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COVID-19 BUSINESS INSURANCE CLAIMS – ADJUSTING EVENT?

Introduction

Many businesses have suffered losses as a result of business interruptions during the Covid-19 pandemic. Some of those businesses have made related claims on their business insurance policies in respect of these losses. Depending on the timing of such claims, there is at least a possibility that a claim may be made in one financial year and the result of that claim not determined until the next. So, how would such claims be treated in the financial statements at the year-end date where Financial Reporting Standard (FRS) 102 is being applied? Let us explore the following example:

Example

The company's year-end is 31 March 2021. The company makes a claim on its insurance policy on 28 February 2021 for Covid-19 business interruptions encountered in the period from 26 December 2020 to 31 January 2021 and receives notification on 30 September 2021 that it has been successful in its claim and will receive £25,000 compensation.

At the company's year-end date of 31 March 2021, the company had an insurance policy in place and had submitted a claim to its insurer in respect of losses associated with business interruption due to Covid-19.

Analysis

Paragraph 2.38 of Financial Reporting Standard (FRS) 102 states:

"2.38 An entity shall not recognise a contingent asset as an asset. However, when the flow of future economic benefits to the entity is virtually certain, then the related asset is not a contingent asset, and its recognition is appropriate."

In relation to events after the end of the reporting period FRS 102 states the following:

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"32.2 Events after the end of the reporting period are those events, favourable and unfavourable, that occur between the end of the reporting period and the date when the financial statements are authorised for issue. There are two types of events:

(a) those that provide evidence of conditions that existed at the end of the reporting period (adjusting events after the end of the reporting period); and

(b) those that are indicative of conditions that arose after the end of the reporting period (non-adjusting events after the end of the reporting period).

32.3 Events after the end of the reporting period include all events up to the date when the financial statements are authorised for issue, even if those events occur after the public announcement of profit or loss or other selected financial information.

<u>Adjusting events after the end of the reporting period</u>

32.4 An entity shall adjust the amounts recognised in its financial statements, including related disclosures, to reflect adjusting events after the end of the reporting period.

32.5 The following are examples of adjusting events after the end of the reporting period that require an entity to adjust the amounts recognised in its financial statements, or to recognise items that were not previously recognised:

(a) The settlement after the end of the reporting period of a court case that confirms that the entity had a present obligation at the end of the reporting period. The entity adjusts any previously recognised provision related to this court case in accordance with Section 21 Provisions and Contingencies or recognises a new provision. The entity does not merely disclose a contingent liability. Rather, the settlement provides additional evidence to be considered in determining the provision that should be recognised at the end of the reporting period in accordance with Section 21.

(b) The receipt of information after the end of the reporting period indicating that an asset was impaired at the end of the reporting period, or that the amount of a previously recognised impairment loss for that asset needs to be adjusted. For example:

(i) the bankruptcy of a customer that occurs after the end of the reporting period usually confirms that a loss existed at the end of the reporting period on a trade receivable and that the entity needs to adjust the carrying amount of the trade receivable; and

(ii) the sale of inventories after the end of the reporting period may give evidence about their selling price at the end of the reporting period for the purpose of assessing impairment at that date.

(c) The determination after the end of the reporting period of the cost of assets purchased, or the proceeds from assets sold, before the end of the reporting period.

(d) The determination after the end of the reporting period of the amount of profit-sharing or bonus payments, if the entity had a legal or constructive obligation at the end of the reporting period to make such payments as a result of events before that date (see Section 28 of FRS 102, Employee Benefits).

(e) The discovery of fraud or errors that show that the financial statements are incorrect.

<u>Non-adjusting events after the end of the reporting period</u>

32.6 An entity shall not adjust the amounts recognised in its financial statements to reflect non-adjusting events after the end of the reporting period.

32.7 Examples of non-adjusting events after the end of the reporting period include:

(a) A decline in market value of investments between the end of the reporting period and the date when the financial statements are authorised for issue. The decline in market value does not normally relate to the condition of the investments at the end of the reporting period but reflects circumstances that have arisen subsequently. Therefore, an entity does not adjust the amounts recognised in its financial statements for the investments. Similarly, the entity does not update the amounts disclosed for the investments as at the end of the reporting period, although it may need to give additional disclosure in accordance with paragraph 32.10 of FRS 102.

(b) An amount that becomes receivable as a result of a favourable judgement or settlement of a court case after the reporting date but before the financial statements are authorised for issued. This would be a contingent asset at the reporting date (see paragraph 21.13 of FRS 102), and disclosure may be required by paragraph 21.16 of FRS 102. However, agreement on the amount of damages for a judgement that was reached before the reporting date but was not previously recognised because the amount could not be measured reliably, may constitute an adjusting event."

Further examples of non-adjusting events are set out in paragraph 32.11 of FRS 102.

