22 June 2022

A round-up of recent issues

Tax update

Contents

1. General

1.1 HMRC agent update 97

HMRC has published agent update 97, which provides an overview of the recent issues of which tax agents should be aware. It includes updates on HMRC services, and forthcoming changes.

The latest agent update summarises various recent issues and changes, including:

- guidance for non-UK resident corporate landlords on format of accounts and other information to be filed online;
- a reminder that NIC thresholds rise on 6 July;
- improvements to CT letters;
- guidance on making a notification into the qualifying asset holding company regime;
- a note on how the CIS applies to property investment companies;
- guidance on self-assessment;
- guidance on MTD for VAT; and
- links to help and support for agents.

www.gov.uk/government/publications/agent-update-issue-97

1.2 HMRC late payment interest rate to increase again

Following the Bank of England base rate rise, the rate of interest HMRC charges on late tax payments will be increased again. This will be the fifth increase in 2022 for non-quarterly instalment payments.

HMRC will increase yearly interest rates on overdue tax by 0.25%, following the Bank of England base rate increase from 1% to 1.25%. The rate applied to the main taxes will therefore become 3.75%. The rate of interest on repayments from HMRC will remain unchanged at 0.5%.

The change will apply from 27 June 2022 for quarterly instalment payments and 5 July 2022 for non-quarterly instalment payments.

www.gov.uk/government/news/hmrc-late-payment-interest-rates-to-be-revised-after-bank-of-england-increases-base-rate--5

1.3 New double tax treaty with Luxembourg

The text of an as-yet unratified new version of the UK-Luxembourg double tax treaty has been published. This includes significant changes to the position of Luxembourg investors with indirect interests in UK residential property. Currently, Luxembourg has taxing rights on disposals by Luxembourg tax residents of indirect holdings of UK property. When the treaty comes into force the UK will be able to tax the gains arising on these disposals.

The dividend withholding tax rate has been cut to 0% from 5%, as has the withholding tax rate on royalties.

This has not yet entered into force.

www.gov.uk/government/publications/luxembourg-tax-treaties#full-publication-update-history

1.4 Professional bodies complain about HMRC service levels

Four professional bodies have sent a joint letter to HMRC regarding service levels

The CIOT, the ATT, the ICAEW, and the ICAS have, following many reports from members, sent a joint letter to HMRC about its poor service levels recently. It asks when various items of data, and responses to recommendations, will be published. It also points out that they are under pressure from their members to resolve the issues, and possibly to raise them more widely, for example with the media and the Government.

www.tax.org.uk/hmrc-service-levels-joint-professional-bodies-letter

2. Private client

2.1 HMRC nudge letter on provisional roll-over relief

HMRC is writing to individuals who made provisional rollover relief claims in years up to and including 2017/18 but have not submitted a final claim within the required time limit.

When a provisional claim for rollover relief is filed, the claimant has until the third anniversary of 31 January following the end of the tax year of disposal to file a final claim, or the provisional claim expires.

The letters state that taxpayers will have 30 days to respond to HMRC with a final claim, if they reinvested the proceeds in the relevant time limits. If not, assessments for the deferred CGT will be raised.

There is a separate time limit for making a claim to rollover relief, and if the taxpayer subsequently makes a valid claim, the tax and interest will be repaid at that time.www.tax.org.uk/provisional-roll-over-relief-hmrc-nudge-letter

2.2 HMRC nudge letter on the remittance basis charge

HMRC is writing to non-dom taxpayers to explain the remittance basis charge (RBC) and request payment in cases it believes that it should have been paid.

In June 2022, non-UK domiciled taxpayers in HMRC's 'wealthy' category will receive letters if HMRC has identified that they need to pay the RBC, or move to the arising basis. The letters will explain what they need to do to amend their 2020/21 tax return, and file a correct 2021/22 tax return. Amendments are required within 60 days, or HMRC may open an enquiry into the position. This follows a clarification in HMRC's guidance on year counting, although the legislation remains unchanged.

www.gov.uk/government/publications/agent-update-issue-97/agent-update-issue-97#remittance-basis-charge

2.3 Non-monetary contribution to a pension scheme not relievable

The FTT has found that pension scheme members who took on the debts of the pension scheme did not make a pension contribution attracting tax relief.

The appellant, a scheme administrator for a number of registered pension schemes, had claimed relief at source for various individual member contributions to the pension schemes. Each member had given an IOU for a set amount of money to the scheme, which was regarded as the contribution, and they later transferred shares to the scheme to the value of the IOU to settle it.

