose of the appeal (different rules apply in relation to case management directions).

Different types of decision

First, it is useful to set out what the First-tier Tribunal (Tax Chamber) Rules (SI 2009/273) tell us. Rule 35 deals with decisions.

The tribunal may give a decision orally at a hearing (rule 35(1)). Usually, however, decisions are reserved and are communicated to the parties in a written decision notice some time after the hearing. If the parties agree, the tribunal may issue a 'short decision', which simply records the decision and sets out any right of appeal. Otherwise, a decision notice must include either a summary of the findings of fact and the tribunal's reasons (which I shall call a 'summary decision') or full written findings of fact and reasons (which I shall call a 'full decision') (rule 35(3)).

If a party receives only a summary decision, they may apply for a full decision and **must** apply for a full decision before making an application for permission to appeal (rule 35(4)). Such an application must be made within 28 days of the First-tier Tribunal sending the summary decision (rule 35(5)). If a party wishes to seek permission to appeal, they have 56 days after the First-tier Tribunal sends its full written reasons (rule 39(2)(a)).

The First-tier Tribunal's practice

Short decisions

There is no published guidance on the different types of decision that the First-tier Tribunal may issue. However, I understand that short decisions are encouraged in any case lasting a day or less, where the issues have been explored and the decision has been explained at the hearing. Parties will typically agree to a short decision if they accept the outcome of the appeal and neither side intends to appeal further. Short decisions are never published by the First-tier Tribunal – so this may be an incentive for a taxpayer in particular to consent.

If the parties do not agree to a short decision (or if the matter requires further consideration), it is up to the judge whether to issue a summary or a full decision. There is no rule one way or the other – it is a matter of judicial discretion.

Summary decisions

Summary decisions are useful in a case with straightforward issues of fact or law, which are unlikely to be appealed or to be of wider interest. For instance, a routine, low value penalty appeal where HMRC succeeds on a straightforward application of the law might be the sort of case which warrants a summary decision.

There is no rule that default paper cases (or any other proceedings decided on the papers) should attract only a summary decision, but it will typically be appropriate in that type of case. Like short decisions, summary decisions are also never published by the First-tier Tribunal.

Full decisions

Full decisions (as the name suggests) will usually be more detailed than summary decisions. They will typically be issued in more substantial or complex cases, if an appeal seems likely and/or if the point is of wider interest. All full decisions are published by the First-tier Tribunal unless the judge directs (very exceptionally) that it is not to be.

Publishing HMRC's losses

In the writer's view, the tribunal should think carefully before issuing a summary (and thus an unpublished) decision in any case that HMRC has lost. If one HMRC officer has an incorrect view of the law, it is unlikely to be an isolated incident.

Although First-tier Tribunal decisions are not binding, a published decision will be of material assistance to taxpayers with similar issues who are in correspondence with HMRC. If the issue is simple, HMRC should get things right without the need for taxpayers to have to appeal. If HMRC disagrees with the outcome, its solution should be to appeal – not to carry on as if the loss never happened (which is easier to do if nothing is in the public domain).

It seems to me that the merits of publishing HMRC losses outweigh any counterarguments. First, it might be said that a summary decision protects the taxpayer's privacy. But taxpayers have no expectation of privacy when appealing to the tribunal (apart from those rare cases where the tribunal directs a private hearing under rule 32 and/or makes some other order prohibiting disclosure or publication under rule 14).

Secondly, it might be said that a full decision is too time consuming if there is unlikely to be an appeal. But if it means that other taxpayers can settle their disputes with HMRC more efficiently, thereby reducing the total number of appeals before the First-tier Tribunal, then this is an overall saving of tribunal time (not to mention, of litigants' costs).

Finally, HMRC may be more likely to appeal a full decision than a summary decision, as it has been published. But as a summary decision should contain the most significant aspects of the tribunal's reasoning, further detail should be unlikely to impact materially HMRC's views about an appeal. HMRC should not be basing appeal decisions on whether its loss is in the public domain.

Incidentally, there is also a view that full decisions are becoming overly lengthy. A recent summary decision was 56 paragraphs long, which can be considered 'full' on any interpretation.

Relying on unpublished decisions

Can a party rely on an unpublished decision of the First-tier Tribunal? There is no express rule on this either way.

In *Ardmore v HMRC* [2014] UKFTT 453 (TC), the First-tier Tribunal prohibited HMRC from relying on an unpublished decision of a Special Commissioner. The tribunal noted at [19] that although decisions of the Special Commissioners were not binding, they did constitute persuasive authorities which would be expected to be followed by the First-tier Tribunal. However, as HMRC would always be a party to a tax appeal (and so would have access to all decisions whether published or not), the tribunal considered it would be unfair to permit HMRC to rely on an unpublished decision not freely available to the general taxpayer.

Ardmore, however, tells us nothing about whether it would be appropriate for a **taxpayer** to rely on an unpublished decision, were a helpful decision to be brought to his attention. Where the decision is truly just a 'summary', it is questionable what, if any, weight a future First-tier Tribunal might place on it, given its lack of detail. A fuller 'summary' decision, however, may well contain sufficient analysis to be of assistance in a later case.

Sharing success

What then can advisers do to bring useful summary decisions to the attention of the wider profession? Bearing in mind that summary decisions are never published by the First-tier Tribunal, the main advice is two-fold:

- Make sure there is no privacy direction in place (under either rule 14 or rule 32).
- Do nothing without your client's consent.

Provided that your client agrees, and you are not contravening a privacy direction issued in the appeal, there are various options to make a summary decision more widely known:

- There is nothing to prevent you from writing an article about it. For example, the unreported decision in *A Blue (UK) Ltd* (TC/2019/00187) has prompted (at least) two articles about the VAT treatment of sale and leaseback transactions following the CJEU's decision in *Mydibel v État Belge* (Case C-201/18) (see *Tax Journal* articles by Julie Green (2 September 2021) and Chris Nyland (15 October 2021)).
- There is also nothing preventing you from sharing a copy of the summary decision itself; e.g. on your firm's website or on LinkedIn.
- However, if your client has won it is not advisable to apply for a full decision, which will in turn be published by the First-tier Tribunal. This will in effect give HMRC extra time to decide whether or not to appeal. It is also possible that the content of a full decision *might* change HMRC's mind about appealing.

To be on the safe side, it is best not to write about or share a summary decision in your client's favour until the time for HMRC to appeal has expired. Needless to say, your client will not thank you if you take a step which inadvertently prompts HMRC to change its mind and appeal when it would not otherwise have done so!

PROFILE

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Profile Hui Ling McCarthy QC is a barrister and CEDR-accredited mediator at 11 New Square. She acts for corporate and private clients in all areas of tax law with an emphasis on corporate and international tax matters, VAT and SDLT, and has appeared in many of the leading cases in these areas in recent years. She chairs the CIOT's Dispute Resolution and Litigation Group and is a Fellow of the ATT.

Taking our share of responsibility

Glyn Fullelove shares his views on the crucial role of the tax charities and what we can all do to support them

The complexity of the tax system was brought home to me (again) when completing my own tax return recently. I now earn rather less than I did a few years ago, but last year I had two sources of current employment income, some deferred income from a previous employment and some self-employed income. I had a wealth of resources and my own professional experience, as well as some very good software, to help me navigate the preparation of my return. However, at various points I found myself wondering which box to tick and spent some time working out why my HMRC Personal Tax Account didn't match with my own records. This was a clear lesson that you do not have to be an additional rate taxpayer to have relatively complicated tax affairs, and that it does not take much to create a mismatch between HMRC's view and that of a taxpayer.

The tax charities are dealing with people who earn a lot less than I do, have no access to resources, and are often vulnerable and going through life-changing events, such as a bereavement or mental or physical illness. For them, the complexity of the regime is overwhelming.

A time of increasing complexity

We should reflect on why that complexity arises. It is easy to assume it is all the fault of the government drafting complicated legislation. But we live in an ever-changing world and tax rules, which were adequate and once appeared relatively straightforward, may not meet the needs of today. I am thinking particularly of the boundary between self-employment and employment, which has become increasingly blurred over the last couple of decades. Attempts to 'patch-up' the system, such as IR35, have created more complexity.

Moreover, in this area we have seen the rise of unscrupulous promoters of schemes – whilst the official term may be 'disguised remuneration', the way many lower-paid workers have been manipulated into using such schemes in recent years suggests a better description would be 'disguised tax avoidance schemes'. A sobering statistic from TaxAid is that 60% of people recently contacting them about the loan charge had incomes less than £20,000 a year, but their average debt was £56,000.

As well as tax rules not meeting the requirements of today, complexity can also arise from new tax legislation. How often have we, as tax professionals, pointed out that a new tax measure appears to affect a particular group of taxpayers unfairly, or that taxes a particular set of transactions in a way we do not see as sensible? This can often lead to a series of exceptions, then to anti-avoidance measures to stop the exceptions being abused, and much expanded and often difficult to interpret law.

This is not to say we should not seek to make tax law as equitable as it can be. However, we should recognise that there is often a choice between simplicity and fairness.

I am reminded of the story of the virtuous tax practitioner, who, on dying and finding themself at the gates of Heaven was told by St Peter that God would see them shortly; and, having lived a virtuous life, did they have anything they would like to ask of God? The tax practitioner said, 'Give my country a simple and fair tax system!' – to which St Peter replied, 'Not even God can grant you that.'

As practitioners, we should acknowledge that some of the complexity in the system results directly from attempts by some of our predecessors, including members of well-known accountancy and law firms, to devise arrangements for their clients which gave rise to tax outcomes contrary to what Parliament intended (and often contrary to what the man in the street would expect). The current Professional Conduct in relation to Taxation (PCRT) rules have moved us away from that type of advice, but it would be disingenuous of us to ignore what has gone before.

Our share of the responsibility

It is increasingly common to hear talk of the 'tax ecosystem' – made up of tax authorities, tax advisers and taxpayers. No part of the system is truly independent of the others and all must work well together if the system is to thrive. If I am right in my contention that complexity is inevitable in this ecosystem, then everyone in the system needs the right resources to help them to be compliant. By the way, in saying complexity is inevitable, I am not criticising the existence of the Office of Tax Simplification or its work – it simply means that the OTS will be an enduring part of the ecosystem.

In his interview in the September issue of *Tax Adviser*, Sir Edward Troup explained the work of the two tax charities, TaxAid and Tax Help for Older People. He also covered why we can't expect HMRC to sort out all the tax problems faced by vulnerable people and noted that the inherent complexities of the tax system provide challenges to many who turn to the charities for help.

As advisers we should recognise our share of responsibility for the complexity of the system, and that this leads to a share in the responsibility of ensuring those who cannot afford paid-for advice are provided with assistance. Currently, this need is best met through the tax charities. By supporting the charities, we as practitioners can help the most vulnerable in our society and meet the objective of all who need advice being provided with it.

This is a time of year when many of us make charitable gifts. Can I ask you to add the tax charities to your gift list this December? Especially helpful are regular monthly donations to the charities (gift-aided, of course). You can give via the Charities Aid Foundation at: cafdonate.cafonline.org/18211

I know that many of you will have already supported the charities in some way this year, so, to all readers of *Tax Adviser*, thank you for your support and please continue to support the tax charities!

PROFILE

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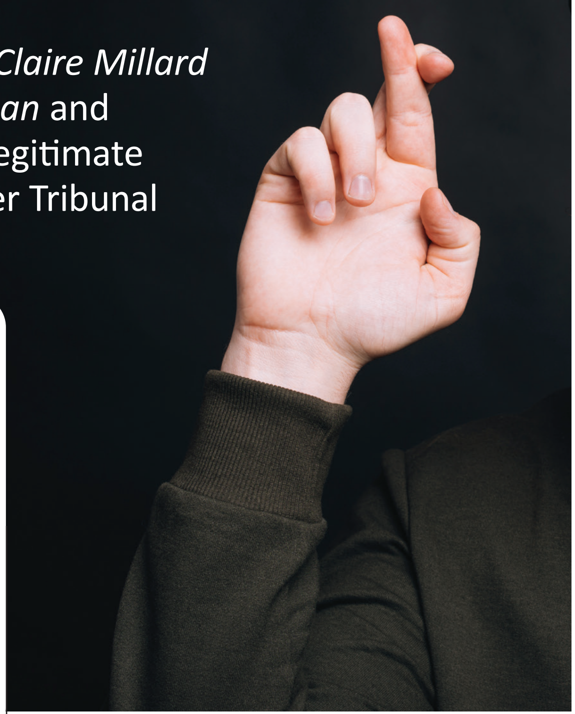
Legitimate expectations

Crystal Randles-Mills and *Claire Millard* consider *KSM Henryk Zeman* and how it relates to arguing legitimate expectation in the First-tier Tribunal



KEY POINTS

- **What is the issue?**
Public law covers the conduct of public authorities when acting in public functions. The most common claims made in tax matters are either that HMRC has not made a decision properly or that the taxpayer had a legitimate expectation that their affairs would be dealt with in a particular way.
- **What does it mean for me?**
The Upper Tribunal decision in *KSM Henryk Zeman v HMRC* reopens the door to the assertion of public law rights in FTT proceedings. This may provide taxpayers with a more streamlined, timely and cost effective approach to resolving certain disputes on public law grounds.
- **What can I take away?**
Going forward, taxpayers considering a public law challenge will need to carefully analyse the specific wording of the relevant sub-section under which an appeal may be brought before the FTT.

One of the longstanding issues in tax appeals concerns the jurisdiction of the First-tier Tax Tribunal. In some cases, taxpayers wish to claim that the tax authority, HM Revenue & Customs, has acted contrary to public law. Public law covers the conduct of public authorities when acting in public functions. The most common claims made in tax matters are either that HMRC has not made a decision properly or that the taxpayer had a legitimate expectation that their affairs would be dealt with in a particular way.

The way to challenge the actions of HMRC is to seek judicial review before the Administrative Court (part of the High Court). This is a problem, as it means that there are two separate appeal routes: to the Administrative Court to challenge the actions of HMRC on public law grounds; and to the First-tier Tribunal to appeal against a determination by HMRC. Employing both routes is costly and uncertain.