In the above example, the claim was submitted pre-year end. However, as per FRS 102, an asset should only be recognised when the receipt of that asset is virtually certain. Therefore, consideration needs to be given as to whether at the year-end date it was virtually certain that the insurance claim would be successful. In some cases this may not be so, but it will depend on the particular facts and circumstances. If a decision is made not to include the post year-end insurance receipts as at 31 March 2021, disclosure of these might need to be made in the 2021 financial statements as a non-adjusting event if material. For the avoidance of doubt, although the insurance claim was made pre-year end and was successful post year-end, this does not mean that the outcome was virtually certain at the balance sheet date, and ultimately professional judgement needs to be applied as to whether that test has been met.

FRC ISSUES DEVELOPMENTS IN AUDIT 2021

On 18 November 2021, the Financial Reporting Council (FRC) published its latest edition of Developments in Audit. This report sets out the FRC's work in the past year to support its objectives of improving audit quality and maintaining resilience in the UK audit services market. It not only provides an assessment of the UK audit market as a whole but also sets out the FRC's expectations of how audit firms should deliver audit quality improvements. It focuses on the following:

Key issues for audit

The results of the FRC's Audit Quality Reviews and recent enforcement cases have highlighted deficiencies relating to a lack of professional scepticism by auditors, including failures to sufficiently challenge management's assumptions, as well as evidence of the poor application of professional judgement. The FRC's regulation of the audit market includes measures designed to drive improvement in the auditor's mindset. Its principles for operational separation of the audit practices of the Big Four audit firms in the UK include the objective to strengthen professional scepticism and judgement through a greater focus on audit and audit quality. The FRC is also launching a project to design a new framework for the exercise of professional judgement, partly in response to a specific recommendation in the Brydon review.

The work of the FRC

The FRC highlights that it has revamped its approach to the way it supervises the largest audit firms through the creation of three teams – Audit Firm Supervision, Audit Market Supervision and Audit Quality Review (within the Supervision Division). Public Interest Entity (PIE) audit firms have been divided into three tiers by the FRC with the aim to ensure proportionality and fairness. In 2021/22 the FRC plans to continue increasing its engagement with the smaller firms that have growth plans in the PIE audit market. The FRC's approach to audit supervision will continue to evolve and respond to developments, such as any additional powers gained as it transitions to the new regulator, the Audit, Reporting and Governance Authority (ARGA).

Audit quality results

The 2020/21 FRC audit quality results show that challenges remain within the wider audit market in achieving and improving quality in audits undertaken. This observation holds true for both larger and smaller audits and audit firms, as well as for the sample of National Audit Office audits reviewed. The most significant thematic weaknesses identified in the 2020/21 inspection cycle by the FRC included:

- Inconsistency in audit quality across different firms, across different audits within the same firm and within different parts of the same audit.
- The lack of professional scepticism, including the failure to adopt an attitude to sufficiently challenge management's assumptions.
- The poor assessment of internal controls – including their effectiveness in mitigating fraud risk.
- However, on the positive side the FRC identified various examples of good practice in the audits inspected during the 2020/21 cycle, such as:
    - The effective use of internal and external specialists to review and challenge management's methodology and assumptions.
    - The delaying of audit opinion signoffs to ensure that sufficient time is available to deliver quality output.
    - The rigorous assessment of the risks related to the carrying value of assets which could be impaired.

To provide enhanced transparency for the 2020/21 cycle, the FRC intends to publish a summary of the key findings and good practice of all corporate inspections, with the audited entities and the audit firm kept anonymous. It plans to inspect around 150 audits in 2021/22 and will continue to focus on more complex and higher-risk audits.

Audit market developments

An audit market overview highlights that while the Big Four continue to audit all FTSE 100 companies, the non-Big Four audit firms increased their market share of FTSE 250 audits. In 2019, two non-Big Four firms audited ten of the FTSE 250 companies; in 2020 four non-Big Four firms audited 22 of these entities. In the wider PIE audit market between 37 and 39 firms have provided audit services to PIEs over the last 4 years.

The proportion of FTSE 350 companies switching auditors averaged 8.7% per year between 2016 and 2020. Switching from Big Four to non-Big Four has remained the largest of the four switching categories. In the last 2 years, however, the proportion of such switches has been falling, from 77.4% in 2019 to 69.2% in 2020.

Restoring trust in the audit market

The government's white paper 'Restoring Trust in Audit and Corporate Governance' has the potential to significantly alter and enhance the FRC's supervisory and enforcement powers. The government is expected to publish its consultation response in the near future, which will include the proposed next steps in the process. Covid-19 and the UK's exit from the EU have heavily affected the available parliamentary time, and the government's update on the timetable for tabling legislation is awaited. In the meantime, the FRC highlights that it has progressed recommendations that are not fully reliant on legislation to implement, including:

- Ongoing enhancements to auditing standards.
- Operationally separating the Big Four firms' audit practices.
- Revising the Audit Firm Governance Code (consultation closed on 18 November).
- Building a proportionate supervisory approach.
- Changes to the PIE auditor registration process.