The FTT agreed with HMRC that these were not pension contributions that attracted tax relief, as they were not monetary contributions. The judge stated that "*the more logical construction is that Parliament's intention was clearly that tax relief is only available in the tax year in which the taxpayer deprives himself or herself of either money or an asset which meets the criteria for an in specie contribution. The granting of an IOU deprives the taxpayer of nothing until it is honoured.*"

Mattioli Woods PLC v HMRC [2022] UKFTT 179 (TC)

www.bailii.org/uk/cases/UKFTT/TC/2022/ukftt_tc_2022_179.html

2.4 Unauthorised transfer charge not upheld on scammed taxpayer

The FTT has ruled that an assessment applying an unauthorised payment charge for a pension withdrawal was invalid, as the taxpayer had not acted carelessly nor deliberately. She had been scammed out of her pension and was unaware that the loan was connected to the pension transfer.

The taxpayer, who was surviving by means of payday loans and pawning her belongings, took out a loan recommended by a financial adviser, who also recommended that she move her pension. She was unaware that the two were connected, but the outcome was the loss of her pension fund. HMRC argued that the loan she received, of which she had repaid well over half before becoming aware of the scam, was derived from her pension. An unauthorised payments charge was applied, along with a surcharge.

The FTT ruled that this was invalid, and allowed the taxpayer's appeal. The loan was an unauthorised member payment, though the taxpayer did not know it, but the assessment was invalid. This was on the basis that the taxpayer had not acted carelessly nor deliberately, .and HMRC had issued a discovery assessment while the enquiry window was still open. Alternatively, the FTT also found that it would not have been just nor reasonable to apply the surcharge, although the unauthorised payment charge itself would have remained payable.

Curtis v HMRC [2022] UKFTT 172 (TC)

www.bailii.org/uk/cases/UKFTT/TC/2022/TC08499.html

2.5 Annexe found not to be separate dwelling

Multiple dwellings relief (MDR) has been denied on a property with an annex, as although it had been used for AirBnB lettings it was not suitable for use as a permanent separate residence.

The taxpayers, a married couple, bought a property and paid SDLT at the rate for the purchase of a single dwelling. They later filed an amendment on the basis that MDR was due, and appealed HMRC's rejection. The annex they claimed as separate was over the garage, detached from the main house, with a separate lockable door and shower room. Systems such as the boiler, heating controls, and security alarms were separate from the main house. The previous owners had used it for longer term guests, and the taxpayers had stayed there when the main house was being renovated, then advertised it as a holiday let.

The FTT agreed with HMRC that no relief was due, as the annex was not suitable for use as a separate dwelling. It had no oven nor designated kitchen area, no separate postal address nor council tax bill. The kitchen area, consisting of a few appliances such as a microwave on the landing, with water needing to be fetched from the shower room, was not suitable for use as a long term home. It was just additional living space for the occupants of the main family home.

It was noted that suitability for occupants generally matters; it is not sufficient for the property to be suitable only for a particular type of occupant such as a relative or squatter.

Generally the assessment is multi factorial and there is no one size fits all and there is no exhaustive list of factors which can be applied to each and every case.

Dower & Anor v HMRC [2022] UKFTT 170 (TC)

www.bailii.org/uk/cases/UKFTT/TC/2022/170.html

3. PAYE and employment

3.1 Employer bulletin: June 2022

The latest Employer Bulletin from HMRC provides reminders and updates on tax issues for employers.

It includes information on:

- the 6 July increases in NIC thresholds;
- guidance on PAYE reporting;
- a reminder about the P11d deadlines and payments;
- guidance on reporting expenses and benefits;
- a reminder that the COVID-19 easement for enterprise management scheme incentives is ending, as is the save as you earn easement;
- a reminder that the COVID-19 easement for social security coordination with the EU is ending; and
- guidance on claiming work expenses.

www.gov.uk/government/publications/employer-bulletin-june-2022

3.2 Series of short contracts meant no temporary workplaces

The FTT has found that workers supplied by an umbrella company were employed by means of a series of short contracts, not one overarching one, so each of their workplaces was permanent under that contract. Travel and subsistence expenses were therefore non-exempt.

The taxpayer was an umbrella company that supplied construction workers it employed to various agencies. The key issue for the FTT to determine was whether the taxpayer employed each worker under one continuous employment contract, or under a series of contracts that began and ended with each assignment. If the first were true, the workers were travelling to a series of temporary workplaces, so could claim reimbursement for travel and subsistence free of IT and NICs. Under short contracts each workplace would be a permanent workplace under that contract.

After consideration of the evidence on how the business worked, and the contract terms, the FTT agreed with HMRC that a series of separate contracts, and thus permanent workplaces, had been in place. The elements of employment, such as mutuality of obligations, applied during each engagement but were not ongoing in between. Although some benefits were paid in between contracts, this was not enough to create an employment relationship in those periods. The PAYE and NIC determinations on the company were upheld.