As a tribunal created by statute, the First-tier Tribunal has only those powers given to it by statute. These powers do not include a general ability to hear public law claims. However, there is a developing line of cases where the High Court and the Upper Tribunal have agreed (or disagreed) that the First-tier Tribunal may hear public law arguments in relation to particular statutory provisions. These arguments usually centre around whether the taxpayer has a 'legitimate expectation' that a certain tax treatment would apply.

The issue has a long history but had appeared largely settled following the Upper Tribunal decision in *HMRC v Abdul Noor* [2013] UKUT 71 (TC), with the conclusion that public law arguments in VAT cases fell only within the jurisdiction of the Administrative Court.

While the Upper Tribunal decision in *KSM Henryk Zeman SP Z.o.o. v HMRC* [2021] UKUT 182 (TCC) carries certain limitations, it reopens the door to the assertion of public law rights in FTT proceedings. This is a significant development, which may provide taxpayers with a more streamlined, timely and cost effective approach to resolving certain disputes on public law grounds – although general public law claims must go to the Administrative Court.

The history of public law arguments in the FTT

The Upper Tribunal in *KSM* fairly described the issue of the tribunal's jurisdiction to hear public law arguments as 'vexed', with a series of opposing, and seemingly irreconcilable, judgments.

In *Oxfam v HMRC* [2010] STC 686, the High Court (which at the time heard appeals from the VAT and Duties Tribunal (as it was) prior to the creation of the FTT and Upper Tribunal) held that the VAT and Duties Tribunal (now the FTT) had jurisdiction to determine a challenge on legitimate expectation grounds to an HMRC decision concerning input tax recovery. Section 83(1)(c) of the Value Added Tax Act 1994 permits an appeal to the FTT 'with respect to … the amount of any input tax which may be credited to a person'. The court held that the phrase 'with respect to' was wide enough to permit the FTT to consider any question relevant to determination of the taxpayer's entitlement to input tax recovery. Further, jurisdiction should be determined by reference to the subject matter (in this case, the amount of input tax repayable) and not the legal regime or type of law.

The High Court held that there was no presumption that public law issues were reserved to the Administrative Court by way of judicial review proceedings. Instead, any court or tribunal has jurisdiction to consider public law issues to the extent that they are relevant to determination of questions falling within their statutorily defined jurisdiction. No specific language to that effect was required within the relevant legislative provisions.

In *Noor*, the Upper Tribunal took an opposing view, in respect of the very same legislative provision. It disagreed with *Oxfam*, concluding that the term 'with respect to' was not wide enough to include any and all legal questions relevant to the amount of input tax recoverable. The Upper Tribunal reasoned that the FTT's jurisdiction under s 83(1) concerned rights and obligations under VAT legislation, and legitimate expectation is not a claim under that legislation. Further, s 83(1)(c) concerns, and is limited to, the amount of input tax repayable. A legitimate expectation could not impact on the amount of input tax, but rather whether (notwithstanding the proper

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VAT position) a repayment should nonetheless be made.

In *Gore v HMRC* [2014] UKFTT 908, the FTT held that it did not have jurisdiction to determine a challenge on the grounds of legitimate expectation under s 83(1)(p). This was on the basis that such jurisdiction would make the 'best judgment' requirement for assessments under s 73(1) – which allows a tribunal to consider the reasonableness of an officer's decision to assess – redundant. The FTT considered that the phrase 'with respect to' in s 83(1) was not wide enough to extend the FTT's jurisdiction to questions concerning HMRC's discretion in issuing an assessment; rather it was limited to determining whether an assessment was properly made under the VAT Act 1994.

The issues in *KSM*

KSM's appeal was concerned with whether statements made by HMRC gave rise to a legitimate expectation that KSM was not required to account for VAT on certain supplies, such that an assessment raised under VAT Act 1994 s 73(1) should be set aside.

On the facts, the Upper Tribunal decided that no legitimate expectation arose, and the assessment should stand. However, the judges nonetheless went on to set out in detail their views on the wider question of the FTT's jurisdiction to adjudicate upon public law arguments in principle and in this context.

VAT Act 1994 s 83(1) prescribes the matters in respect of which an appeal may be brought before the FTT. KSM's case concerned s 83(1)(p), whereby an appeal may be brought 'with respect to … an assessment under s 73(1) … or the amount of such an assessment'. Section 73(1) provides that, where certain circumstances exist, HMRC 'may assess the amount of VAT due from [the taxpayer] to the best of their judgment and notify it to him'.

HMRC argued that, as the FTT is a 'creature of statute', its jurisdiction must be established from the proper construction of the provision conferring the relevant jurisdiction upon it (in this case s 83(1)(p)). HMRC's view was that s 83(1)(p) did not confer jurisdiction to challenge an assessment on public law grounds, and therefore KSM was not permitted to rely on any legitimate expectation in FTT proceedings.

KSM argued that the FTT's jurisdiction is not limited to that bestowed by statute. Instead, common law principles should be assumed to sit behind the specific legislative provisions, with the result that the FTT is implicitly bound by public law principles and no explicit legislative language to this effect is required. If a decision of HMRC is contrary to public law, and in consequence ultra vires, the FTT must recognise the nullity of that decision.

The decision in *KSM*

The Upper Tribunal reiterated the established position that the FTT has no general supervisory jurisdiction (i.e. the power to review and re-make HMRC decisions on public law grounds). However, it took the view that it does not automatically follow that the FTT has no jurisdiction to hear challenges brought on public law grounds in respect of specific decisions.

First, it was necessary for the Upper Tribunal to consider the operation, in these circumstances, of the 'exclusivity principle' (the principle that public law arguments should only be heard by the Administrative Court, by way of judicial review). The Upper Tribunal referred to the Court of Appeal's decision in the recent case of *Beadle v HMRC* [2020] EWCA Civ 562. In that case, the court held that where a public body brings enforcement action against a person in a court or tribunal, the rule of law and fairness require that the person in question is entitled to defend themselves by challenging the enforcement decision on public law grounds. An exception to this would arise only where the relevant statutory scheme explicitly, or by clear and necessary implication, excluded such a challenge.

In an appeal against a VAT assessment, the Upper Tribunal in *KSM* considered that a taxpayer was, in substance, defending against enforcement action brought by HMRC. Accordingly, following *Beadle*, the Upper Tribunal concluded that the starting point is that a public law challenge against an assessment is within the jurisdiction of the FTT, unless the relevant statutory scheme provides otherwise.

Turning to the construction of s 83(1)(p), and whether it excludes from the FTT's jurisdiction public law challenges, the Upper Tribunal noted that such construction must be conducted in the context of other statutory provisions to which that jurisdiction relates. Accordingly, in this case, the wording of both s 83(1)(p) (the provision giving the tribunal the jurisdiction to hear appeals relating to assessments) and s 73(1) (the provision giving HMRC the power to raise an assessment) was relevant.

The tribunal agreed with the conclusion in *Oxfam* that the ordinary and natural meaning of the phrase 'with respect to' at s 83(1) requires that the scope of the FTT's jurisdiction be determined by reference to the subject matter of the sub-section in question, not the particular legal regime or type of law. The subject matter of s 83(1)(p) is an assessment or the amount of an assessment to VAT. It is clear from the permissive nature of HMRC's power to assess under s 73(1) ('they may assess the amount of VAT due') that, in order for there to be an assessment, HMRC must have made a decision that there should be one.

Given that an assessment is therefore an exercise of HMRC's discretion, and legitimate expectation in this context concerns the question of whether a decision to assess should or should not have been made, the Upper Tribunal held that it is difficult to see how the legislation excluded a taxpayer challenge to an assessment on legitimate expectation grounds.

Further, it noted that HMRC's position would require a distinction to be drawn between a decision to assess (in respect of which, according to HMRC, the FTT would not have jurisdiction) and the process of deciding to assess by reference to best judgment (in respect of which the FTT clearly did have jurisdiction). The Upper Tribunal considered that the legislation could not be readily interpreted to support that proposition and voiced its concerns as to the workability of such a conclusion in practice.

Finally, the Upper Tribunal noted a number of factors which supported a conclusion that it was in both the public interest and the interests of justice for the FTT's jurisdiction to extend to public law arguments, where appropriate. These included:

- the risk of duplication, delay and injustice that may arise where there is potential for dispute over the correct forum for a particular challenge;
- the difficulty and expense of bringing a judicial review and the risk of injustice in respect of the ability of a private person to enforce their rights if that is the only action available to them;
- the fact that FTT proceedings, encompassing determination of associated public law arguments, are likely to produce certainty on the final tax position at an earlier stage than a judicial review; and
- the fact that there is no wider public significance to an FTT decision in respect of a particular taxpayer's circumstances, on the basis that decisions of the FTT are not binding in future cases.

Accordingly, the Upper Tribunal concluded that: 'We do not consider that s 83(1)(p) does exclude that ability [to bring a challenge on legitimate expectation grounds before the FTT]. On the contrary, on the facts of this case and given the broad subject matter of s 83(1)(p), we see strong reasons for thinking that it would be artificial and unworkable to exclude a defence based on the public law principle of legitimate expectation from the tribunal's appellate jurisdiction. We therefore consider that the FTT did have jurisdiction to determine that question in this case.'

Implications

While this is a welcome development for taxpayers, the decision in *KSM* should not be construed as negating the role of judicial review in the Administrative Court in VAT and other tax disputes where the taxpayer considers that public law arguments are in play (i.e. those that address the apparent 'fairness' of an HMRC decision beyond the tax technical position).

The Upper Tribunal specifically noted that the bases for appeal set out in VATA 1994 s 83(1) are expressed differently, and that cases will differ depending on the specific statutory language in question. The analysis, however, clearly conceived that there would be circumstances in which that language excluded a taxpayer's right to plead public law arguments in the FTT but that regard must be had to the relevant statutory provision giving the FTT jurisdiction.

Notably, while the Upper Tribunal agreed with the analysis of the High Court in *Oxfam* as to the scope of the term 'with respect to', it did not specifically comment on the subsequent conclusion in *Noor* that public law grounds could not be raised under s 83(1)(c). Instead, the Upper Tribunal noted that the scope of s 83(1)(p) is wider than that of s 83(1)(c), providing a basis on which future tribunals may conceivably conclude that the outcomes in both *Noor* and *KSM* are correct, and reconcilable with one another.

Going forward, taxpayers considering a public law challenge will need to carefully analyse the specific wording of the relevant sub-section under which an appeal may be brought before the FTT. In light of *KSM*, the key question will be to consider whether the wording and context of that provision excludes (explicitly or by implication) from the FTT's jurisdiction a challenge brought on public law grounds. Where any uncertainty remains, a taxpayer would be well advised to continue to bring an application for judicial review in parallel to any appeal, to protect its position.

It is not yet known whether HMRC will appeal the *KSM* decision (which is unlikely, given that the judgment was in favour of HMRC). In any event, and notwithstanding that this decision is binding on at least the FTT, it is likely that this will continue to be an evolving area of law.

The buying game

Karen Eckstein considers the risks and opportunities you may not have thought of when buying or selling a professional services firm

KEY POINTS

- **What is the issue?**
A business acquisition would allow the purchaser to access the target firm's client base; access individual employees within the target firm; access practice areas within the target firm; grow within a particular location; and accelerate growth and benefit from economies of scale.
- **What does it mean for me?**
The seller clearly wants to maximise the potential return and minimise the potential claims that would be made under any warranties or indemnities that they may be asked to provide in the transaction.
- **What can I take away?**
A detailed and analytical review of the target practice's risk management environment can be extremely useful, considering the processes and systems it has in place, its culture and its risk maturity, together with an analysis of its practice areas and their particular risk profile.

The professional indemnity insurance market is currently very hard, and many professionals are struggling to find insurance cover on affordable terms. There is a limited number of insurers who are prepared to insure tax advisors, as there is a perception in the market that the work carried out by tax advisors is inherently risky. Insurers have been extremely wary of anybody who has a history of introducing tax schemes to clients.

There is some hope as a result of the recent success in *Knights v Townsend Harrison Ltd* [2021] EWHC 2563 (QB), which explored the extent of the duty of care owed by introducers to tax schemes and which dismissed claims by claimants who allegedly suffered losses as a result. However, success in any case is fact specific, and the courts will look at the specific duties adopted by the advisors in each case. It is likely that insurers will remain wary of anyone with a history of introducing tax schemes to their clients.

Advisers who are struggling to obtain cover at all or on affordable terms therefore need to consider options to enable them to continue in business. One option could be to obtain a detailed review of their claims history and their tax scheme activities so that these can be analysed and the risk assessed and quantified. This can then be reported and explained to insurers and hopefully cover obtained on better terms.

Reasons for sale and acquisition

An alternative option is to find a purchaser for their business, or to purchase other businesses in the hope that the larger entity is more attractive to insurers.

Other reasons for selling a business might be because the owner is coming up for retirement, or because their business has been profitable in recent years and the owner wants to capitalise on that recent profitable period.

Many businesses are currently acquisitive because of the low cost of borrowing. Clearly, purchasing an existing business is a quicker way of expanding into a new area (whether that be a new practice area or geographic location, or both) and can be cheaper and less risky than recruiting specific individuals. Of course, one acquires the client base at the same time. There are also economies of scale to be taken into account and, from an insurance perspective, riskier practice areas may form a lower percentage of the overall business. So there are lots of reasons why growth by acquisition is attractive.

Preparing for sale

So what things does a seller need to think about when preparing for sale? Clearly, the seller will want to maximise the potential pay out and minimise potential liabilities. Advisers can contribute towards preparing a business for sale, through improving overall profitability, margins and cash flow . They can also advise on the commercial terms, including warranties and indemnities.

What is rarely considered is the risk of potential negligence claims and their root cause. Sellers should ask whether the claims and activities analysis referred to above could help to increase the sale price and reduce the warranties and indemnities, as well as reducing any escrow payment required. The report would go to the causes of potential claims, their value and possible defences. It would consider whether processes are in place to prevent any new claims arising from those causes and provide a valuation of risk.

If risk improvements were implemented before sale (and demonstrated in an updated report) the saleability would be enhanced and business value increased. It should also limit the likelihood of claims arising under which any warranties or indemnities or escrow payment should be required.

