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1. Private client

1.1 HMRC investigates share sale proceed discrepancies

HMRC is reviewing a number of 2019/20 returns where the reported proceeds for share sales do not match those declared by the purchasing company.

HMRC will write to those taxpayers it has identified as having discrepancies. They will be asked to check their 2019/20 return, and to submit a disclosure on the digital disclosure service if they identify an error. If they believe that the original tax return is correct they will be asked to email HMRC to confirm these. Taxpayers who do neither may be issued with a discovery assessment after further review.

www.tax.org.uk/share-sale-proceeds-hmrc-briefing

1.2 LLP found not to be trading

The FTT has dismissed an appeal from a taxpayer denied entrepreneurs' relief (ER), now known as business asset disposal relief, finding that the LLP he had units in had not started trading before he sold the units.

The taxpayer had obtained 14.65% of the equity in an LLP that intended to construct and operate a renewable energy plant. During his 15 month ownership of the units, the LLP entered into a number of contracts relating to this venture, including for the purchase of materials needed, and applied for a relevant permit. The permit to operate was issued seven months after the sale.

The FTT considered the definition of 'trading', and the possible tests, and agreed with HMRC's conclusion that the LLP was not trading in the year prior to the sale. Although preparations had been made for the trade to commence, the LLP was supplying neither goods nor services in that time, and had not begun 'operational activities', so no ER was available.

Wardle v HMRC [2022] UKFTT 158 (TC)

www.bailii.org/uk/cases/UKFTT/TC/2022/TC08485.html

1.3 Taxpayer win in information notice case

The FTT found that HMRC did not have reasonable grounds for suspecting that tax paid was insufficient for most of the items in an information notice.

Following a statutory review, HMRC had issued the taxpayer with an information notice covering four tax years, asking for information about his UK and non-UK bank accounts, credit cards, remittances, gift, and connections to UK and non-UK trusts. He had lived in the UK since 2007, and was non-UK domiciled. His only income included on UK tax returns in those years was UK bank interest, which HMRC believed to be incompatible with his UK lifestyle, though he explained that he received regular gifts from his father.

The FTT only upheld the part of the information notice about connections to trusts. The taxpayer had given a legitimate explanation of HMRC's initial concern about his lifestyle, and its wider concerns around his business interests were outside the scope of the issues in the information notice.

Hackmey v HMRC [2022] UKFTT 160 (TC)

www.bailii.org/uk/cases/UKFTT/TC/2022/TC08487.html

1.4 Loss of tax caused carelessly by agent

The FTT has found that an agent who did not realise that redress payments related to a business were taxable was careless, as the HMRC guidance at the time indicated that they were taxable.

The taxpayers received redress payments for mis-sold interest rate hedging products, with interest. They did not include the payments in their declared income on their tax returns, but included white space notes stating that these had been received, the amount, and that they were not considered to be taxable. The interest on the payments was declared as taxable.

The question before the FTT was whether or not the mistake was because of the carelessness of the agent who had prepared the returns. The FTT found that it was so, as HMRC's guidance at the time had indicated that the payments were taxable, as the payments were related to a business. The agent's method of declaration was not merely a different technical view, that he could have supported. Although the agent had been mistaken, he had failed to take reasonable care in checking whether or not the payments were taxable. The assessments were therefore valid.

Johnson & Anor v HMRC [2022] UKFTT 156 (TC)

www.bailii.org/uk/cases/UKFTT/TC/2022/TC08483.html

2. PAYE and employment

2.1 CA upholds HMRC UT win in tax avoidance case

As at the UT and FTT, the taxpayer has lost his appeal in a lead case on income from a tax avoidance scheme. The CA upheld the UT's decision that the discovery assessments were valid, and HMRC's decision to disapply a PAYE regulation such that the liability fell on the scheme user was valid.

The taxpayer had engaged in a tax avoidance scheme, under which his income was partly paid in the form of interest-free loans. The non-UK resident employers paid sums into Employee Benefit Trusts (EBTs), which were intended to be lent on to the taxpayer on the understanding that they would never be repaid. The income reported was simply the loan benefit.

He argued that, even if the loan was employment income, he should receive a tax credit for PAYE that the end user should have deducted. As it was a non-UK employer HMRC had exercised its statutory discretion to relieve the end user from the PAYE liability, and therefore charged it on the taxpayer. The taxpayer disputed the scope and legality of this use of discretion. The CA agreed with the tribunals that HMRC had this discretion, but that the FTT did not have jurisdiction to determine whether or not HMRC had exercised it correctly.