A IS GREATER THAN OR EQUAL TO ONE

The First Tier Tribunal decision in Ellis & Another (2021) TC08277 concerned the VAT Do It Yourself House Builders Scheme.

Section 35 VATA 1994 provides that a refund of VAT incurred by a person constructing his own house can be claimed on a dwelling to be used for residential purpose, provided that the person is not carrying out these works in the furtherance of a business. The section allows the Commissioners, to prescribe by Regulations, the time limits for making a claim, the information required, and documents to be provided. The regulations are contained in SI1995/2518 and refers to "claim" throughout.

The tribunal referred to section 6 of the Interpretation Act 1978 which says that "in any act, unless the contrary intention appears, …. words in the singular include the plural and words in the plural include the singular".

The background to the case is that Mr Ellis, a jobbing builder, and Ms Bromley constructed their own home. Mr Ellis carried out a lot of the construction work himself during holidays and weekends and the result of this was that it took around five years to construct the house.

During the construction period, Mr Ellis and Ms Bromley lived in a mobile home in the grounds of the house, and a local resident complained. This caused the local Council to visit the property and, while uncompleted, it was capable of being inhabited. The Valuation Office Agency then issued a notice of alteration of the valuation list at the end of 2015 resulting in Council Tax being paid from September 2015 onwards.

Mr Ellis and Ms Bromley made an interim claim for repayment of VAT of slightly over £5,000 in April 2017 using form VAT431MB, and received repayment of the VAT. It was clear from this that no claims had yet been made in respect of the construction of garden walls, accessway to the property, kitchen, or bathrooms.

HMRC's guidance notes for completion of the VAT431MB form states that only one claim may be made in respect of one building and that this must be made within three months of completion. Mr Ellis found the form self-explanatory, and he did not refer to these notes.

A further claim was made on 2 May 2019 which HMRC rejected on the basis that only one claim could be made; and that this must be made within three months of completion of construction work. The valuation office was not concerned about the internal completion of the building, which was incomplete. A Building Control Completion Certificate had not been obtained at the date of the tribunal hearing and could not be obtained until all aspects of the construction had been completed.

In paragraph 42 of its judgement, the tribunal answered the question “does section 35 VATA prevent more than one claim for repayment being made” stating “in our view it does not. On the plain reading of the section there is no express indication that only one claim may be made. Like many provisions, section 35 VATA is drafted in the singular. Drafting in the singular is an established technique to assist in clarity and to enable the proposal to be dealt with succinctly. As there is no express indication to the contrary in section 35 VATA, section 6 Interpretation Act 1978 applies to confirm that the reference to “a claim” in section 35 VATA must be read as including “claims”.”

In reaching this decision, the tribunal considered “are the Regulations authorised by the powers conferred by primary legislation and therefore intra-vires”? In deciding that they were not the tribunal said that:

- Section 35(2) does not expressly provide for the introduction of regulations that alter section 35(1).
- Section 35(2) empowers HMRC not to entertain a claim unless it is made in such time and form and contains such information and is accompanied by such documents as are specified by regulations. Neither section 35 nor any other provisions of the VAT Act give authority to introduce regulations that alter the scope of section 35(1) and restrict a self-builder to make a single claim upon completion of the building. Regulation 201 is therefore ultra-vires to the extent that it limits a self-builder to make a single claim following completion of the building.
- Regulation 201 may well be lawful to the extent that it requires evidence of completion of the building work in respect of which a claim has been made. It is ultra-vires in so far as it requires evidence of completion before a claim may be accepted as that would have the effect of restricting the scope of section 35(1). To restrict a self-builder to make a single claim only after the building has been completed in its entirety goes too far.
- Regulation 201 is lawful to the extent that it places an outer limit on when claims can be made, that is within three months of the completion of the building.

The tribunal discussed the principle of the fiscal neutrality and the consequences of it being engaged.

They also considered whether the 2015 Valuation Office Agency notice was evidence of completion. It considered that it was not but that it was merely evidenced that some building works had been undertaken and that the dwelling was capable of being inhabited.

If the regulations were lawful in restricting the number of claims to one, the Council re-banding would not, however, have been evidence of completion, and was not akin to a completion certificate issued by the local authority.

On the basis that the regulations were ultra-vires in restricting the number of claims, the 2017 claim was a valid claim. The tribunal however went on to observe that, were HMRC correct in their view of section 35, and the regulations then the position would be:

1. The re-banding of the property for council tax purposes in 2005 was not evidence of completion, but merely evidence that the building was capable of being inhabited. The consequence would be that the 2017 claim was not a valid claim within the meaning of section 35 and so would not prevent a subsequent claim.
2. As the property was still not complete at the date of the tribunal hearing, and as the 2015 notice of council tax banding could not be accepted as evidence of completion, the 2019 claim would be an invalid claim also.
3. A further claim would be possible once the building was complete.