Splitting up the business

An alternative step that the seller could consider is hiving off an area of the practice known to be unattractive to purchasers, which would drive down the overall sale price. That separate area could be retained by the seller, and enhanced procedures and processes put in place to improve risk management performance. This could mean

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THE NEED FOR STRINGENT REVIEW

Firm A purchased Firm B, which has a large number of tax return clients. The transaction completes on 15 January. After completion, Firm A discovers that 200 tax returns for private clients have not been prepared – the questionnaires have not been returned by the clients, and it is impossible for them to be completed by the end of the month.

These tax returns were not overdue when the transaction completed, and so did not fall within the warranties and indemnities in the agreement. However, Firm B had no terms in its engagement letter requiring clients to submit the information by a specific deadline and had no diary system to chase clients. Claims arose because the clients' tax returns went in late, losing claims for substantial tax reliefs. The liability caps in the engagement letters were too low, so were struck out, meaning that substantial claims arose which the firm had to meet.

Had a review been undertaken of Firm B's processes and systems and engagement letters, Firm A would have been prepared. It could have ensured that appropriate warranties and indemnities covered the situation, and that appropriate terms were added in their engagement letters, preventing the client problems arising in the first place.

that insurance can be obtained on better terms than previously before the seller then decides to close that aspect of the business. Run off cover is based on the premiums charged in the latter years of business, so this in turn should impact on those costs. Again, this needs to be considered significantly in advance of sale, securing the advice of expert professional indemnity brokers and commercial advisors, as well as risk management experts.

Before deciding on these steps, a risk management report should be commissioned relating to both aspects of the business. This should consider the risk management processes and systems, the value of potential claims arising, the defences to those claims, and the improvements that could be put in place in those practice areas. This report could then provide insurers with the quantified estimate of potential liability, allowing them to provide an insurance quote for each element of the business, helping the potential seller to make informed decisions as to the way forward.

This report would make the saleable element of the business more valuable, as it should have a lower risk attached to it. It would also enable the seller to determine an exit route for the less saleable element of the business.

Even if the seller did not decide to carve out the less attractive element of the business and wanted to sell the business as a whole, the report should assist in making the business as a whole more attractive. The entirety of the risk management processes and systems will have been reviewed, and the problems within the business identified. Root causes of claims and notifications can identify weaknesses within the business to determine the improvements needed prior to sale, thus increasing the sale value.

The purchaser's perspective

As mentioned above, the purchaser may be motivated to buy a professional services firm for a range of reasons, including acquiring an additional client base with additional employees, adding new locations or practice areas, and potentially benefiting from economies of scale.

Many people think that purchasing an existing business in a new location is less risky than a start-up. However, they overlook the fact that there may well be skeletons lurking in the cupboard. Existing businesses may have historic problems – caused by difficulties in certain practice areas, by certain individuals, by process failures or by the business culture. The unwary purchaser may find that the fantastic bargain it has made turns out to be a very expensive purchase.

Purchasers looking to buy a professional services business will usually only undertake due diligence to work out what the business is worth, looking at the assets and liabilities of the business, its financial management and legal structure. Due diligence usually considers the property, assets, staff and litigation the business is currently embroiled in. An analysis of cash flow might be undertaken and the purchaser might look at the target firm's claims history, but it is rare that any detailed analysis is undertaken.

In summary

A detailed and analytical review of the target practice's risk management environment can be extremely useful, considering its processes and systems, its culture and its risk maturity, together with an analysis of its practice areas and their particular risk profile. Combining this with a legal analysis of files (on a sample basis) to consider any potential claims can help to determine the way forward in negotiations.

It will help the purchaser to negotiate the appropriate warranties and indemnities, and to agree an escrow account into which funds can be placed and released as the risk reduces on an ongoing basis. Just as importantly, the purchaser will be aware of any shortcomings in the risk management processes and can correct those immediately following purchase to avoid new claims arising in that area. This, of course, allows the prevention of claims arising in the new combined business. It also allows for a speedier integration of the two businesses, an additional important benefit not to be overlooked.

Will it be a safe landing?

Helen McGhee and *Tom O'Reilly* consider the Court of Appeal's judgment in the *Fisher* case and how it is likely to impact the rules on transfer of assets abroad

KEY POINTS

- **What is the issue?**
On 6 October 2021, the Court of Appeal handed down its hotly anticipated judgment in *HMRC v Fisher and others* [2021] EWCA Civ 1438. The case considers various aspects of the application of the complex transfer of assets abroad legislation, and how the rules applied to the transfer of a UK telebetting business to a company in Gibraltar.
- **What does it mean to me?**
The Court of Appeal decided that the transfer of assets abroad rules may be invoked where the transfer is procured by a minority shareholder voting in favour of a course of action. It is also clear from the judgment that the motive defence is lost if any commercial rationale is too closely linked to a tax mitigation objective.
- **What can I take away?**
If practitioners are actively pursuing any of the arguments which were the subject of discussion in the Court of Appeal in *Fisher*, they might be well advised to pause and await an almost inevitable appeal to the Supreme Court. This might offer some much needed finality and clear limits to the scope of the potentially very far reaching transfer of assets abroad code.

The transfer of assets abroad provisions exist to counteract tax avoidance achieved by means of a relevant transaction which results in income becoming payable to a person abroad by virtue of a transfer of assets. Where the transfer of assets abroad code applies, it operates to treat income arising to the person abroad as belonging for UK tax purposes to any UK resident individual responsible for the original transfer of assets to a non-UK person.

In the case of *HMRC v Fisher and others* [2021] EWCA Civ 1438, the Court of Appeal allowed HMRC's appeal and reversed the decision of the Upper Tribunal, ruling (subject to a convincing dissenting judgment from Philips LJ) that:

- the transfer of assets abroad anti-avoidance legislation was indeed triggered;
- the motive defence was not available; and
- EU law did not offer any respite for the taxpayers.

The story so far

The facts of the case have been rehearsed previously in the *Tax Adviser* article 'All Bets Are Off' (June 2020). To briefly set the scene, the case concerned the Fisher family, who consisted of four members – Stephen, Anne, Peter and Dianne. From the late 1980s until 1999, the family ran a telebetting business (SJA) in the UK through a UK company.

The patriarch Stephen dealt with the shops and administration, and had overall responsibility for the company. He and his son Peter were responsible for the day to day running of the business, future planning and strategy, and they made the majority of the decisions. Dianne worked on accounts administration, while the matriarch, Anne, had virtually nothing to do with the business from 1996 onwards and played no active part in the company's decision making processes. No assessments were raised on Dianne as she had not been UK resident at the relevant time.

In 1999, a major competitor in the betting industry moved its entire betting operation to Gibraltar, which charged a much lower rate of betting duty. The entire industry quickly followed and by July 1999, it had become clear that the only way in which to save the business would be to move it to Gibraltar.

On 29 February 2000, the majority of the SJA business was sold to a Gibraltar company which was also owned by the family (SJG). On the date of the transfer, Stephen and Anne held approximately 38% of the shares of SJA and Peter and Dianne each held approximately 12%. Following the transfer, Stephen and Anne each held

26% of the issued share capital of SJG and Peter and Dianne each held 24%.

Stephen, Anne and Peter were assessed by HMRC under the transfer of assets abroad code to a proportion of the profits of SJG in line with their shareholding from 2000/01 to 2007/08.

The First-tier Tribunal held that the assessments had been validly raised and that the transfer of assets abroad code was invoked. The FTT also held that the code infringed Anne's EU law rights as an Irish citizen.

The Upper Tribunal quashed HMRC's assessments in their entirety, holding that the transfer of assets abroad code did not apply; and that even if it had applied, the taxpayers were entitled to claim the motive defence contained in Income and Corporation Taxes Act 1988 s 741.

The Court of Appeal

Before the Court of Appeal, the following issues were considered:

1. Given that the transfer of the business had been effected by the company SJA, rather than by Stephen, Anne and Peter personally, was the transfer of assets abroad code engaged at all? This is referred to as the quasi-transferor issue.
2. For the code to apply, did there need to have been avoidance of **income** tax?
3. In the event that the transfer of assets abroad code applies, was the motive defence available?
4. Was the transfer of assets abroad code compatible with EU law? If not, was it open to Stephen and Peter, as well as Anne (as an Irish citizen), to rely on a breach of EU law to argue that the transfer of assets abroad provisions should be disapplied?
5. Was some of SJG's income too remote from the transfer of the business to be the subject of the charge? This is not considered in detail in this article. The taxpayers were seeking to establish that the income being assessed did not arise from the transfer but was instead retained profits. Importantly, the Court of Appeal did not allow the taxpayers to challenge a finding of fact at this stage in the proceedings that they had not challenged at the appropriate time at first instance – a valuable learning point.
6. Were the assessments on Stephen and Anne for 2005/06 and 2006/07 defective, having regard to the requirements of the Taxes Management Act 1970 s 29? We do not consider the discovery issue in this article – suffice to say the assessments were not considered to be defective.

The tax years under appeal straddled the rewrite of the transfer of assets abroad code from the Income and Corporation Taxes Act (ICTA) 1988 to its current location at Income Tax Act (ITA) 2007 Part 13 Chapter 2. The parties agreed that the rewrite had not altered the law in any relevant way and the judgment refers to the ICTA 1988 provisions.

Who can be a quasi-transferor?

The concept of a quasi-transferor was first alluded to in the case of *Congreve v IRC* (1948) 30 TC 163, where, although the House of Lords held that any individual could be taxed by the transfer of asset codes, the alternative idea emerged that the transfer of assets abroad code could

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apply even if an individual didn't actually effect the transfer but instead *procured* it.

In *Vestey v IRC* [1980] AC 1148, the House of Lords partially overturned *Congreve*, holding that an individual must be a transferer to be taxed, but left open the possibility of taxing an individual *associated with* the transfer. Walton J, who coined the phrase 'quasi-transferor' in *IRC v Pratt* [1982] STC 756, contributed to the evolution of the concept and considered (albeit in a different context and under an older version of the provisions) whether there could be multiple transferors and a corresponding apportionment of income between taxpayers; he held there could not.

With this backdrop of jurisprudence, the *Fisher* judgment considers the question as to whether the taxpayers had procured the transfer at length. It was decided that this is a broad spectrum anti-avoidance provision intended to apply to any number of transferors (or quasi-transferors) who could be said to have procured the transfer by virtue of doing something positive to bring about the transfer.

Note that taking no active part in the decision making, merely passively allowing someone else to do something (as Anne had done here), was not enough to bring her within the scope of the provisions – Anne had not procured the transfer and so could not be a quasi-transferor.

In addition, a director who is not also a shareholder could not be a quasi-transferor, as he would be acting solely in his capacity as an officer of the company and not on his own behalf. However, directors/shareholders having control jointly (but not individually) of a company may be regarded as together *procuring* a transfer, thus invoking the transfer of assets abroad provisions.

Lord Justice Phillips, dissenting, considered it wrong in principle and illogical to regard a minority shareholder as procuring an act by the company of which the shareholder was a member simply by voting in favour or otherwise supporting that act. Unless there was a voting pact with other shareholders, a minority shareholder had no power in his own person to procure any outcome. Phillips LJ would therefore have dismissed the appeals in their entirety. Of course, the trouble with arguing that minority shareholders are not able to procure – even if they vote in favour – is that some careful fragmentation takes the taxpayers outside the scope altogether, because no single shareholder's vote would be decisive. The context here is a company controlled by two parents and their two children.

Was it necessary to have avoidance of actual income tax?

The taxpayers contended that for the transfer of assets abroad code to apply, there needs to have been avoidance of *income* tax as a result of the transfer – here the Fisher family were seeking to mitigate betting duty payable by the company. The House of Lords had considered this question in the case of *IRC v McGuckian* [1997] 1 WLR 991 and held the contrary – that no actual avoidance of income tax was required. The Court of Appeal saw no reason to disapply the rationale of *McGuckian* and seemed to state that although s 739 refers to income tax, the underlying objective of the legislation would be undermined if the section could only be in point if there had been income tax avoidance.

The motive defence

Given how potentially far reaching the transfer of assets abroad code is, the motive defence is intended as a means of taxpayer protection to provide some limits to its application; however, it is notoriously difficult to invoke and prove in practice.

It was accepted that the transfer was a genuine commercial transaction – the taxpayers were trying to keep up with their competitors. The Upper Tribunal had said that the avoidance of betting duty had simply been the means of achieving the main purpose, which had been saving the business. Regardless, the Court of Appeal opined that the tax saving or avoidance here was too pivotal and intertwined with the commercial rationale – it was impossible to separate the avoidance of betting duty and saving of the business – and thus it simply could not be said that the avoidance was not one of the purposes of the transaction.

Having a commercial driver is seemingly not sufficient to secure the motive defence where there is also a tax saving on the agenda. Any decision on this subject will be very fact specific and the decision is certainly vulnerable to an appeal.

The EU law defence

The court considered the previous CJEU case law on direct tax infringements, including a reasoned order of the CJEU dated 12 October 2017 in response to a reference from the Upper Tribunal in this case. The CJEU held that Gibraltar is, for the purposes of EU law, a part of the UK and not a separate member state or a third country. It also held that the fundamental freedoms of establishment and free movement of capital do not apply to a situation happening wholly internally within a member state; to say otherwise would compromise the fiscal autonomy afforded to each member state.

Conclusion

No doubt HMRC will be buoyed by the victory and potentially seek to apply the transfer of assets abroad provisions to more circumstances whereby individuals, holding shares in a company which transfers assets outside of the UK, could be said to have procured the relevant transfer.

The transfer of assets abroad code is intricately drafted and the court seems to seek to apply it in a way so as to ensure a fair outcome. It will be interesting to see if the Supreme Court comes to a different conclusion as to what would be fair in this context – one assumes an appeal will be forthcoming.

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Welcome to the December Technical Newsdesk

Well, it's been a busy few weeks for the CIOT, ATT and LITRG technical teams. The Chancellor delivered his Budget on 27 October 2021 and, whilst it might have been light on headline grabbing tax announcements, there was still plenty of detail for us to work through. All three bodies published several press releases on Budget Day itself.

The announcements in the Budget meant the UK could get its 21st new tax since the year 2000, if the government goes ahead with a proposal to introduce an online sales tax. We were, though, pleasantly surprised to see the announcement of a consultation to explore the arguments for and against such a tax, rather than it being presented as a fait accompli, seemingly bucking recent trends (see below).