Exchequer Solutions Limited v HMRC [2022] UKFTT 181 (TC)

www.bailii.org/uk/cases/UKFTT/TC/2022/ukftt_tc_2022_181.html

4. Business tax

4.1 Delay to UK implementation of the global minimum tax rate

Following responses to its consultation on the implementation of the agreed global minimum tax rate, the UK Government has announced that the UK Pillar 2 legislation will first apply to accounting periods beginning on or after 31 December 2023, rather than 1 April 2023.

As part of the package agreed by the OECD to manage the taxation of multinational companies, the UK along with 135 other countries is due to introduce a global minimum tax rate in 2023. The Government had planned to implement the new rules from 1 April 2023 but following the recent consultation this has been delayed until 31 December 2023. This is to provide sufficient lead-in time for the final policy decisions to be agreed with OECD, and for businesses to take appropriate steps. The original implementation date would have been ahead of many other countries and would have put UK businesses at a competitive and administrative disadvantage.

A formal response to the consultation along with draft legislation is expected over the summer.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1082639/20221061 3_FST_P2_Letter_PO_version_.pdf

www.gov.uk/government/consultations/oecd-pillar-2-consultation-on-implementation

4.2 HMRC advises longer processing times on R&D tax credit claims

HMRC has announced that following an increase in irregular claims it is enhancing its extensive compliance checks into R&D tax credit claims. As a result of the increased checks the standard processing times will increase.

To combat abuse of the R&D tax credit system HMRC is carrying out enhanced checks on all R&D tax credit claims, which will increase processing times. HMRC now aims to either pay the tax credit or contact the claimant company regarding their claim within 40 days but hopes to return to the normal 28 days processing time as soon as it is able. HMRC has also requested that the following guidelines are followed:

- ensure that all entries on the R&D section of the CT return are completed in full;
- submit additional information alongside the claim to help HMRC process the claim quicker; and
- review the latest guidance on completing the return.

HMRC ask claimants not to contact the R&D helpline to check progress of claims and has requested that agents use the company's online account to check the status of the claim. Claims submitted incorrectly, inflated, or fraudulently may incur a penalty.

www.icaew.com/insights/tax-news/2022/Jun-2022/HMRC-enhances-compliance-checks-on-RD-tax-credit-claims

4.3 Film co-production company eligible for Seed Enterprise Investment Scheme

The FTT has overruled an HMRC decision to refuse to issue Seed Enterprise Investment Scheme (SEIS) compliance certificates on shares issued by a film co-production company. It found that the taxpayer did have the intention to grow and develop its trade, and that its business activities were sufficient to constitute a qualifying business activity for the purposes of SEIS relief.

The taxpayer, a film production company, sought authority to issue SEIS certificates in relation to two investments. HMRC rejected the application on the basis that it failed to meet three conditions, a decision that the taxpayer appealed.

The first condition under consideration was the risk to capital condition. As with many film production companies the taxpayer was investing in only one film at a time. The FTT found that this did not mean that the taxpayer had no intention to grow and develop the trade, and that it was not unreasonable for the taxpayer to assume that a successful low budget production would result in the opportunity to secure a larger budget for a future production.

The second was whether or not the taxpayer was carrying on a qualifying trade. Based on the documentary evidence available, the FTT concluded that the taxpayer's trade was the co-production of films. Many film and television productions are co-produced particularly for films requiring multiple locations and special effects. The FTT was therefore satisfied that the activities of co-production were sufficient to constitute a discrete trading activity.

The final consideration was whether or not disqualifying arrangements were used to artificially increase the SEIS relief available. In this instance the film rights were held by another entity, and only assigned or licensed to a production company at the point when the film title was viable to move to the pre-production phase. A special purpose vehicle was set up for each film. HMRC argued that special purpose vehicles would artificially increase the level of relief available compared to the rights and production sitting within one company. The FTT considered the development of intellectual property and the production of the films to be separate business activities requiring discrete skills and resources and so it was not artificial to split them into separate entities. In addition, the company initially holding the film rights did not issue any shares with the benefit of SEIS and so the FTT was satisfied that there were no disqualifying arrangements.

Having examined these three areas, the FTT found that HMRC were wrong to refuse to issue the compliance certificates.

Cry Me a River Ltd v HMRC [2022] UKFTT 00182 (TC)

www.bailii.org/uk/cases/UKFTT/TC/2022/ukftt_tc_2022_182.html

4.4 Deduction for amortisation of goodwill disallowed

A deduction for amortisation in respect of goodwill recognised on incorporation of a sole trade business has been denied by the FTT. There was no acquisition of new goodwill from an unconnected third party.

Two individuals formed a partnership to run an estate agency business in 1999. The partnership ended in 2010 when one of the partners retired, but the business continued as a sole trader. The retiring partner was paid £450k to transfer his legal ownership in the partnership property to the sole trader. The business was subsequently incorporated in 2013 and £900k of goodwill was recognised in the company accounts. Half of the goodwill was attributed to the shareholder's original share of the partnership business. This was treated as pre-2002 goodwill with no tax deduction for amortisation. The other half was treated as an acquisition of goodwill and a tax deduction was claimed.