The taxpayer’s appeal was allowed. Whether Do It Yourself House Builders will start to make multiple claims to improve their cashflow remains to be seen. It would however be very helpful to know whether HMRC accept this decision and alter their guidance, or whether they will appeal it. The Interpretation Act is certainly very compelling in favour of the conclusion of FTT.

SMALL IS BETTER – A BUDGET SUMMARY

This is certainly the case as regards Budgets and Finance Acts for those of us who have been calling for stability and simplification for what now seems like decades. The only downside to this is that there is not a huge amount in the Autumn 2021 Budget to write about.

For individuals, it has already been announced that the rate of income tax applying to dividends will be increased by 1.25% with effect from 6 April 2022, with new rates of 8.75%, 33.75% and 39.35%. This mirrors similar increases in national insurance for employees, employers, and the self-employed, on earned income.

Albeit in the nature of a loan to HMRC, the section 455 tax on loans by companies to participators will also increase to 33.75%.

The Treasury is to be given powers to make regulations to provide exemptions and allowable deductions from otherwise taxable benefits in kind in cases of national emergency. Currently, for example, many employers are providing testing for Covid 19. These regulations will not however be able to create or to increase a liability to tax.

The Finance Bill will include provisions which should simplify the income tax position of the self-employed on trading income, and the concept of basis periods will disappear. Instead, business profits will be apportioned to tax years with effect from 6 April 2024. The prior year to 5 April 2024 will be a transitional year when profits of the period from the end of the basis period for 2022/23 up to 5 April 2024 will be subject to income tax, with any overlap relief being released in 2023/24.

Where business profits taxable in the year to 5 April 2024 will be higher than they would otherwise have been, the “transitional adjustment” is to be spread over five years, albeit businesses can elect out of this with the additional amount being taxed in 2023/24.

Annual investment allowance is to continue at its current £1 million until 31 March 2023. This applies to both unincorporated businesses and companies.

The new residential property developer tax, which is to be effective from 1 April 2022, will be charged at 4% on profits in excess of £25 million. This will therefore apply to larger companies or groups who deal in, seek planning permission for construction of, construct or adapt, market, or manage residential property. This will apply to companies subject to UK corporation tax.

There are some apparently Brexit inspired changes for companies:

1. Expenditure on data and cloud computing costs are to be included in the qualifying expenditure for R&D tax credit. The scheme will however be geared more towards R&D carried out in the UK rather than abroad.
2. Chapter 3, part 5, CTA 2010 is to be repealed with effect from Budget Day in respect of losses of EC companies operating in the UK via a permanent establishment.
3. Changes are to be made to tonnage tax to remove some restrictions which had been necessary to meet the EU State Aid requirements.

There is a certain irony in that the Finance Bill will introduce a requirement in respect of corporate returns filed after 31 March 2022 to notify an UTP. This is an uncertain tax position which occurs when two conditions are met:

1. If a provision has been made in the accounts for a tax position included in the tax return, and
2. where the tax position is not in accordance with HMRC’s known position.

The irony is that, for some decades now, statute has introduced uncertainty and, in some cases, HMRC have stated that they will not provide a non-statutory clearance and their guidance is poor. One of the most obvious examples of this is the targeted anti-avoidance rule in respect of members’ voluntary liquidations and the uncertainty as to whether liquidation distributions made to individuals could be subject to income tax as a distribution rather than capital gains tax. This wastes everyone’s time and money, causes great uncertainty, perhaps extending over several years where the matter proceeds to tribunal and beyond.

There is to be a very welcome increase to sixty days, up from the present thirty, where returns and payment of CGT must be made for the disposal by individuals, trustees, or executors of land in the UK. This is to apply for disposals from 27 October 2021. Non-residents are subject to this regime in respect of both residential and commercial property, while UK residents are basically only subject to it where the gain on residential property is not exempt. Where the property is a mixture of residential and commercial then UK residents will only have to return the gain attributable to the residential portion and pay the tax on this element.

There is a bit of bite in a VAT change in that the supply of dentures between Northern Ireland and the rest of the UK is to once again be exempt. Only a government press release could call false teeth dental prostheses!

It is also proposed that the second-hand motor vehicle margin scheme is to apply to vehicles purchased in “the rest of the UK” and sold in Northern Ireland. This will take effect after agreement with the EU.

TOP 5 TIPS TO HELP MAKE YOUR FIRM MORE CYBER SECURE

Written by Michael Kleinman, Cyber Security Consultant at Lugo, an ICAS Evolve partner

It can be hard to keep cyber security a constant priority throughout your everyday working life. Accountants are especially busy when approaching the personal tax submission deadline at the end of January and finding some time away from clients can be incredibly difficult. However, just because you are busy does not mean the cyber threats looming over your firm get any less dangerous. That’s why we are providing you with some of the best quick tips you can implement to make yourself more cyber secure.