The CIOT said that the government should not just keep adding to the number of taxes the UK has (see www.tax.org.uk/pr21newtaxes). The Chancellor referred eight times in his speech to tax simplification, yet we could be looking at six new taxes in the space of a couple of years – as many as in the previous eight years. Meanwhile, no taxes have been abolished over this period. This includes only taxes introduced by the UK government. If Scottish and Welsh taxes are included, this would add at least four further taxes to the total. Adding this number of new taxes to the tax code is not simplification!

On the topic of simplification, the ATT highlighted that the extension of the temporary increase in the annual investment allowance (AIA) to 31 March 2023 creates an opportunity to simplify the transitional rules to help smaller businesses (see www.att.org.uk/PR_AIA).

The CIOT also commented on the spending review as it affects HMRC, noting that the HMRC settlement amounts to a real-terms growth rate of 1.2% per year over this Parliament. Whilst we are not experts in running a large customer services organisation, given the significant pressures on HMRC and the changes – digitalisation, new taxes, new customs arrangements – they have to manage, we worry it is less than they need.

LITRG produced a very helpful summary of the Budget's tax and related announcements of most interest to those on low incomes (see www.litrg.org.uk/ref2575).

The Finance Bill, which covers many of the measures announced, as well as updated legislation on basis period reform, was published on 4 November.

The CIOT has also provided evidence (which included observations from LITRG) to the Treasury Committee Inquiry into the Autumn Budget and Spending Review 2021, which included observations from LITRG. We expressed our disappointment that, unlike the Spring Budget and 'tax consultation day', subsequent tax policy making has largely ignored the tax policy making process (see tinyurl.com/f5kutuwy).

Significant tax announcements are made outside of fiscal events, and consultations on substantial changes are being condensed into multiple stages over short periods. We continue to see that where the tax policy making process is not followed, the resulting legislation fails to meet the policy aim and brings many implementation problems. Our evidence to the committee can be found on our website at: www.tax.org.uk/ref865.

We have set out in more detail below our work on the Budget and Finance Bill, and if you have any comments on these measures please do send them to technical@ciot.org.uk, atttechnical@att.org.uk or LITRG@ciot.org.uk.

Autumn Budget 2021 and Finance Bill: ATT, CIOT and LITRG comment

GENERAL FEATURE

On Budget Day, 27 October, the ATT, CIOT and LITRG technical teams published several press releases, including some welcome changes that we had suggested. We commented generally on the lack of tax simplification – instead, the government continues to add to the number of taxes. Our focus is now on the Finance Bill, published on 4 November – comments are welcome.

Our comments on some of the key areas below draw upon our press releases on Budget Day, our comments made to the Treasury Committee and our initial review of the draft legislation.

Annual investment allowance (AIA)

One potential opportunity for simplification was identified by the ATT in its welcome of the Chancellor's announcement of an extension of the temporary increase in the AIA to 31 March 2023 (see www.att.org.uk/PR_AIA). This extension of the period in which businesses can obtain full tax relief on a higher level of qualifying capital expenditure is good news for businesses whose annual capital spending exceeds £200,000, particularly if their profits are charged to income tax rather than corporation tax. (Many of the businesses whose profits are charged to corporation tax are likely to be insulated from the impact of the transitional provisions following the introduction of the super deduction from 1 April 2021.)

ATT said that this extension presents an opportunity to simplify the transitional rules to help the many smaller businesses whose annual capital expenditure never exceeds £200,000 but which can nevertheless be caught out by the odd transitional rules. HMRC's Policy Paper (see tinyurl.com/wxyj3mrm) referred to 'more detailed transitional rules for businesses subject to income tax and with a tax period spanning the date of the decrease of the AIA limit on 1 April 2023' but the Finance Bill has not taken the opportunity to amend the transitional rules.

Basis period reform

At the Budget on 27 October, it was confirmed that reform of the basis period rules will go ahead from April 2024, with a transitional year from April 2023. Under these reforms, from 6 April 2024, unincorporated businesses will be taxed on the profits which they actually earn in any tax year to 5 April (or 31 March). Under current rules, businesses pay tax on the profits earned in their accounting year which ends in that tax year.

The ATT, CIOT and LITRG had previously called for basis period reform to be delayed from its originally planned introduction date of April 2023 (with a transitional year from April 2022). Such a delay was confirmed by the government on 23 September 2021.

Prior to the Budget, the ATT, CIOT and LITRG gave evidence on the proposed basis period reform to the House of Lords Economic Affairs Committee's Finance Bill Sub-Committee as part of their inquiry into Draft Finance Bill 2021-22. A summary of the evidence given during the evidence sessions we took part in can be found in the blog on the CIOT website at www.tax.org.uk/blogbasisperiod.

On Budget Day, the ATT said that the Budget announcement provides some welcome certainty, allowing affected taxpayers to begin preparations for the potentially significant additional administrative burdens and tax bills which could arise from this reform. But the ATT also emphasised that it is vital that HMRC make use of this extra time to further explore how the practical and financial impacts on relevant businesses could be limited (see www.att.org.uk/PR_tax_reporting_reform).

The CIOT agreed with this and said HMRC's efforts should now be directed towards making this process as streamlined and simple to apply as possible, to limit the ongoing time burdens and costs involved. The CIOT said that the estimate in the impact assessment for the one-off costs for businesses – including familiarisation with the rules, updating software, and deciding whether to change their accounting date to 31 March or 5 April – is unrealistic. The CIOT also noted that reform of the basis period rules will result in a significant acceleration of tax payments by businesses affected by the change; the £1.7 billion raised by the measure over the next five years makes it the biggest tax raising measure confirmed by the Budget (see www.tax.org.uk/prsetaxreform).

Capital gains tax payment window

The ATT and CIOT welcomed the Chancellor's move to increase the deadline for reporting capital gains tax (CGT) on residential property disposals which complete on or after Budget Day (27 October 2021) from 30 days to 60 days.

However, the CIOT said that it remains concerned that the system for reporting these gains is difficult for taxpayers to interact with and that there are low levels of awareness of the requirement to report among taxpayers (see www.tax.org.uk/prdoublingcgtreporting). ATT echoed this and said that it would still like to see the government do more to alert landlords, second homeowners and others to these obligations (see www.att.org.uk/PR_ext_CGT_payment).

The CIOT also welcomed changes to CGT legislation to correct an anomaly that obliges a UK taxpayer to declare capital gains by reference to both the residential and commercial portions of a mixed-use property under the 60 day reporting, despite the policy intent that CGT is only returned under the 60 day service on the residential portion of the property.

Employment taxes: flexible powers

The ATT welcomed the Budget announcement that the government will give ministers greater ability to introduce necessary income tax and NIC reliefs in the event of future disasters or emergencies of national significance, following a Budget representation on employer-provided and employer-funded coronavirus testing (see www.att.org.uk/ref386).

When the pandemic hit last year, in addition to managing the major new support measures such as the Coronavirus Job Retention Scheme, employers found themselves having to consider the tax implications of a number of additional expenses. Such payments included reimbursing employees the cost of equipment so they could work at home, or paying for employees' COVID-19 tests. Under tax laws at the time, such payments could have created benefit in kind charges for both employees and employers.

While HMRC moved swiftly to clarify the tax position for some of these, there was a period of uncertainty for employers and employees over whether such costs would cause tax issues down the line. The ATT concluded that any new measures that make it easier for HMRC to react swiftly and remove tax obstacles from employers and employees in such extraordinary circumstances are very welcome (see www.att.org.uk/PR_tax_relief).

Green taxes

The CIOT welcomed the Chancellor's decision to increase the amount of air passenger duty (APD) paid on long-haul flights. However, it questioned whether the decision to introduce a new lower rate of APD on UK domestic flights is the right message at this stage, and how this is compatible with the UK's climate ambitions while aviation decarbonisation strategies to reach Net Zero are still works in progress.

The CIOT also welcomed a number of other environment related tax announcements contained in the Budget, including exemptions from business rates for the installation of onsite renewable energy generation and storage, and a new 100% relief for eligible heat networks. These are aligned with the government's agenda for the decarbonisation of buildings, as outlined in the ten point plan (see tinyurl.com/5jy3fajs).

The CIOT has called for the government to develop a climate change tax policy roadmap (see www.tax.org.uk/climatechangeroadmap). This would assist in developing a more strategic and coherent approach to tax policies that affect the environment.

Indirect taxes

In its comments to the Treasury Committee Inquiry, the CIOT welcomed the simplicity of the proposed alcohol duty reform regime, and particularly that stakeholder feedback has informed the proposals published for consultation on Budget Day (see tinyurl.com/cxmx7phd). It would be beneficial for the consultation to consider the objectives of the tax and how best to reconcile or balance them with health and budgetary concerns: that is to say, curtailing alcohol abuse, the need to raise revenue, and helping the hard-pressed hospitality and leisure sectors.

The CIOT still has concerns around the existing high level of burdens on obtaining excise approvals, though notes that the consultation allows stakeholders further opportunity to propose administrative simplifications to shape future policy for alcohol duty.

Notification of uncertain tax treatment

The Budget confirmed that the government will introduce the new compliance burden for large businesses, requiring them to notify HMRC where they have adopted an 'uncertain tax treatment', from April 2022. Uncertain tax treatments will be defined by two criteria: that a provision has been made in the accounts for the uncertainty; or that the position taken by the business is contrary to HMRC's known interpretation (as stated in the public domain or in dealings with HMRC).

The CIOT welcomed the announcement in the Budget that a third criterion (that of where there is a substantial possibility that a tribunal or court would find the taxpayer's position to be incorrect), the most problematic element of the new compliance burden on large businesses, has been dropped, at least for now. It shows that the government has continued to listen to stakeholders. There has been significant engagement with HMRC and HMT, and a willingness to discuss the concerns we raised throughout the consultation process. Nevertheless, because of the starting point for the measure (stage 2 of the tax consultation framework), notwithstanding the improvements that have been made, we remain unconvinced that the measure is needed at all or that it will achieve the stated policy aims effectively or proportionately (see tinyurl.com/kdmjp52p).

This measure is also being considered by the House of Lords Economic Affairs Committee's Finance Bill Sub-Committee as part of their inquiry into Draft Finance Bill 2021-22, and ATT and the CIOT gave evidence on this measure in its evidence sessions prior to the Budget. A summary of the evidence on this measure can also be found in the Blog on the CIOT website at www.tax.org.uk/blogbasisperiod.

Pension inequality for low-income workers

LITRG welcomed the Budget announcement which will end the injustice that over a million low-income workers (mostly women) lose out on pensions tax relief.

This was the long-awaited response to the government's call for evidence on pensions tax relief administration, in response to which LITRG had called on the government to resolve the inequality affecting workers in net pay arrangement (NPA) pensions schemes (see Notes for editors at www.litrg.org.uk/ref2573). The issue arises because affected workers do not get tax relief on some or all of their pension contributions if they do not earn enough. By contrast, if their employer chooses to operate a relief at source (RAS) scheme, the worker obtains tax relief via a separate mechanism, even if they are a non-taxpayer. The solution involves providing the former group with a 'top up' payment to give them the same tax relief as those in RAS pension schemes.

Commenting on the Budget's announcement, LITRG said that the process for the top-up payments should be made as straightforward as possible, and are disappointed that the change will only come into effect from 2024/25 (see www.litrg.org.uk/ref2573).

Scotland

The CIOT commented on some of the implications of the UK Budget on Scotland, focusing on the implications for income tax, air passenger duty and changes to universal credit and the national minimum wage. Further details can be found in the press release at tinyurl.com/6djvy38b.

Universal credit taper

LITRG welcomed the Budget announcements that the universal credit taper rate will be reduced to 55%, the universal credit work allowances will be increased by £500 a year and the national living wage will increase to £9.50 an hour. However, the complex interactions between the tax, national insurance and benefit systems mean that the headline figures may not give people the full picture. LITRG also highlight that the changes will not be replicated for working tax credit claimants (see www.litrg.org.uk/ref2574).

The ATT, CIOT and LITRG will remain engaged with the Finance Bill as it goes through Parliament, so if you have any comments on the draft legislation or other matters raised by the Budget, please get in touch at technical@ciot.org.uk or atttechnical@att.org.uk.

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Coronavirus Job Retention Scheme: compliance update

EMPLOYMENT TAX | MANAGEMENT OF TAXES

The CIOT, ATT and LITRG are represented on the Coronavirus Job Retention Scheme External Stakeholder Forum. We continue to work with HMRC and other representatives to obtain clarity on a variety of compliance-related matters.

Whilst the Coronavirus Job Retention Scheme (CJRS) has now closed, and late claims or amendments can only be made in exceptional circumstances, many issues remain; particularly around HMRC's compliance approach, and identifying and correcting errors in claims.

We recently sought and obtained agreement from HMRC that CJRS overclaims could be offset against underclaims within a given claim period (see www.tax.org.uk/cjrsupdates and www.att.org.uk/cjrs_updates) with only the net amount being repayable. At the latest meeting of the forum on 3 November, HMRC also confirmed that underpayments to an employee would not jeopardise CJRS claims for that employee, provided the employee has been paid at least 80% of their salary over the entire period covered by the scheme.

We are continuing to seek clarification of several other points, including:
- whether there are calculation errors/misunderstandings that HMRC accept do not need correcting;
- how businesses (particularly businesses without a Customer Compliance Manager) and/or their agents can have a meaningful dialogue with HMRC about their circumstances without it automatically triggering a payment reference;
- whether any form of materiality can be applied (for example, per claim, per employee, etc.) to prevent employers having to calculate and correct errors of relatively trivial amounts; and
- how to 'top up' underpayments to employees where it has been deemed necessary to do so (particularly given that there are some complex tax and benefit implications).

We have provided HMRC with several scenarios to illustrate these points, which they are currently considering. We will provide further updates through our weekly email newsletters and in these pages when we are able to do so.

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Compliance Reform Forum: update from October 2021 meeting

MANAGEMENT OF TAXES

The Compliance Reform Forum is a joint forum in which HMRC consult and communicate with representative organisations, including CIOT, ATT and LITRG, about changes to their compliance checking activities, with a particular focus on the views of tax agents and their clients. At the last meeting in October 2021, the following items were on the agenda.