HMRC denied the deduction on the basis that the goodwill is inseparable from the business to which it relates, and as the business had not changed, and the shareholder of the appellant company had been involved throughout, then at no point had the goodwill been acquired from an unrelated party. The legislation deems that all goodwill will have been created pre-2002 if any one of the related parties was carrying on the business prior to that date. HMRC also argued that, although not recognised as a separate legal entity, it was the partnership that owned the goodwill and not the individual partners.

The FTT first considered who owned the goodwill prior to the dissolution of the partnership. It found that the partners did not own the underlying assets of the partnership, they had a beneficial interest in the partnership, including the goodwill. The FTT also considered what it was that was transferred on retirement, and found, as supported by the partnership agreement, it was the beneficial interest in the partnership that was transferred, not the underlying assets. The FTT concluded that as the goodwill was not acquired from the retiring partner, and as the goodwill was not created, or acquired from an unconnected third-party post April 2002, no deduction was available.

Beadnall Copley Ltd v HMRC [2022] UKFTT 00183 (TC)

www.bailii.org/uk/cases/UKFTT/TC/2022/ukftt_tc_2022_183.html

5. VAT and other indirect taxes

5.1 HMRC changes the tests for determining what is a business activity

HMRC issued a Business Brief setting out its revised tests for determining what constitutes a business activity for VAT purposes

As a result of numerous tribunal decisions concerning business and non-business cases, HMRC has replaced the previous test that applied. Historically, HMRC relied on the principles laid down in the *Lord Fisher* and *Morrison's Academy Houses Association* cases, which were established over 40 years ago.

In light of recent decisions, the Business Brief confirms that HMRC will no longer rely on the principles established in the previous two test cases in determining whether or not an activity is business. It will instead rely on the following two-stage test:

1. The activity results in a supply of goods or services for consideration; and
2. The supply is made for the purpose of obtaining income therefrom (remuneration).

Businesses can no longer rely on the previous tests to decide whether an activity is business or not.

www.gov.uk/government/publications/revenue-and-customs-brief-10-2022-vat-business-and-non-business-activities/vat-business-and-non-business-activities

Customs & Excise Commissioners v Lord Fisher [1981] STC 238

Customs & Excise Commissioners v Morrison's Academy Boarding Houses Association [1978] STC 1

5.2 VAT disallowed on purchase of cars

Where a taxpayer fails to provide sufficient evidence that the purchase of a car is intended only for business use, input tax cannot be claimed on the basis that it will not be considered business expenditure.

The FTT has ruled that where a taxpayer claims input VAT on the purchase of a vehicle, VAT is not recoverable unless it can be proven that the vehicle is unavailable for private use. An exception to this rule is where the vehicle is registered as a taxi or for private hire.

The FTT considered whether or not the taxpayer met the conditions for recovering VAT on the purchase of a car. The taxpayer was registered for VAT and carried out trade in camping, weddings and events. The taxpayer reclaimed VAT in relation to the purchase of two luxury vehicles on the basis that they would be used for business purposes, as well as some items of clothing and a personalised number plate.

The FTT found that there was not sufficient evidence to prove that the vehicle could not be used for personal use, which was the key test in recovering the VAT. Additionally, the FTT found that the clothing and personalised number plate were not for business purposes and therefore dismissed the appeal entirely.

Maddison and Ben Firth T/A Church Farm v HMRC [2022] TC08496

www.bailii.org/uk/cases/UKFTT/TC/2022/169.html

6. And finally

6.1 A little too late

Last week's Update highlighted the FTT decision in the Tedesco case which had remarkable similarities to the McEnroe FTT decision handed down in April this year. Both cases were ruled in favour of HMRC, however it appears a simple restructuring of the sales agreement prior to completion could have avoided the matter altogether. By structuring the agreement so that the shares would be sold at a lower price, with the buyer taking on and discharging the outstanding debt, CGT should have been calculated using the lower price. Obviously, in any tax case, if someone had just done something differently the issue wouldn't have happened, but it must be particularly galling when the change needed is so minor.

Clearly a hypothetical reality is much better in this case than the actual reality. Unfortunately the FTT isn't known in dealing in the hypothetical and the Tedesco case transcript makes it clear that the Tribunal is only there to find the relevant facts and apply tax statues to those facts. These cases appear to highlight that a collaborative way of working between tax advisers and solicitors could avoid these issues – business development hats on everybody!

Tedesco v HMRC [2022] UKFTT 171 (TC)

www.bailii.org/uk/cases/UKFTT/TC/2022/TC08498.html

McEnroe & Anor v HMRC [2022] UKFTT 113 (TC)

www.bailii.org/uk/cases/UKFTT/TC/2022/TC08444.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	