1 - Enable Multi-factor Authentication where possible

Multi-factor authentication is another layer of security that is designed to make it more difficulty for attackers to access your accounts. When multi-factor is enabled, you will be asked for your regular password and an authentication code. This will be sent to your authentication device, usually a mobile phone.

Consider enabling multi-factor authentication wherever possible. This will make it much harder for attackers to gain access to your accounts, even if they have your password, as they will require access to your phone to complete the login process. Mobile phone apps like Microsoft Authenticator, Google Authenticator and Authy can store authentication codes for multiple websites in one place to make the authentication process as simple as possible. Using an authenticator app is also more secure than getting the code via text message, as SMS has infamously poor security, leaving it open to attack.

2 - Use a password manager browser extension

A password manager is a brilliant tool that acts as a vault for all your passwords. The vault itself is protected with one strong master password, and you can also enable multi-factor authentication to help secure access to the vault. These password managers keep track of long and complex passwords for all your accounts. This removes the hassle of you needing to remember them, as many people have dozens of accounts that they require passwords for.

Another benefit of password managers is that they can create secure passwords for you and will suggest new ones when you are creating a new account for a service. Password managers like LastPass, 1Password and Dashlane also offer browser extensions. When you navigate to a website that requires you to login (Facebook, Gmail, Office 365 etc), the password manager extension automatically enters your stored login information for you. Password manager extensions save you from needing to manually type out your login credentials, making you more efficient while keeping your passwords safe.

3 - Update your software when possible

Though it may sound simple, applying updates is one of the most effective ways of deterring cyber-attacks. Making sure you apply updates for software you use frequently is important for staying ahead of cyber threats. When attackers look at potential companies to target, they scan your network and computer for any vulnerabilities that they can manipulate. Out of date software is an excellent source of vulnerabilities for attackers.

The best defence against these vulnerabilities is to keep software up to date. Auto update features should be turned on to prevent you from missing important security updates. It is also crucial to make sure your software is still being supported. If the software supplier does not offer any more updates, then the software is vulnerable to cyber threats. Remove all unsupported software on your devices.

4 – The Cloud and Backing up your stuff

Backing up vital information can often be overlooked by people; however, it is the best defence against ransomware attacks. Ransomware attacks occur when a perpetrator places encryption on all your computer’s files and will only give you access if you pay a ransom. In most cases, the attacker will not give you access back even if you pay the ransom. The only real solution is to reset your computer and start again from your latest backup.

When you store your data in the cloud, it makes it more difficult for attackers to gain access to these files and encrypt them because your computer and your files are in two separate places. This separation helps protect the files from malicious action.

Backups should also be made of cloud data and should be stored in a safe environment. These backups should be taken regularly to prevent major data loss in the case of a cyber-attack.

It is also important to keep a paper copy of any action plans, contact information, or critical information you may need if your computer is unusable in the case of a damaging cyber-attack.

5 – Get Cyber Essentials

Cyber Essentials is a certification that shows that your firm has defences in place against the most common cyber-attacks. Getting cyber essentials will help you attract new business because potential clients will have confidence that you are taking steps to protect your client's information. It may also open some other business opportunities as Cyber Essentials is a minimum requirement to tender for many government contracts.

While getting Cyber Essentials can take time, depending on the size of your firm, you do not have to struggle through the process alone. Lugo are running a Funded Cyber Support for Accountants Programme to help you through the process with free support available. If you are interested in the opportunity, please click here to find out more – it's 100% FREE!

SUPER-DEDUCTIONS – TIMING IS EVERYTHING

The March 2021 Budget brought in the highly publicised super-deduction for expenditure by companies in the period 1 April 2021 to 31 March 2023. The Autumn Budget extended the £1m Annual Investment Allowance ("AIA") limit which was due to expire on 31 December 2021. The AIA limit is now scheduled to fall back to £200,000 on 1 April 2023, when the super-deductions end.

While it might seem early to be looking to the end of claims window, it would be prudent to discuss capital expenditure plans with clients well in advance. One of the reasons for this is interaction between the claims window, company accounting periods, and coronavirus loss claims.

Background

For companies only, the enhanced capital allowances introduced by the March 2021 Budget comprise 130% relief for expenditure on plant and machinery which would normally qualify for 18% writing down allowance; and 50% FYA for expenditure on special rate expenditure which would normally attract a 6% writing down allowance.

With the March Budget 2021 majoring on the generosity of the headline rate, clients may be unaware of the impact of the accounting date and the fine detail.

Areas to watch

There are three significant areas to watch now:

- interaction with coronavirus extended loss relief carry back rules
- acquisitions and disposals, especially where accounting periods straddle 31 March 2023
- maximising claims through the best mix of allowances.

Interaction with loss rules

The timeframe for extended corporation tax loss carry back relief for years affected by the pandemic partially overlaps with availability of super deductions.