COVID-19 support scheme compliance activity
This covered HMRC's approach, current and emerging risks and a forward look – with particular regard to the Coronavirus Job Retention Scheme, Self-Employment Income Support Scheme and Eat Out to Help Out scheme. Having designed some upfront defences against fraud and error into the schemes, including some pre-payment checking, HMRC are now focusing on post-payment compliance work.

They explained that their compliance approach to the schemes is to make a proportionate response to the risks and behaviours they see. Where people have made an honest mistake, they want to help them to put things right, for example by using 'nudge' letters. They are finding that the response rate to these is good. For cases of suspected fraud and error, they will target on a one-to-one basis and several thousand enquiries have been opened so far. Criminal investigations are being reserved for the most egregious fraud cases and there have been several arrests. There was also an update on their Taxpayer Protection Taskforce, which had been announced in the March 2021 Budget to help tackle COVID scheme fraud. 1,265 staff have been committed for two years to recover money paid out to incorrect and fraudulent claims.

Attacks against the system
HMRC provided an update on their income tax self-assessment suspect repayment fraud (SURF) letters. These are letters HMRC send to taxpayers to verify income tax self-assessment repayment claims. When a taxpayer submits a self-assessment tax return resulting in a repayment of tax being owed to them, HMRC undertake routine checks to ensure that the claim is genuine and to identify potential compliance risk.

Where their risk indicators suggest that the person or claim may not be legitimate, they will contact them to confirm their identity. This will include the requirement for the person to provide documentary evidence to prove who they are, and to answer some questions with regards to the repayment request they have submitted. If the person does not reply to the letter, HMRC will remove them from the self-assessment system online and not make the repayment. However, some genuine claimants have also received the letters. Stakeholders suggested that more transparency in respect of this work would be of assistance to advisers, particularly in respect of timeframes for genuine repayments, as there are currently long delays and taxpayers are blaming their agents for these. HMRC recognise that the current service standard is unacceptable for those genuine taxpayers caught up in this and are working to remove the backlog and reduce the average age of repayments.

You can find more information about the SURF letters on the CIOT website at tinyurl.com/zc6j79dp and tinyurl.com/5chkjxsu.

Progress on HMRC's customer experience work
In July 2019, the Financial Secretary's Written Ministerial Statement set out a package of commitments with the objective of building and maintaining greater confidence and trust in the tax system, including actions to improve taxpayer experience with a specific focus on extra support for those taxpayers that need it most. Since then, HMRC have been working with the Compliance Reform Forum and other stakeholders on various interventions designed to improve customer experiences.

Work done to date includes improvements to over 1,000 of HMRC's most used letters and factsheets, the creation of a series of YouTube videos on compliance, embedding their compliance 'extra support' team into HMRC's Customer Compliance Group (which has received around 2,800 referrals), launching a new compliance check opening letter 'introductory pack' and introducing a compliance check exit survey to gather feedback from taxpayers at the end of a compliance check.

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Employment Taxes Forums

EMPLOYMENT TAX

A brief overview of the Employment Taxes Forum meetings attended by representatives of the CIOT, LITRG and ATT, including the Employment and Payroll Group, the IR35 Forum, the Expat Tax Forum, the Collection of Student Loans Group, and the Rewards and Employment Engagement Forum.

In this article, we summarise the main points from meetings of various forums that took place this autumn, which are attended by CIOT, LITRG and ATT volunteers. HMRC publishes the minutes of their meetings on GOV.UK.

Employment and Payroll Group
The group is the main HMRC forum for employment tax related matters. The forum is attended by representatives of CIOT and ATT and meets quarterly. The main topics of discussion were the Coronavirus Job Retention Scheme, the new Health and Social Care (HSC) Levy, the NICs holiday for employers of armed forces veterans, the freeports employers NICs relief, HMRC's single customer account, the new rules being

introduced on Notification of Uncertain Tax Treatment, and the P11D process.

The HSC Levy will come into effect from April 2023 (with a temporary increase to NICs for 2022/23) and will be a 1.25% tax on earnings for employees, the self-employed and employers. It is expected to tax earnings in the same way as NICs, except that it will also apply to the earnings of those over state pension age. Several points were raised with HMRC regarding the scope and mechanics of the levy and detailed technical guidance was requested to be published as soon as possible.

IR35 Forum
This group is attended by the CIOT and recent discussions have included the future of the forum, HMRC's compliance activity (where HMRC has identified contracted-out services to be a problematic area) and their 'compliance check' letters. The group has also discussed tax offsets following status recategorisations; for example, where the worker or their personal service company has already paid dividend tax or corporation tax on payments received but the work is subsequently recategorised as within the off-payroll working rules and the end client or agency is liable for PAYE and NICs. While HMRC agree that they should not be collecting more tax than is due, a legislative approach to offsetting tax already paid is not proposed.

Following the meeting, the non-HMRC members of the forum wrote to the new Financial Secretary to the Treasury regarding the tax offsets issue and, in particular, the need to tax fairly and make sure the right party pays the right amount of tax (for example, in line with HMRC's Charter). Engagement on this matter is continuing between representative bodies and HMRC.

Joint Forum on Expatriate Tax and NICs (Expat Tax Forum)
This forum is attended by the CIOT, and recent discussions have included the lengthy delays in processing 'S690' applications, as well as in processing payroll specific amendments (for example, NT codes) more generally. The forum has also discussed the difficulties in obtaining Unique Taxpayer Reference numbers for taxpayers, especially for foreign nationals on a local UK contracts and UK outbounds, and Scottish taxpayers (where the Scottish rate has been incorrectly disapplied).

Collection of Student Loans Consultation Group
CIOT, LITRG and ATT representatives all participate in the Collections of Student Loans Consultation Group. Topics discussed included the Scottish student loans threshold introduced on 6 April 2022; HMRC's work on ensuring that employers operate the correct plan type; and HMRC's more frequent data sharing with the Student Loans Company of student loan deductions reported by employers through the RTI system and how HMRC is verifying in-year data sent to the Student Loans Company with end of year totals.

Reward and Employment Engagement Forum
This group is an independent external stakeholder forum with a special interest in payroll matters to which HMRC are regularly invited. It is attended by ATT, CIOT and LITRG representatives. It meets three or four times a year and at the last meeting there were guest attendees from the Cabinet Office to discuss how to make all forms on GOV.UK accessible, easy to use and easy to process. Feedback from the forum's members was that improvements to online forms would be a welcome. However, it also needs to be recognised that not everything can be done online, or online in one go, so printable versions and save and return options should be available. For agents in particular, there should also be the ability to complete more than one form at the same time.

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Construction Industry Scheme: landlord contributions to tenant works

EMPLOYMENT TAX | LARGE CORPORATE | OMB

HMRC are asking for evidence of the problems in practice with the Construction Industry Scheme when landlords make payments to tenants carrying out construction works to finish a building or fit it out to their own specification, a practice that is increasingly common.

The Construction Industry Scheme (CIS) requires a contractor to withhold tax from payments to subcontractors for certain construction work. The scope of CIS means that it may extend to landlords making payments to tenants who are carrying out construction works to finish a building or to fit it out to their own specification, a practice that is increasingly common.

The tenant either has to register for the CIS as a subcontractor or receive the payment under deduction of tax and claim it back from HMRC. Typically, tenants are not physically carrying out the works themselves but rather sub-contracting works to third party contractors. At the latter stage, the CIS rules operate as intended to capture actual construction operations. It is the application of CIS between tenant and landlord for the same works that adds administrative costs, affects cash flow and comes as a surprise to start-up businesses and businesses expanding into the UK as they will not have a trading history to allow them to register under CIS.

The CIOT's Property Taxes Committee engagement with HMRC on this issue has been ongoing since early 2017.

The issue is now being reconsidered by HMRC's Construction Forum (see tinyurl.com/4zuzacj9). HMRC have requested that current evidence is provided of the issues in practice in order to assess the case for change, and, if the evidence points that way, to put the case to ministers.

Please could members send examples of recent experiences where the operation of the CIS scheme in this context has caused administrative burdens and costs, ideally with some approximate quantification of those costs.

Please send this evidence to Kate Willis (kwillis@ciot.org.uk) and copying in the co-chair of the Construction Forum, Justine Riccomini Head of Taxation (Scottish Taxes, Employment & ICAS Tax Community) (jriccomini@icas.com).

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Reporting rules for digital platforms: HMRC consultation

PERSONAL TAX | MANAGEMENT OF TAXES

The CIOT and LITRG have responded to HMRC's consultation document which explored how the UK government will implement the OECD's Model Reporting Rules for Digital Platforms, which require certain UK digital platforms to report information to HMRC about the income of sellers of services on their platform.

HMRC will exchange the information with the other participating tax authorities for the jurisdictions where the sellers are tax resident. Digital platforms in participating jurisdictions will be required to provide a copy of the information to the sellers to help them comply with their tax obligations. The reporting rules will come into force from January 2023 at the earliest.

In its response, the CIOT says that overall the proposals look reasonable and in line with the OECD model rules. It is particularly welcome that reports must be made to sellers as well as the tax authority since this will help to drive compliance.

We note that the definition of 'personal services' is very broad. This may lead to difficulties in determining who is caught by these rules. HMRC need to provide more clarification in their guidance about who is included and who is excluded.

We support HMRC's suggestion to introduce a new 'verification' service, which sellers could use to generate a bespoke code or reference number that could be used as a tax identification number (TIN). Ideally, the verification service should be operational in time for the commencement of the rules in January 2023 so HMRC should ensure that sufficient resources are allocated as soon as a decision is made (to introduce the new service) in order to make this possible.

Changing the UK's tax year to 31 December would address the timing issues caused by reporting platforms having to report information by 31 January for the calendar year just ended to HMRC and to each reportable seller. As the consultation document acknowledges, the reporting deadline in the model rules does not fit well with the 31 January deadline for filing a UK self-assessment tax return. In general, however, we think annual statements will not be as helpful as more timely information, particularly with the introduction of Making Tax Digital for Income Tax Self-Assessment in April 2024, which will require UK traders to keep records up to date and submit information to HMRC quarterly.

The data should be presented to the sellers by the platform operators in an easily understandable and usable format. We suggest that it might be appropriate for HMRC to specify the title, format and content of the report that is presented to sellers.

HMRC could consider working more closely with online platforms from an educative/guidance point of view, as people might be more receptive to messages about their potential UK tax obligations from the online platforms rather than HMRC. However, UK tax rules around the tax consequences of assets held or income arising overseas are complex. We do not think it is reasonable to expect platform operators to provide relevant information to their sellers on this. There is a strong case for improving the GOV.UK guidance in this area.

In its response, LITRG say the new rules do have the potential to help tackle the problems identified of income not always being visible to tax authorities and taxpayers not always self-reporting. However, we caution that the rules will not be a complete solution, particularly if HMRC do not use the information they receive in a timely manner. Crucially, HMRC will also need to help taxpayers understand that they still have a responsibility to check for income not captured on any statement they receive.

HMRC should be aware that for various reasons (that we explain in our response), the information collected is likely to highlight significant mismatches in terms of income generated versus transactions/activities which have been declared to HMRC. Obviously, HMRC will need to be adequately resourced to deal with all issues that could arise from the introduction of these rules, including this.

Additionally, with our eye – as ever – on the practicalities, in our response, we highlight some other points we have identified around HMRC's proposed implementation of the rules. For example, we wonder if the operational cost for platforms in complying with the new burdens put on them are likely to ultimately be passed on to workers, which could result in some of them moving 'off platform' to sell their goods and services.

Although not specifically mentioned in the consultation document, we also air some concerns about the potential for this data to be used by the authorities for other purposes (for example, universal credit).

The CIOT's response can be found here: www.tax.org.uk/ref832

LITRG's response can be found here: www.litrg.org.uk/ref2569

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Review of the UK's Anti-Money Laundering and Combatting the Financing of Terrorism regulatory and supervisory regime

GENERAL FEATURE

The consultations on the UK's Anti-Money Laundering and Combatting the Financing of Terrorism regulatory and supervisory regime and on the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 were an opportunity to send the message that any changes should simplify matters and reduce rather than increase the burden on businesses.

The CIOT and ATT responded to the call for evidence and the consultation on the UK's Anti-Money Laundering (AML) and Combatting the Financing of Terrorism (CFT) regulatory and supervisory regime and on the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (MLR 2017). There was considerable overlap in the questions and responses in both documents and as a result this article does not distinguish between them.

In particular, along with many other AML professional body supervisors, we called for more real time granular information from law enforcement about money laundering in the tax sector. For example, what sort of offences are tax professionals reporting, what are they not reporting when they should and what difference would it have made if they had been reported? The Office for Professional Body AML Supervision (OPBAS) could build on and enhance the role they play in facilitating this.

Supervisors are being encouraged to look at firms' Suspicious Activity Reports (SARs) with the possibility that this may become mandatory. While it might be useful as a means to help some firms improve the quality of reports, certain safeguards would need to be in place; for example, the redaction of names and some details. We also made the point that improvements to the SAR reporting system would improve SAR quality.

We called for clearer legislation. The lack of clarity leaves the MLR 2017 open to interpretation, which makes it difficult for those in the regulated sector to be certain about what is required of them. This can lead to businesses undertaking more checks than required and adopting an overly cautious risk-based approach for fear of falling foul of the legislation. It also creates the need for detailed and HM Treasury approved guidance, such as the anti-money laundering guidance for the accountancy sector. Our response highlighted concerns about the delays in obtaining HMT approval when guidance is updated.

Under the reliance provisions in the MLR 2017, a firm may rely upon another's client due diligence (CDD) subject to certain conditions being met. We reported that in our experience very few firms use these provisions because they remain open to sanction should the relied upon CDD be defective. We suggested that it would be helpful if sufficient checks were undertaken by agencies such as Companies House so that firms, unlike at present, could rely on the information included on their registers for CDD purposes.

In response to a question about activities which we consider have a low impact in the fight against money laundering, we referred to the need to confirm that none of the firm's business owners, officers or managers has committed an offence as defined in MLR 2017 Sch 3 (mostly financial crimes). The fact that we, again in common with many of the professional body supervisors, have not identified any Sch 3 offenders brings into question the value of this requirement. Likewise, there would seem to be limited value in the obligation for sole practitioners without employees to have written policies and procedures.

OPBAS assesses and reports on the effectiveness of the professional body supervisors. We have called for OPBAS to be clearer on how their different levels of effectiveness are defined and to set out the specific actions a supervisor should take to move from, say, being rated as largely effective to effective.