HMRC's alternative argument, that the taxpayer allowing his non-resident employer to dispose of his income fell within the transfer of assets abroad (TOAA) rules, was rejected. His employer in fact had no income after valid deductions for the contributions to the EBTs, so the TOAA rules could not apply.

Permission for a judicial review was also refused.

Hoey & Ors v HMRC [2022] EWCA Civ 656

www.bailii.org/ew/cases/EWCA/Civ/2022/656.html

3. Business tax

3.1 Remuneration trust scheme defeated at FTT

The FTT has found that a marketed tax avoidance scheme involving a remuneration trust was not effective for tax purposes.

A company (C) made contributions to a trust (T) that made loans to the three individuals who were also employees and indirect shareholders of C. The contributions in question were made in the periods ended 31 December 2011 to 31 December 2014. HMRC denied CT deductions for both the contributions to T and the fees paid by C for the marketed avoidance scheme. It also concluded that the loans by T should be subject to PAYE and NICs.

The FTT found for HMRC and agreed with the disallowed CT deductions. C's explanation that the contributions to T were to establish a 'fighting fund' to protect the business and give insurance discounts were found not to be credible, as these were not referred to in the scheme documents and there were other ways to give discounts. The FTT concluded that the contributions were made to obtain a tax deduction and were not wholly and exclusively for the purpose of the trade. The treatment of the fees followed this.

The FTT found that the contributions were not automatically earnings as initially argued by HMRC because the loans were made with a legal obligation to repay. They were, however, taxable as employment income under the disguised remuneration rules. Various aspects were considered, including that the funds were paid as part of a pre-arranged transaction to onward lend and that the individuals had taken salary reductions. NICs were also due.

CIA Insurance Services Ltd v HMRC [2022] UKFTT 144 (TC)

www.bailii.org/uk/cases/UKFTT/TC/2022/TC08475.html

3.2 One year delay to UK reporting by digital platforms

HMRC has confirmed that the start date for reporting by digital platforms will be delayed a year to 1 January 2024.

As announced in the Spring Budget 2021, the Government plans to introduce domestic legislation to implement the OECD's model reporting rules for platform operators. These rules will apply to operators of websites and apps that connect consumers with sellers of goods and services. Operators will be required to provide information to HMRC on the income that sellers earn through their sites, with the aim to improve tax compliance by sellers using digital platforms.

www.icaew.com/insights/tax-news/2022/May-2022/UK-Reporting-by-digital-platforms-to-start-on-1-January-2024

3.3 HMRC suspends payment of some R&D tax credits

Payment of a subset of open claims will be delayed while HMRC investigates irregularities.

Most R&D claims will be unaffected, but the claims under investigation will not be processed in the normal timeframe. HMRC has asked agents not to call the helpline nor email HMRC, but to look at their agent online accounts for updates.

www.icaew.com/insights/tax-news/2022/May-2022/HMRC-suspends-payment-of-some-RD-tax-credit

3.4 HMRC wins appeal on withholding tax on manufactured overseas dividends

The SC has allowed HMRC's appeal, finding that the manufactured overseas dividend (MOD) regime did not constitute a restriction on the free movement of capital.

'Manufactured dividends' arise in scenarios where securities are lent to another party under terms that require the borrower to pay amounts equivalent to the dividend stream the shares would have yielded if the lender had retained beneficial ownership. Where the shares are held by a company outside the UK, the contractual income stream is called 'manufactured overseas dividend'. The MOD payments were not actually dividends, but a special tax regime (since discontinued) resulted in deemed withholding tax payable by the borrower similar to that on dividends. A corresponding withholding tax credit was available to the lender.

The taxpayer, a pension fund, indirectly suffered £8.8m of withholding tax arising from stock lending arrangements carried out between 2002 and 2008. As a pension fund, it was not taxable on such income and unable to benefit from the £8.8m tax credits. The withholding tax suffered was an actual cost.

The CA had agreed with the taxpayer's argument that the MOD regime imposed a restriction on the movement of capital under EU law. It found that the correct approach to this issue was to compare the UK tax treatment of UK manufactured dividends and MODs. The FTT had compared the receipt of a MOD with the receipt of the foreign dividend itself. The UK law in these circumstances provided for withholding tax on a MOD, but not on a UK manufactured dividend. The MOD regime did therefore infringe upon the right to free movement of capital.

The SC overturned this, finding for HMRC that there was no breach of the right to free movement of capital, as the idea that investors would be discouraged from the UK was speculation. The SC also concluded that even if there had been a breach to freedom of movement the remedy sought by the taxpayer, full credit for the withholding tax, was out of proportion to any wrong done.