Super-deductions are available between 1 April 2021 and 31 March 2023; while extended loss relief applies to accounting periods ending between 1 April 2020 and 31 March 2022.

This means that in the period 1 April 2021 to 31 March 2022, the rules overlap. Hence a new possibility emerges of claiming super-deductions to create or enhance a loss, which could then be carried back up to three years.

With March 2022 fast approaching, the scope for accessing this window is limited.

Acquisitions and disposals

Just as expenditure qualifying for super-deductions comes with a multiplier, so too will disposals. In addition, due to the special rules, disposal of assets on which super-deductions or 50 % special rate First Year

Allowance have been claimed give rise to an immediate balancing charge. The proceeds relating to assets on which these enhanced capital allowances were claimed cannot be offset against main pool balances.

Where the accounting year ends before 1 April 2023, qualifying super-deduction expenditure obtains the enhanced 130% rate and disposal proceeds are subject to a 1.3 multiplier. But where the accounting date straddles 31 March 2023, these rules are modified.

The 1.3 multiplier ensures that a tax advantage is not obtained simply through purchase and resale of qualifying assets.

Accounting dates straddling 31 March 2023

There are special rules in the Finance Act 2021 covering acquisitions and disposals in accounting periods which straddle 31 March 2023. Note that straddling accounting periods will begin from April 2022.

The special rules in s11 FA 2021 replace the 130% super-deduction rate and rules in s.12 FA 2021 replace the 1.3 multiplier for proceeds of sale by a figure that is determined by the number of days in the accounting period before 1 April 2023.

Calculating the super-deduction percentage

For qualifying expenditure, the rule is that the super-deduction percentage is 100%, plus a proportion of 30% depending on the number of days in the accounting period before 1 April 2023.

The proportion is the number of days in the accounting period before 1 April 2023, divided by the total number of days in the accounting period, multiplied by 30%.

The multiplier on disposals

Similarly, sale proceeds are increased where an accounting period straddles 31 March 2023. The calculation here is the number of days in the accounting period before 1 April 2023 divided by the total number of days in the accounting period, multiplied by 0.3, and adding 1.

Tax relief given

These transitional rules are designed to match the apportionment of company profits to financial years. Where a company is due to pay the new 25% rate of CT from 1 April 2023, then the transitional multipliers ensure that approximately the same tax relief is given either side of 31 March 2023, despite the change in tax rate. (This mirrors the basic premise of super deductions: that until 1 April 2023 the CT at 19% on capex at 130% (24.7p relief for every £1 spent) is more or less equal to CT at 25% and 100% capital allowances (25p for every £1 spent).)

But this assumes the company pays at 25% from 1 April 2023. Companies which expect to pay corporation tax at the full rate from 1 April 2023 will find that the sums about balance. But companies expecting to pay corporation tax post 31 March 2023 at the Small Profits Rate or where marginal relief is available, could lose out. The tax relief given will depend on the rate of tax applying to the profits of the relevant year.

Example 1 - acquisition

EFGH Ltd incurs capital expenditure of £100,000 in its accounting period to 30 September 2023. There are 182 days in the accounting period before 1 April 2023, so the super-deduction rate is 182/365 x 30% = 15% plus 100% = 115% (actual calculation would be based on unrounded percentages). The super-deduction is £115,000, rather than £130,000.

This reduced rate of 115%, as against 130%, would apply to expenditure from 1 October 2022. From a planning point of view, expenditure on 30 September 2022 would attract 130% relief, while expenditure on 1 October 2022 would obtain only 115%.

If EFGH Ltd pays tax at 25% post 31 March 2023 then 6/12 of profits would be taxed at 25%; 6/12 at 19%. So relief on the capital expenditure would be £115,000 x 0.5 x 19% + £115,000 x 0.5 x 25% = £25,300. If the accounting period had ended on 31 March 2023, the relief would have been £130,000 x 19% = £24,700.

But if EFGH Ltd pays tax at less than 25% post 31 March 2023, the outcome is different. At 19% the outcome would be £115,000 x 0.5 x 19% + £115,000 x 0.5 x 19% = £21,850.

For year ends 30 June, and 31 December, the percentages would be, 122.5%, and 107.5% respectively.

Example 2 - disposal

EFGH Ltd disposes of assets for £100,000 in its accounting period to 31 May 2023. Super-deduction was claimed on the asset. There are 304 days in the accounting period before 1 April 2023.

The multiplier is calculated as 304/365 days x 0.3 = 0.25 + 1 = 1.25 (in practice, calculations should be based on unrounded amounts).

EFGH Ltd will have a balancing charge of £125,000 for the period to 31 May 2023. Note this balancing charge cannot be offset against any brought forward pool balance.

Partial claims

Where an asset only partly qualified for Spring Budget 2021 enhanced capital allowances, then sale proceeds need to be apportioned based on the ratio of amounts on which enhanced allowances were claimed and total expenditure.