The full response to Review of the UK's AML/CFT regulatory and supervisory regime can be found on the CIOT website at www.tax.org.uk/ref863 and the ATT website at www.att.org.uk/ref389.

The full response consultation on Amendments to the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 Statutory Instrument 2022 can be found on the CIOT website at www.tax.org.uk/ref864 and the ATT website at www.att.org.uk/ref390.

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Scottish Taxes Update

GENERAL FEATURE

CIOT and LITRG submitted a joint response to a Scottish government consultation on Tax Policy and the Budget.

Scottish government consultation: Tax Policy and the Budget
The Scottish government published a consultation (see tinyurl.com/jmacb2uh) at the end of August 2021, seeking views on its overarching approach to tax policy, and how it should use its devolved and local tax powers as part of the Scottish Budget for 2022/23. The consultation documents included its first framework for tax, on which it also invited comment.

The aim is to enhance the Scottish approach to taxation, and clearly communicate the functions, principles and policy objectives that underpin how Scottish tax changes are assessed and delivered.

CIOT and LITRG submitted a joint response. We welcomed the publication of the Framework for Tax, and the fact that it is accessible to a fairly wide audience. Our response noted a few areas where we think improvements could be made. A key aim of the Framework is to enhance transparency, but we thought more could be done to explain the benefits of this to the reader.

We raised a concern with the sixth principle of the Scottish approach to taxation, anti-avoidance – a more positive and proactive framing of this would arguably align better with the other five principles. One option might be to replace it with a principle of effectiveness, noting that taxes should be designed to raise the intended revenues and achieve the other deliberate purposes of the policy, including being designed to make avoidance as difficult as possible.

The fifth principle is engagement. We welcomed the fact that the Scottish government has in general engaged well with stakeholders when developing tax policy. We noted that there would be value in providing clear updates to stakeholders as to the status of work in tax areas, particularly when new taxes are being consulted on and developed. One option might be to have a dedicated webpage on the Scottish government website that shows the status of all Scottish taxes, including information such as whether legislation has been passed and whether the tax is active.

The Framework for Tax document briefly sets out the role of Revenue Scotland. We suggested that for transparency and clarity, it would be helpful if the document included similar brief paragraphs on the roles of different parties, such as the Scottish Parliament, the Scottish government, Revenue Scotland and HMRC. This would help to improve public understanding of the roles and responsibilities of the parties involved in tax policy, legislation and management, which is important for accountability.

We also used our response to briefly set out our thoughts on priorities for local and devolved taxes over the course of the next parliament. We think these should include fulfilling a previous commitment to make changes to the group relief provisions for land and buildings transaction tax, reforming council tax, and examining options for taxes and tax policies to assist with the achievement of the net zero target. These should assist with the Scottish government's stated aim of creating a fairer, greener and more progressive Scotland.

Our full response is available to view on the CIOT website at www.tax.org.uk/ref837 and LITRG website at www.litrg.org.uk/ref2571.

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LITRG respond to 'Shaping future support: the health and disability green paper'

EMPLOYMENT TAX GENERAL FEATURE

There is an ever-growing focus on getting more disabled people in work. LITRG highlights a number of areas in the tax and related benefits system that could act as barriers to work.
In July, the government published a green paper on health and disability (see tinyurl.com/2zhb9d55). LITRG's response to the paper makes recommendations on where we think rules and practice could be changed to improve incentives, reduce burdens and thus contribute to the government's overall objective.

We framed our comments and suggestions under four questions below, posed in the green paper.

What more information, advice or signposting is needed and how should this be provided?
Here, our response highlights that some disabled people use

funds from the Department for Work and Pensions Access to Work scheme to hire a support worker. This means they might become an employer, something which is not well understood by users of the scheme or those administering it. Meanwhile, HMRC provide little tailored information on the tax considerations that arise when a grant is used to fund a support worker. The current approach is leaving disabled people in a potentially difficult position, which may ultimately undermine the scheme.

How can we better support young disabled people and people with health conditions who are moving out of education to find appropriate work?
In response to this question, we raised the perhaps comparable recent announcement of a national insurance 'holiday' for veterans and the possibility of the tax system being used in a similar way to encourage employers to create job opportunities for disabled people.

Universal credit has many features, such as the work allowance and taper, that aim to make it easier for people to move into work. How can we ensure that disabled people and people with health conditions are aware of these features, and encourage people to try out work on universal credit?
Here, we set out some considerations as to areas for improvement. In general, there are some glitches and mismatches in the design of the system, which mean that the system is not working as well as it should, including for disabled people.

More specifically, some of the Universal Credit system relies on the discretion of work coaches, which means that outcomes can be uncertain and inconsistent for disabled people. We say it is vital to ensure that appropriate training and guidance is given to staff implementing any such discretionary aspects of the rules.

While continuing to focus financial support on people who need it most, how could we more effectively support disabled people with their extra costs and to live independently?
In response to this question, we say that changes to employment expenses relief and other changes to tax rules could help to influence behaviour in this area. One such example we give is that where you have a sympathetic employer, certain costs that are met for you to assist you to work (such as the provision of a taxi into work) will not be classed as a taxable benefit and are therefore tax-free. However, you cannot claim relief if you meet such costs personally.

Conclusion
Overall, we suggest that the Department for Work and Pensions should actively work together with other areas of government, such as HMRC, to bring about these small, but important changes. Stepping back and considering the system as a whole will lead to better coordinated policymaking in this area.

As an aside, more disabled people will come into contact with HMRC if they are helped into employment. On a day to day operational basis, we have ongoing concerns that people who have additional needs may not be adequately catered for by HMRC and we will continue to make representations to HMRC, to this end, via the appropriate channels.

The full response can be found here: www.litrg.org.uk/ref2560

Meredith McCammond
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Bereavement benefits remedial order

PERSONAL TAX

LITRG reviews proposals to extend bereavement benefits to surviving partners with children after the death of a partner to whom they were not married or in civil partnership.

Widowed parent's allowance (WPA) was available until April 2017, at which time the entire bereavement benefit regime (including WPA but also bereavement allowance and bereavement payment) was replaced by bereavement support payment (BSP). A higher rate of BSP is payable where claimants have dependent children.

Hitherto, eligibility for all of these benefits included a requirement for the surviving partner to have been married to, or in civil partnership with, the deceased.

However, in the February 2020 case of *Jackson and Simpson v SSWP* [2020] EWHC 183 (Admin) the High Court ruled that denying higher rate BSP to unmarried (or non-civil partner) cohabiting parents breached their children's human rights. This followed the *McLaughlin* [2018] UKSC 48 judicial review ruling made by the Supreme Court in August 2018 in relation to WPA.

Following those cases, on 28 July 2020, the government announced that it would make a remedial order to extend WPA and BSP to cohabitees with children. A proposed draft of this order (see tinyurl.com/2w4zez3y) was not, however, forthcoming until July 2021.

The proposal as it stands is to extend eligibility to claimants back to 30 August 2018 – the date of the Supreme Court judgment in *McLaughlin.* When the details are finalised and the order commences, claimants will be able to access lump sums of WPA or BSP as applicable to their circumstances.

For those whose partner died on or after 6 April 2017 (when BSP was introduced), LITRG believes that the current wording of the order will mean they get a back payment of the full amount of BSP, so £9,800. However, other information from the Department for Work and Pensions (DWP) suggests that this sum is to be pro-rated where the death occurred before 30 August 2018. Clarity on this point is needed.

LITRG has been looking at the tax and benefit interactions of these back payments of benefit. WPA is taxable and typically assessable as income in means tests, whereas BSP is not taxable and is typically disregarded as income in benefits means tests. We have some concerns that those in receipt of the £9,800 BSP amount may trigger unexpected benefit interactions if, for instance, they save and 'capitalise' the money. However, our main concern is that the potential tax and benefits complexities for claimants of WPA have not been thought through.

WPA is taxable as social security pension income under Income Tax (Earnings and Pensions) Act 2003 ss 577-579. It is paid gross by DWP. Like the state retirement pension, WPA is taxable based on the amount accruing in the tax year, specifically without regard to when the amounts are actually paid. It is assumed that back payments would be taxed by reference to the year in which they ought to have been paid, had the claimant been permitted to claim them as if they were married or in civil partnership. However, this is not currently clear. It might be argued that because there was no entitlement to the benefit before implementation of the remedial order, the payment should be taxed in the year it is claimed or received, irrespective of it having been notionally calculated by reference to an earlier period of time.

The position for universal credit for lump sums of WPA is also not entirely clear. Payments of WPA are usually treated as unearned income for universal credit in the assessment period they are received. DWP could of course choose to legislate for a different treatment of the lump sum; for example, it could be allocated to the relevant assessment period it accrued in (resulting in potential universal credit overpayments in the assessment period concerned).

If it follows the usual rules, then this would mean that a claimant's income is probably going to be more than their maximum universal credit in that assessment period and so it would just reduce the universal credit payment in that one month. In theory, this means they could be far better off than if they had received the payments at the correct time. This is because if it had been paid at the correct time, it would have been deducted at a pound-for-pound rate from the claimant's universal credit entitlement.

LITRG is urging HMRC and DWP to work through the tax and benefit issues together and to ensure the treatment of lump sums under the remedial order is fully understood before the legislation is finalised. DWP must also ensure that claimants of back payments are advised what they need to do in terms of tax, tax credits and benefits following a claim. It would be unacceptable for people to receive a large amount and then have it unexpectedly create difficult tax, tax credits and benefit issues. The draft remedial order is to be considered by the Joint Committee on Human Rights, to which LITRG has submitted comments.

Kelly Sizer
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Mandatory disclosure rules: HMRC research

GENERAL FEATURE

The government announced earlier this year that it would consult on implementing the OECD mandatory disclosure rules to replace DAC 6 and transition from European to international rules. A HMRC consultation is expected shortly.

In the meantime, HMRC are starting to plan their work on designing and building a new digital service for reporting cross-border arrangements under the OECD rules. They would like to speak with CIOT members and ask them some questions about mandatory disclosure rules reporting, covering if and how their organisation is preparing for the mandatory disclosure rules and any challenges or concerns they might be having.

They say this would greatly help in the future development of the digital service. They are particularly interested in speaking to members from smaller firms. They would also be interested in receiving feedback on their existing digital service for reporting cross-border arrangements between the UK and EU member states (see tinyurl.com/a95mt74w). Please contact the Technical Team at technical@ciot.org.uk if you would like to take part in this research and we will put you in touch with HMRC.

Margaret Curran
mcurran@ciot.org.uk

CIOT	Date sent
Finance Bill Sub-Committee investigates basis period reform and uncertain tax treatment www.tax.org.uk/ref842	13/10/2021
Amendments to the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 Statutory Instrument 2022 www.tax.org.uk/ref864	13/10/2021
Review of the UK's AML/CFT regulatory and supervisory regime www.tax.org.uk/ref863	14/10/2021
Residential property developer tax: draft legislation www.tax.org.uk/ref846	15/10/2021
Reporting rules for digital platforms www.tax.org.uk/ref832	21/10/2021
A framework for tax www.tax.org.uk/ref837	26/10/2021
ATT	
Review of the UK's AML/CFT regulatory and supervisory regime www.att.org.uk/ref389	14/10/2021
Amendments to the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 Statutory Instrument 2022 www.att.org.uk/ref390	14/10/2021
LITRG	
LITRG welcomes the opportunity to respond to the Shaping future support: the health and disability green paper www.litrg.org.uk/ref2560	05/10/2021
Budget Representation 2021: Loan charge www.litrg.org.uk/ref2561	06/10/2021
Reporting rules for digital platforms www.litrg.org.uk/ref2569	20/10/2021
Tax policy and the Budget – a framework for tax www.litrg.org.uk/ref2571	27/10/2021

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CIOT & ATT

Virtual Christmas Carol Service

EVENTS

Celebrate the festive season with the CIOT and ATT at their Virtual Christmas Carol Service on Thursday 9 December at 6pm.

Hosted from the candle-lit St Peter's Church, Eaton Square, you will be warmly welcomed by the Reverend Julie Khovacs and the Presidents of the CIOT and ATT.

From the comfort of your own home, you will be able to join us in song with your favourite carols and listen to readings.

Please register for the free event at www.tax.org.uk/christmas-carol-service-2021 to ensure you receive the log in details.

We look forward to seeing many of our Members and Students there!

In the news

COVERAGE OF CIOT AND ATT IN THE PRINT, BROADCAST AND ONLINE MEDIA

'Plans to make pensioners pay National Insurance for the first time has set a dangerous precedent and the levy could rise in future, warns the prestigious Chartered Institute of Taxation.'
Daily Express, 14 September 2021

'Bowing to pressure from professional bodies such as the ATT, the UK government will delay for a year far-reaching changes to the way businesses report their profits and requirements for digital record keeping by self-employed people.'
Financial Times, 24 September 2021

'With the UK Budget looming, the Chancellor's thoughts must turn to measures that protect the most vulnerable members of society as the UK economy strides away from the pandemic. That's why submissions from the Low Incomes Tax Reform Group must be near the top of his in-tray.'
Yorkshire Post, 13 October 2021

'The Budget is good news for low earners – the cut in the universal credit taper, the work allowance and the national minimum wage increase. The taper change will help people who are in work – but if you aren't in work it's not going to help you.'
ATT Technical Officer Emma Rawson, *BBC Five Live's Wake Up to Money show*, 28 October 2021

'Council tax reform can support the Scottish government's ambitions to deliver a minimum income guarantee. With council tax, there is no need to wait for more powers to be devolved, and no need to wait for Westminster's go-ahead.'
CIOT Technical Officer Joanne Walker, writing in *The Times* (Scotland edition), 11 October, highlighting the potential for council tax reform

'The Chartered Institute of Taxation has urged ministers to review the tax rules on travel costs to and from their employer's premises where the employees worked part-time at home.'
Financial Times, 1 November 2021

CIOT & ATT

Building your personal tax brand: Interview with Tasneem Kadiri

PERSONAL DEVELOPMENT

Joanne Herman on how you can build your personal tax brand.

Welcome back to my special December blog edition about personal branding. It gives me great pleasure to introduce you to Tasneem Kadiri. Remember back in June, I shared an article about being pitch perfect in 60 seconds? Here's Tasneem's. Thank you for your insights, Tasneem!