HMRC v Coal Staff Superannuation Scheme Trustees Ltd [2022] UKSC 10

www.bailii.org/uk/cases/UKSC/2022/10.html

4. VAT and indirect taxes

4.1 HMRC updates guidance for DIY housebuilders

HMRC has published a brief with guidance on when it may accept amended DIY housebuilders scheme claims in certain circumstances.

HMRC allows only a single claim to be made under the DIY scheme. Following an FTT decision, however, it has amended its guidance for cases where it is agreed that a claim has been repaid in error. Now, a subsequent claim will be allowed in these cases, if there is evidence that it has been made within three months of completion.

www.gov.uk/government/publications/revenue-and-customs-brief-8-2022-single-diy-claim-first-tier-tribunal-andrew-ellis-and-jane-bromley

Ellis & Anor v HMRC [2021] UKFTT 343 (TC)

www.bailii.org/uk/cases/UKFTT/TC/2021/TC08277.html

4.2 Sub-sale relief scheme fails

The FTT has found that group relief could not be claimed on a transaction subject to SDLT, as it was not a sub-sale as defined in the legislation. The whole transaction was designed to avoid tax.

The taxpayer acquired a 999 year lease on a property from another company in the same group purely for commercial reasons. The method chosen for the transfer was, however, designed to achieve a CT advantage of approximately £44m in the form of a £170m tax-free step-up from book cost to the considerably higher market value, with all the steps being carried out on the same day. The lease was transferred at book value to another group company (A), A being transferred to the taxpayer, with the lease being transferred from A to the taxpayer at book value. The taxpayer accepted after enquiry that no CT advantage could be obtained, but maintained its claim to group relief from SDLT.

The FTT rejected this claim. No group relief was available, as this transaction was part of arrangements designed to avoid tax, though the CT avoidance failed.

The transaction was not a sub-sale, as the transfers were done in successive steps, rather than one being incomplete before the second was carried out. SDLT should be charged on the lease transfer from A to the taxpayer. There was a market value charge even though the consideration was book value.

The Tower One St George Wharf Limited v HMRC [2022] UKFTT 154 (TC)

www.bailii.org/uk/cases/UKFTT/TC/2022/TC08481.html

5. Tax publications and webinars

5.1 Tax publications

The following Tax publications have been published.

- [What will basis period reform mean for you?](#)
- [Notification of uncertain tax treatment for large businesses](#)

5.2 Webinars

The following client webinars are coming up soon.

- 8 June - [S&W Sessions: Business Rates: Change is coming](#)
- 9 June - [Contemporary FD Bitesized](#)
- 9 June - [Webinar series for Professional Practices: Financial Planning for Professionals](#)
- 14 June - [Basis Period Reform - getting ready for change](#)

<https://smithandwilliamson.com/en/events/>

6. And finally

6.1 Back to Toyland

We were disappointed with the judgment in *Wardle* (see item 2.2 above). Not indeed the decision itself; we wouldn't be so presumptuous. It's just that there was maybe an omission and a lost opportunity. In any case where we discuss pre-trading, we always nod sagely and just say '*Noddy*'. It's an invariable opportunity to demonstrate tax erudition and to be a bit, er..., gnostic.

Noddy as corporate tax practitioners know, is an old case on such activity but, even if not precisely on the point here, close enough, surely, at least to be mentioned?

Sadly, then, *Wardle* wasn't a *Noddy* decision.

Wardle v HMRC [2022] UKFTT 158 (TC)

www.bailii.org/uk/cases/UKFTT/TC/2022/TC08485.html

Glossary

Organisations		Courts	Taxes etc	
ATT - Association of Tax Technicians	ICAEW - The Institute of Chartered Accountants in England and Wales	CA - Court of Appeal	ATED - Annual Tax on Enveloped Dwellings	NIC - National Insurance Contribution
CIOT - Chartered Institute of Taxation	ICAS - The Institute of Chartered Accountants of Scotland	CJEU - Court of Justice of the European Union	CGT - Capital Gains Tax	PAYE - Pay As You Earn
EU - European Union	OECD - Organisation for Economic Co-operation and Development	FTT - First-tier Tribunal	CT - Corporation Tax	R&D - Research & Development
EC - European Commission	OTS - Office of Tax Simplification	HC - High Court	IHT - Inheritance Tax	SDLT - Stamp Duty Land Tax
HMRC - HM Revenue & Customs	RS - Revenue Scotland	SC - Supreme Court	IT - Income Tax	VAT - Value Added Tax
HMT - HM Treasury		UT - Upper Tribunal	LBTT - Land and Buildings Transaction Tax	

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