Disposal of special rate assets

Where the 50% FYA special rate allowance was claimed, the disposal calculation is different. Here the aim is to separate the proceeds attributable to disposal of the 50% FYA part, from the whole.

Example 3 – 50% special rate FYA and disposal

EFGH Ltd disposes of assets which cost £200,000, and on which 50% FYA special rate allowances were claimed, for £100,000 in its accounting period to 31 May 2023.

The balancing charge on the special rate allowance part is sale proceeds of £100,000 x (50% x 200,000 ÷ 200,000) = £50,000.

Of the sales proceeds, £50,000 would be an immediate balancing charge, and the remaining £50,000 could be set off against any balance on the special rate pool (s13 FA 2021).

Note that if 50% FYA had been claimed only on part of the expenditure (e.g. AIA might have been allocated to part of the costs), then the denominator of fraction will change, and the overall percentage will not be 50%.

Summary

Consideration of timing of capital acquisition and disposals in the light of accounting dates will prove beneficial in the run up to 31 March 2023. Bespoke calculations will be needed depending on year ends, patterns of expenditure and the mix of allowances claimed.

Maximising claim through the best mix of allowances

With the extension of the AIA £1m limit to 31 March 2023, careful attention will be needed as to the differences between possible capital allowance claims. Some expenditure may well qualify under multiple headings, while other expenditure may be restricted to a specific allowance.

From a practical angle, one of the biggest problems is likely to be with buildings. Analysis of expenditure will be key to maximising claims.

Expenditure on buildings could attract Structures and Buildings Allowance (at 3%), but integral features and other special rate pool items might come within the new 50% FYA. Additionally the boundary with plant and machinery needs close attention. Super-deduction could be available where items qualify as plant or machinery.

Enhanced capital allowances are only available on new assets. And the position with leases can be complex. Leased assets are generally excluded, but there is an exception for background plant and machinery for landlords leasing buildings.

The enhanced capital allowances give opportunity here for maximizing and accelerating tax relief. Nor should the rules for apportionment be forgotten if AIA is used and the limit changes during the accounting period – this too needs careful planning.

Choosing which allowances to claim

As super-deductions are only available on new assets, how expenditure is allocated to allowances is key. Unlike the AIA, there is no cap on super-deductions. The main parameters are that AIA should be used to cover capital expenditure on second-hand plant and machinery and any other items not covered by super-deduction.

Acquisition date rules

The normal rules for when expenditure is incurred for capital allowances (s5 CAA 2001) are modified for enhanced capital allowances. The normal rule is that expenditure is incurred as soon as there is an unconditional obligation to pay (s5(1) CAA 2001). Points to watch are that this rule is disapplied for contracts entered into before Budget Day (3 March 2021). Instead, for contracts existing at Budget Day, the expense is 'incurred' the date the contract was entered into, even if the unconditional obligation to pay arises later (s 9(7) FA 2021).

The rule (in s12 CAA 2001) that enables pre-trading capital expenditure to be deemed as incurred on the first day of trading is disapplied as regards the enhanced allowances. The expenditure must actually be incurred (contracted for) during the specified period of 1 April 2021 to 31 March 2023.

Note also that expenditure incurred in a period that the trade permanently ceased does not qualify.

Assets acquired on hire purchase can qualify, but only if the contract is after Budget Day and the assets was brought into use no earlier than 1 April 2021.

Conclusion

Moving from a headline announcement of 130% relief to practical application of the detailed rules will need care. Talking through capital expenditure and disposal plans with clients well in advance of March 2023 will assist maximising of claims and avoidance of unexpected and unwelcome outcomes.

HMRC guidance can be found in the manuals at [CA 23162](CA 23162).

HMRC POWERS OF DISCOVERY ALL CHANGE FOR HICBC

HMRC's discovery powers were restricted by the Upper Tribunal in a case involving the High Income Child Benefit charge (HICBC), but the government has included clauses in the Finance Bill to override the decision. The changes potentially have impact far beyond HICBC.

There have been a few First Tier Tax Tribunal cases on HICBC, but the Jason Wilkes case (Jason Wilkes [2021] UKUT 0150 (TCC)) went to the Upper Tribunal. It concerned HMRC's powers to raise discovery assessments in cases where a taxpayer has unassessed liabilities. The tribunal decided for the taxpayer, but this may yet be overturned on appeal. While an Upper Tribunal decision would normally set a precedent for lower courts, the government has stepped in to overturn the decision by clarifying and confirming the rules in the 2021/22 Finance Bill.

What was the case about and what are the implications for practice?

Background to the Wilkes case

As in many HICBC cases going to Tribunal, Mr Wilkes was unaware that HICBC was due. He was employed and was not in self-assessment. He had not notified HMRC of his liability to HICBC.

While HMRC accepted that Mr Wilkes had a reasonable excuse for failure to notify, it tried to raise a discovery assessment to recover the underpaid tax.