Tasneem Kadiri

Tasneem's 60 second pitch
Tasneem Kadiri is the UK and Ireland Tax Director at L'Oréal where she is responsible for both direct and indirect taxes.

Tasneem is winner of Tolley's Taxation Awards 2020 for best In-house Tax Leader. She has almost 20 years' experience in tax, audit and accountancy, having worked in both practice and industry.

She is on the ICAEW Large Business and International Tax Committee, the Committee for Women in Tax, the Diversity and Inclusion Committee for CIOT and leads the BAME best practice group for the Multicultural Professional Network Forum (House of Lords).

Tasneem is also on the Gender Equality Network at L'Oréal.

Today, we'll be asking her how personal branding helped her career in tax, how she showcases her personal brand and her tips to help you build yours. Here are her insights on building a personal tax brand.

What's your definition of personal branding?
Having a uniqueness, something that sets you apart from others. Branding with your own creative twist. Everyone has a personal brand, whether they realise it or not. It encompasses your values and what you stand for.

How has personal branding helped your career in tax?
Being mindful of my personal brand has been a benefit in my career.

I was asked to join the Women in Tax Committee, and diversity and inclusion are areas I feel very passionate about. This month, I will be taking over as chair, which is an amazing opportunity for me. This partly came about due to the strong network and reputation which I have built in the tax profession as a result of my personal brand. It means I can help make a difference to the tax profession.

My person brand has helped to widen my network, not just in tax but also outside of tax. I have been approached for speaking opportunities. I have made many new connections, which provide a richness to new ideas, cultures and ways of working. I've been approached to write in in publications like this one!

Last year, I was nominated and awarded the 'Best In-house Tax Leader' (Tolley's Taxation Award) which has further pushed my personal brand.

Personal branding has helped my career significantly and will continue to do so as long as I'm mindful and continue to invest time. What you put in is what you get out.

What are the benefits of personal branding?

- Builds a strong network

CIOT, ATT & ADIT

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ATT Fellow	£230
ATT Joint Fellow	£135

- Differentiates you and sets you apart from others
- Increases your opportunities – committees or speaker engagements
- A chance for people to get to know the whole you and your wider skills – not just your technical skills but also what you can offer on top of those technical skills. This all helps with your career path.

How can someone strengthen their brand?
Be yourself, know your strengths and use these to excel. I also think self-awareness and being mindful is really key for your brand.

Ask yourself the following questions. Who are you and what do you stand for?

Ask friends for your strengths and weaknesses. Find out how others perceive you.

Google yourself. What do you find? Are you happy?

Feedback is so important.

What would you tell tax advisers to focus on as a starting point?
Self-awareness and being mindful about your personal brand. Find your passion. Know your values – your values at work and in your personal life should be the same.

How do you showcase your personal brand?
The biggest advice I have for anyone about personal branding is to talk about topics which matter to you and which you feel most passionate about. My posts on social media also mirror this. The rest just comes naturally. Find your niche.

What do you focus on for the development of your own personal brand?
Self-development and self-awareness.

Strong personal brands don't go it alone. Who makes up your support system?
I have certain role models who I look up to. My mentor, other leaders, my managers, friends and of course family. Actually, my son is the person I have learnt the most from. I love his determination in life. If he wants something he does not give up.

Your support system is anyone who can teach you something or inspire you, it's not always the obvious suspects so I would say look for inspiration wherever you can and keep an open mind.

What are your top tips for creating a personal tax brand?
Self-awareness and be authentic. I didn't set out to create a personal brand, I just started to follow my passion – this is my biggest tip. Write with your own style. Don't try to be a copy of someone else; be the best version of yourself. Don't compare yourself to others but compare yourself.

Look out for Tasneem's CTA story next year. In the meantime, you can LinkedIn with her here: linkedin.com/in/tasneem-kadiri-fca-cta-09046097

CIOT

Bruce Wilson Sutherland

OBITUARY

Bruce Wilson Sutherland CBE, FCA, Hon FTII, Hon FIOD
25 May 1923 – 21 October 2021

Bruce Wilson Sutherland, who has died at the age of 98, was a born survivor and best known as an authority on unquoted share valuations and taxation, particularly capital taxes.

Born in May 1923, Bruce left his classics degree at Nottingham University unfinished to join The Black Watch (Royal Highland Regiment). In 1942, he transferred to the 3rd Battalion of the 1st King George V's Own Gurkha Rifles on the North-West frontier of India, now Pakistan. He was heavily involved in the battle of Imphal fighting the Japanese as they tried to invade India through Burma. Afterwards he was posted to Saigon, commanding a battalion of Japanese soldiers to assist in defeating the Viet Minh.

After the war, Bruce needed to earn a living and decided to become an accountant.

In 1951, he was offered the position of chief accountant of Hardwick Industries Ltd, based in Nottingham. In 1954, he left to become a partner in a long-established firm of chartered accountants which later became part of Touche Ross (now Deloitte).

Bruce established himself as a leading authority on unquoted share valuations and on taxation, particularly the capital taxes. In 1966, he set up Bruce Sutherland & Co, a specialist share valuation practice.

Bruce was soon asked to join various tax committees, including holding the positions of chair of the Association of British Chambers of Commerce (ABCC), deputy chairman of the CBI tax committee, chairman of the tax committees of the IOD, vice chairman of BCC and chairman of the Society of Share and Business Valuers.

Bruce was asked to become a confidant of and adviser to the then chairman of the Board of Inland Revenue, and he was involved in many discussions and

Bruce Wilson Sutherland

working groups dealing with a wide range of tax problems. The deputy chairman of the board of Inland Revenue said that: 'Bruce had done more for our tax system than anyone he had known.'

Bruce also assisted the Conservative Party and was recruited by Margaret Thatcher, then a Shadow Treasury Minister, to advise her on the new Labour government's proposed capital transfer tax.

He went on to act as an adviser to shadow and later Chancellors of the Exchequer and Treasury Ministers on tax matters. In recognition of this, he was appointed CBE in 1981. He was once described by Denis Thatcher as the only man who Maggie would dare not Handbag!

Bruce became a fellow of the CIOT in 1994 and was awarded an honorary fellowship of the CIOT in 2007. In 2012, he was awarded the Taxation Lifetime Achievement Award.

A keen skier, Bruce holidayed in Switzerland most winters and summers.

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Any queries about your Branch, getting involved, or Branch Webinars?

Contact our team at **branches@tax.org.uk**

CIOT

Can tax help us meet our Net Zero goals?

DEBATE

We bring you highlights of the CIOT/IFS online debate that took place in October 2021.

The CIOT and Institute for Fiscal Studies held their final online debate of 2021, focusing on the role of the tax system in helping countries to meet their net zero goals.

Chaired by IFS director Paul Johnson, four experts discussed the rationale for carbon levies, the UK's stop-start approach to environmental taxation and the potential for a fundamental rethink of the way the global tax system supports climate goals.

Alex Bowen of the London School of Economics argued that carbon pricing had an important role to play in helping countries to achieve their climate ambitions. His preference is for a carbon tax. Bowen presented research showing that these have helped to reduce emissions in countries where they have been introduced, contributing to an increase in the percentage of global emissions covered by carbon pricing from 4% in 2005 to around 20% today.

He said that carbon pricing had the potential to raise significant revenues for governments, but that a big concern was the level at which it should be set (estimates of what is needed range between $40 and $160 per tonne) and how governments should spend the money raised. Ultimately, he said, someone is going to be disappointed.

Through his work with the United Nations Subcommittee on Environmental Taxation Issues, **Chris Morgan** of KPMG agreed that a global carbon price could make an important contribution to climate goals. Its simplicity was one of the reasons that the UN had focused its efforts on this area, particularly for developing nations.

However, a standard price will be difficult to agree on and could contravene global trading rules. As Morgan explained, not all nations will be persuaded of the benefits and may also see it as a threat to their own economic development agendas. It could also lead to carbon leakage, as businesses transfer their operations from higher to lower taxed jurisdictions. While there is little empirical evidence that this is a problem today, it could present challenges in the coming decades.

Morgan suggested this could be countered if countries with complementary climate ambitions joined together to form carbon 'clubs'. These would provide preferential trading conditions to nations with shared ambitions. But they were likely to fall foul of global trading rules, particularly if they were to penalise 'outside' nations through mechanisms like tariffs.

Femke Groothuis argued that governments needed to go further than carbon levies, which she believed were insufficient on their own to deal with the scale of the climate challenge. She has suggested that governments embark on a more fundamental shift away from the taxation of labour – which she said had the potential to penalise investment in green technology and innovation – towards resource use.

A study produced by Groothuis' Ex'tax Project (a Dutch think tank) in 2016 had concluded that reductions in payroll taxes and increases in tax credits, alongside greater taxation of pollution and resource use according to the 'polluter pays' principle, could help to deliver higher economic growth, create more jobs and reduce pollution and import dependency.

It had also found that this could help to deliver a more progressive tax system. Groothuis explained that while all households would benefit from an increase in their purchasing power, the benefits would be most keenly felt by those on the lowest incomes.

Peter Levell of IFS said the UK needed to develop a more consistent approach to carbon taxation, as opposed to the current inconsistent patchwork of taxes, levies, subsidies and obligations that did not necessarily reflect the costs of emissions in certain sectors.

He showed that energy intensive industries were taxed less on their emissions compared to non-intensive industries, and long-haul aviation was undertaxed for the emissions it produced (a situation perhaps partly remedied by increases in long-haul air passenger duty at the subsequent UK Budget). Government policy has also incentivised the development of low carbon technologies, with subsidies for emerging energy sources like wave and tidal power at the expense of more developed technologies like onshore wind.

But Levell argued that the time had come for the UK to reset its approach to carbon pricing amid the looming threat to fuel and vehicle tax receipts from the rise in electric vehicles – an area of policy that may give civil servants sleepless nights in the years to come.

In the Q&A session that followed, guests quizzed the panel on topics including how to replace fuel duty, the impact on decarbonisation on the government's 'levelling up' agenda, business support for global climate objectives and the role of carbon taxation in managing an equitable transition to net zero.

Introducing the debate, CIOT President Peter Rayney highlighted that the climate debate came on the same day that the CIOT was publishing its Climate Change Tax Policy Roadmap. This sets out the principles that should underpin the development of future climate tax policymaking. The paper calls for tax to be considered alongside wider climate policy objectives, to consider the impact of potential losses in tax revenue arising from decarbonisation, and for the UK government to position itself as a global leader in the climate tax agenda.

You can watch a recording of the debate at: bit.ly/3x32mmN
CIOT's Climate Change Tax Policy Roadmap: bit.ly/3HuZljZ
CIOT Blog on the debate: bit.ly/3HC3iDM

ATT

Virtual Admission Ceremony

EVENT

More than 60 new ATT Members celebrated their achievements at a virtual Admission Ceremony on the evening of Thursday 4 November.

ATT President, Richard Todd, said: "This occasion allows you to celebrate your momentous achievement with family and friends and enables me the perfect opportunity to formally welcome you to the ATT family.

"We don't underestimate the significance of your achieving membership of the ATT. Many of you will have completed your final studies through lockdown and virtual exams."

After the Admission Ceremony, the Chair of the New Tax Professionals Committee, Toyin Oyeneyin, kindly hosted a quiz and Members were also given an opportunity to learn more about the New Tax Professional network, becoming a Chartered Tax Adviser and volunteering.

We look forward to meeting many more Members as we plan, restrictions permitting, to resume face to face admission ceremonies in 2022.

ATT

Feature a Fellow: David Holmes

PROFILE

David Holmes MA MEng ATT(Fellow) CTA tells us about his career in tax.

Since 2019, I have been Managing Director of Ingleton Partners, an independent UK/US private client tax practice. We predominantly act for US persons living in the UK who still have to file US taxes by virtue of US citizenship.

When my colleague Tom and I founded Ingleton Partners in 2009, we were in our twenties and that made us very unorthodox! We relied on all the resources available through the ATT: template documents, guidance on procedures and AML supervision.

Taking my ATT exams was a 'light bulb' moment. Like many before me, I fell into my specialism. I took an internship with KPMG, landing in private client tax before joining PwC, as a graduate, in a specialist UK/US team.

Through the ATT, I developed clarity and understood the principles of tax and the interactions between the different taxes. This experience was invaluable and is why our new trainees take the ATT. It gives the broad and fundamental understanding of UK tax that they need.

In 14 years, I've never stopped learning and I love that aspect. Thanks to the branch webinars I've done more CPD than ever this year.

For those starting out, my advice would be to work hard and grow your thirst for knowledge. Commercially, it's important to understand the value of the knowledge you impart and believe you are worth it.

For me, becoming a Fellow was about recognising my 14 years in tax and that I now possess a deep and specialist knowledge in my field. It affirms the value I bring to my clients, business and team.


David Holmes

If any other ATT Fellows would like to feature in a future issue of Tax Adviser, please email us at: page@att.org.uk

ADIT

Get the latest from our Champions!

QUALIFICATIONS

As word continues to spread among international tax professionals and employers around the world about the benefits of ADIT learning, our ADIT Champions have played a key role in promoting both the qualification and Affiliate certification to audiences in their respective countries.

Since 2020, our five Champions – Andrada Gorita, Colm Mooney, Katia Papanicolaou, Quang Phan and Siddharth Banwat – have worked hard in contributing to the successful delivery of ADIT promotional campaigns, participation in online events on international tax talking points, and offering their valuable insights on how the services that we offer to ADIT students and holders can be developed and tailored to the diverse needs of international tax professionals in different countries and sectors.

We recently hosted our first ADIT Network webinar, at which international tax audiences in Ireland explored the indirect tax impacts of Brexit with expert speakers Ciaran McGee and Janette Maxwell. The event was the brainchild of Colm who, as our ADIT Champion for Ireland and Transfer Pricing Policy and Process Senior Manager at Pfizer, has played a key role in organising this and subsequent events for the growing community of ADIT professionals and their employers in Ireland. We look forward to delivering more ADIT Network webinars over the course of the next year, working with our Champions to bring together speakers and audiences on topics relevant to ADIT professionals in the countries represented by each Champion.

All of our Champions hold the ADIT qualification, as well as working full-time in international tax, meaning they are well-placed to offer first-hand insights on the technical knowledge and career benefits that the qualification provides. We are very grateful for the key role that they play in promoting ADIT learning and serving their respective ADIT communities!

To find out more about ADIT Champions, visit: www.tax.org.uk/adit/champions.

Cyprus Champion: *Katia Papanicolaou*| cyprus@adit.org
India Champion: *Siddharth Banwat* | india@adit.org
Ireland Champion: *Colm Mooney* | ireland@adit.org
Malaysia Champion: *Quang Phan* | malaysia@adit.org
Romania Champion: *Andrada Gorita* | romania@adit.org

Disciplinary reports

Findings and orders of the Disciplinary Tribunal

TAXATION DISCIPLINARY BOARD

Ms Nikita Choudhury
NOTIFICATION

At its meeting on 13 September 2021, the Disciplinary Tribunal of the Taxation Disciplinary Board determined that Ms Nikita Choudhury of Luton, a student member of the Association of Taxation Technicians, was guilty of breaches of the Professional Rules and Practice Guidelines 2018 (PRPG) in that she acted dishonestly in colluding with another student when sitting a professional examination.

The tribunal determined that Ms Choudhury:

1. be suspended from the ATT student register for a period of two years;
2. be prohibited from sitting any further ATT examinations for a period of two years; and
3. pay £1,000 towards the costs of the TDB.

Ms Magdalena Durma
NOTIFICATION

At its meeting on 13 September 2021, the Disciplinary Tribunal of the Taxation Disciplinary Board determined that Ms Magdalena Durma of Newton Abbot, a student member of the Association of Taxation Technicians, was guilty of breaches of the Professional Rules and Practice Guidelines 2018 (PRPG) in that she acted dishonestly in colluding with another student when sitting a professional examination.

The tribunal determined that Ms Durma:

1. be removed from the ATT student register; and
2. pay costs of £1,361.

Mr Marc Andrew Hackney
NOTIFICATION

At its hearing on 13 September 2021, the Disciplinary Tribunal of the Taxation Disciplinary Board determined that Mr Marc Hackney of Hull, a member of the CIOT, was guilty of unbefitting conduct in that he had been convicted on indictment on 28 February 2020 for: (i) fraud by abuse of position; and (ii) forgery, for which he had received a two year suspended sentence with a requirement to undertake 300 hours of community service.

The tribunal determined that Mr Hackney be expelled from membership of the Chartered Institute of Taxation and pay costs in the sum of £1,250.

Mr Rakib Miah
NOTIFICATION

At its meeting on 13 September 2021, the Disciplinary Tribunal of the Taxation Disciplinary Board determined that Mr Rakib Miah of Tottenham, London, a student member of the ATT, was guilty of breaches of the Professional Rules and Practice Guidelines 2018 (PRPG) in that he acted dishonestly in colluding with another student when sitting a professional examination.

The tribunal determined that Mr Miah:

1. be suspended from the ATT student register for a period of two years;
2. be prohibited from sitting any further ATT examinations for a period of two years; and
3. pay £100 towards the costs of the TDB.

Ms Shalini Renumakula
NOTIFICATION

At its meeting on 13 September 2021, the Disciplinary Tribunal of the Taxation Disciplinary Board determined that Ms Shalini Renumakula of Swindon, a student member of the Association of Taxation Technicians, was guilty of breaches of the Professional Rules and Practice Guidelines 2018 (PRPG) in that she acted dishonestly in colluding with another student when sitting a professional examination.

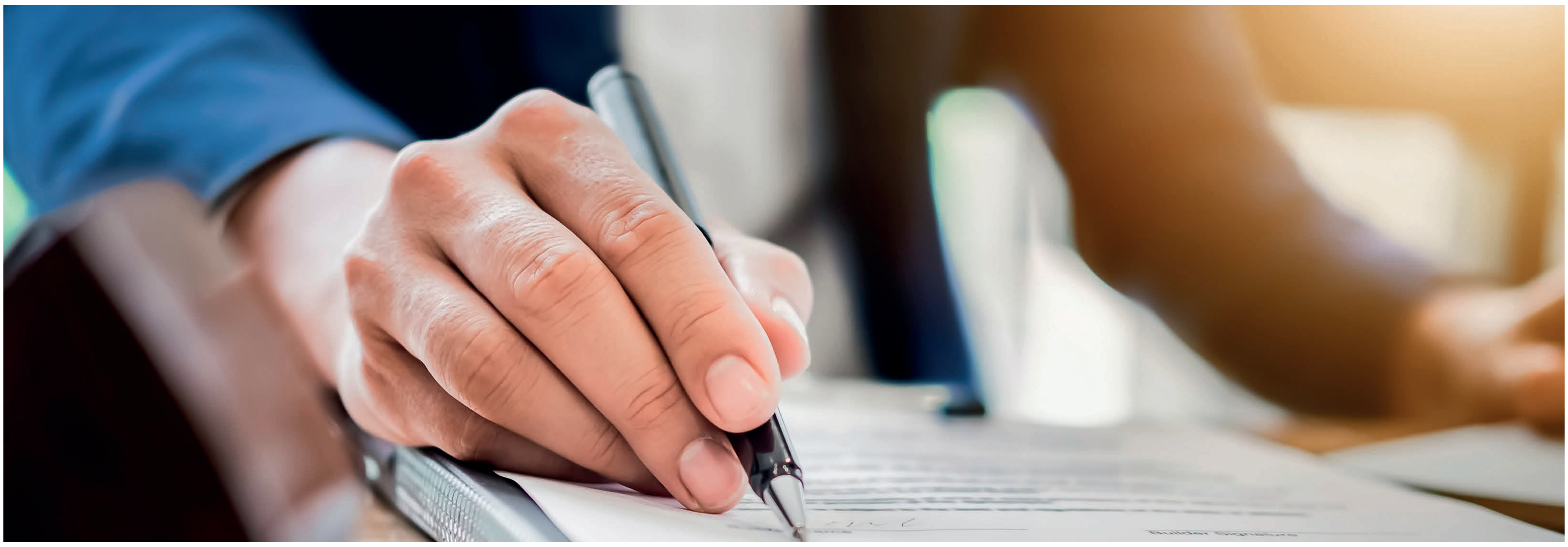
The tribunal determined that Ms Renumakula:

1. be removed from the ATT student register; and
2. pay £1,000 towards the costs of the TDB.

Copies of the Tribunal's decisions can be found on the TDB's website www.tax-board.org.uk

OPPORTUNITY TO BE AN EXAMINER FOR THE CIOT

Chartered Institute of Taxation.



We are looking to strengthen our examining teams for the 2023 exam session and future years. If appointed, work on the 2023 papers will start in March 2022. You will be required to attend a training session on the morning of Tuesday 8 March 2022 with all examiners and also an Examiner's day with the other members of your team on your paper which will take place on a day to be agreed with your team. We are seeking specialists in the following areas who would like to join us:

- **Indirect Taxation**
- **Taxation of Owner-Managed Businesses**
- **Taxation of Individuals**
- **Human Capital Taxes**
- **Inheritance Tax, Trust and Estates**
- **Corporation Tax**

Applications are invited from those with at least three years' post qualification experience who can offer the skills required to help to maintain and enhance the standard of our examinations. The key requirements for the role are:

- **The ability to keep to the tight timetable for the preparation and review of the exam questions and for the marking of scripts**
- **Strong technical skills**
- **Good written communications skills**
- **The ability to work as a member of a team**

You would be part of a team responsible for drafting, reviewing and marking one of the Advanced Technical examination papers and for ensuring that the examinations are of the highest possible quality. The time commitment varies from paper to paper, but most examiners continue to work full-time and carry out CIOT work at weekends and in the evenings. Typically, an examiner in an Advanced Technical team will be part of a team of four and will write and review half of a paper once a year and will mark questions they have set.

The 2022 syllabus and recent exam papers can be found here:

Past exam papers: https://www.tax.org.uk/pastpapers

2022 syllabus: https://www.tax.org.uk/prospectus-and-syllabus

Remuneration is commensurate with the strong skill set demanded for examiners.

If you are interested then please email **Jude Maidment** a copy of your CV in the first instance (**jmaidment@ciot.org.uk**). This will be passed to the Chief Examiner. If you would like to discuss the examiner role then please contact Jude on 020 7340 0577.

Georgiana Head Recruitment

MEET YOUR ADVISERS

GEORGIANA HEAD

Director

Tel: 0113 426 6672
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georgiana@ghrtax.com

ALISON TAIT

Director

Tel: 0113 426 6671
Mob: 07971627 304

alison@ghrtax.com

Private Client Advisory
Cheshire or Shropshire - with all the trimmings

Our client is a large independent firm of accountants. They seek a private client specialist to join and advisory focused team, this role could be based in Northwich or Nantwich in Cheshire or in Shropshire. The firm also has offices in North Wales. A key element of your role will be supporting local firms of solicitors with tax planning for their clients such as IHT and will planning, capital gains tax advice and advice re trusts. This firm offer a mix of home and office working. Perfect opportunity for someone looking for good quality work but in a more local setting. **Call Georgiana Ref: 3176**

Capital Allowances
Harrogate – New year, new start

This is an opportunity to do Capital Allowances work outside of a traditional accountancy firm setting. Our client is a long established firm of specialist Capital Allowance Consultants providing a service to accountants and property owners throughout the UK. You may be a surveyor or CTA qualified– but key is you will need proven capital allowances experience. You might currently work in a Big 4 or Top 20 and be looking for something different. Would also consider a more junior surveyor looking to specialise. **Call Georgiana Ref: 3167**

In-house Group Tax Manager
Alderley Edge, Cheshire - Christmas bonus

In-house role for a Group Tax Manager based in Alderley Edge. This major property group seeks an all-round corporate tax advisor who is interested in also doing some treasury work. In this role, you will help the share-holders and the business with tax planning advice and you will manage the compliance and reporting for the group. As the lead tax person, you will have responsibility for both direct and indirect tax. Reporting to a Financial Controller, this mainly office based role would suit a qualified tax specialist with strong compliance and reporting experience. **Call Georgiana Ref: 3170**

Personal Tax Manager
Leeds – to £48,000

This independent firm is looking for a personal tax manager to oversee the completion of individual and partnership tax returns. In addition to reviewing work, you will also manage a portfolio of more complex clients. You should be ATT/CTA qualified, with the ability to multi task and complete assignments within a set deadline. You will ideally have had 2–3 years' experience in a personal tax management role and experience in dealing with NHS superannuation issues. **Call Alison Ref: 3107**

Personal Tax Senior
Leeds – to £28,000

Independent firm seeks a personal tax senior with 2–3 years' personal tax experience. You will deal with the self-assessment tax compliance for individuals and partnerships. This includes managing client relationships, answering ad-hoc tax related queries and helping the senior management team with technical work and business development. You will ideally be ATT qualified, but study support may be available for the right candidate. You should have strong organisational skills and be IT proficient. **Call Alison 3166**

Private Client Manager
Manchester – to £50,000 + benefits

Fantastic opportunity for an ACA/CTA qualified private client specialist to contribute to the continued growth of private client advisory work in this North West team. Clients are generally HNWIs, and technical areas you will advise around include trusts, UK property, private equity and international aspects (residence, non doms and overseas trust/company structures). You will also have man management and business development responsibilities. Experienced assistant managers and new managers will be considered. **Call Alison Ref: 3174**

www.georgianaheadrecruitment.com

Mixed Tax Manager or Supervisor
Pinner, London – Festive fare

Our client is an independent firm of accountants and tax advisers based in Pinner, north west London. This is a key role working as part of a growing company and tax team. The supervisor or manager will take immediate responsibility for assisting with all day-to-day management and overseeing of the tax work, including dealing with corporation tax, self-assessment, VAT, ATED and payroll related issues. This will include providing compliance and advice services to a wide range of businesses and individuals (including HMRC enquiries and resolutions). **Call Georgiana Ref: 3168**

Corporate Tax Director
Greater London – to £100,000

A fantastic opportunity for a corporate tax director to manage and deliver corporate tax compliance and advisory services to a client base made up of OMB's, SME's and entrepreneurs. You will advise on areas such as corporate restructuring, succession planning, employee share schemes and share ownership trusts and profit extraction from family businesses. You will manage the client relationship and coach and mentor junior colleagues. Strong communication and problem-solving skills are essential. **Call Alison Ref: 3175**

Tax Senior Associate
Liverpool – £excellent

This role can be in the personal, corporate or employment taxes compliance team, as each area is recruiting. You will review tax compliance returns and will also manage the junior reviewers. This is a fantastic opportunity to play a key role in pushing the growth of this team forwards. You must have tax compliance experience and experience of managing junior team members. Great communication skills are a prerequisite as are good time management and organisational skills. **Call Alison Ref: 3128**

Business Tax Assistant Manager or Manager
Wakefield – £excellent

Highly regarded independent firm seeks a technically strong business tax adviser to join their growing tax team. The role has a corporate tax bias, but you will get involved in both personal and corporate tax work. You will oversee the corporate tax compliance for your clients and will also work closely with the directors on advisory projects. The firm is based a short walk from the train station and offers flexible working. Part time and full-time candidates will be considered. **Call Alison Ref: 3159**

Employment Taxes
Scotland – Perfect present

Our client is a market leading, specialist provider of tax services to the public sector including NHS trusts, councils, further education colleges and housing associations. Due to increased demand for their services and expansion, they seek a dynamic individual who will help them develop their offering in Scotland. It is likely that you will be an experienced manager or senior manager/associate director. You may be ex HMRC. Multiple locations in Scotland considered, and the role can be remote worked but will need travel to Scotland and at times to team meetings in England. **Call Georgiana Ref: 3157**

Tax Lawyer
Remote Working - New Year's resolution?

Our client is a boutique law firm which specialises in tax. They seek a UK qualified tax lawyer ideally with at least 6 years' pqe. In this role, you will deal with a wide range of work from transaction support to report writing. This firm acts as tax department to a range of commercial law firms, and also has its own clients. It deals with UK and international corporate tax matters as well as SDLT property tax and VAT. Would consider someone who wants to work from home as long as they commit to some travel as needed. Part time working available too. **Call Georgiana Ref: 4000**

YOUR TAXATION RECRUITMENT SPECIALISTS