Upper Tribunal decision

The Upper Tribunal judgement in the Wilkes case is remarkable in that it set limits on HMRC's discovery powers for HICBC.

The Upper Tribunal held to a plain English meaning of the legislation and would not extend the scope of s29 TMA 1970 to cover income tax due on HICBC, as HMRC wanted them to do. HMRC invited the Tribunal to read s29 (1) (a)TMA 1970 as if HICBC was 'income that ought to have been assessed to Income Tax'. But HICBC is an income tax charge, not a source of income. Indeed it might not even be related to income received by the taxpayer in question – someone else, a partner or spouse for example, could have received the Child Benefit.

The Upper Tribunal also considered the scope of s29 (1) (b). This is the discovery power where an assessment has become insufficient. HMRC was looking for the Tribunal to accept that the purpose of s29 was to enable HMRC to make good a loss of income tax by assessing an amount that ought to have been assessed to income tax. But the Upper Tribunal found that s29 (1) (b) applies only where an assessment has already been made, and is insufficient, not in the scenario where an assessment has not been made at all.

No assessment made

In Mr Wilkes' case, HMRC had not issued a notice to file, and Mr Wilkes had not made a self-assessment for example by voluntarily submitting a paper tax return.

HMRC has several options in such cases to ensure an assessment is made. For example, it may make a simple assessment under s 28H TMA 1970, based on information already held. HMRC had information about Child Benefit paid to Mr Wilkes' wife, and details of his employment income submitted under RTI.

Alternatively, if a notice to file has been issued, HMRC can raise an assessment by determination, in the absence of a taxpayer self-assessment.

But in Mr Wilkes case, no assessments had been made. It was reasonable, in the Tribunal's view, to expect HMRC to use such powers as it already has. HMRC had missed the boat, and the Tribunal would not extend the discovery powers to cover the omission.

Government response

The impact of this decision on HICBC will be somewhat limited due to the government's announced intention to overturn the result through the next Finance Bill, to 'put beyond doubt' that HMRC may use discovery assessing powers to recover several tax charges. These include the High Income Child Benefit Charge (HICBC) and some charges related to pensions (for example, in respect of unauthorised payments) but also charges linked to Gift Aid donations.

In the case of Gift Aid, the charity or Community Amateur Sports Club claims repayment of tax treated as having been paid on the donations it has received – but if a donor has paid insufficient tax in the year to cover the tax reclaimed, then HMRC can raise a tax charge on the donor. (See [£215,000 tax bill for being generous] for an example of this rule in action).

Clause 95 of Finance Bill 2021/2022 deals with discovery assessments and applies retrospectively, except for individuals who previously received a discovery assessment and:

- who submitted an appeal to HMRC, based on the arguments considered by the Upper Tribunal, on or before 30 June 2021 (the date at which the Upper Tribunal handed down its decision in the Wilkes case case.); or
- whose appeal, made on or before 30 June 2021, has been stood over by the Tribunal pending the final outcome of the relevant litigation.

The Finance Bill also provides, but prospectively, not retrospectively:

- that discovery assessments may be used to recover any income tax or capital gains tax that ought to have been assessed but has not been assessed; and
- that section 7 of TMA 1970 will be revised to confirm that individuals who are chargeable to various specified income tax charges need to notify chargeability to HMRC.

However, there are wider implications for the Taxes Management Act 1970 which no longer looks fit for purpose.

Impact on taxpayers

From a taxpayer perspective, the changes in the Finance Bill increase the risk of unexpected tax bills, long after the event.

Taken alongside the failure to notify rules of s7 TMA 1970, this now means an automatic 20-year window for HMRC to issue a discovery assessment for undeclared HICBC.

The 20-year window for HICBC seems somewhat harsh, given the realistic possibility that an individual may not be aware that they are liable to the charge – with liability being dependent on a claim to child benefit by another individual, and requiring exact knowledge of who is the higher earner in a couple (in cases where both members of the couple may be earning over £50,000 pa).

There are two main outcomes here. If there have been cases where HMRC has raised discovery assessments and these have been appealed, then the final decision in Wilkes, may apply, as set out above. In other cases, the new legislation is expected to mean that HICBC will be payable where HMRC has raised discovery assessments, but any penalties may still be subject to appeal.

Conclusion

The government's response to the Wilkes' decision highlights the need to get clients' affairs in order historically as well as in real-time. It would be prudent to take steps to review new and existing clients for possible hidden liabilities on HICBC, pension charges and Gift Aid.

NEW POWERS TO INVESTIGATE DIRECTORS OF DISSOLVED COMPANIES

The Insolvency Service are to be given powers to investigate directors of companies that have been dissolved via the **Ratings (Coronavirus) and Directors Disqualification (Dissolved Companies) Bill**. Extension of the power to investigate will also include the relevant sanctions such as disqualification from acting as a company director for up to 15 years.

The measures will be retrospective and will enable the Insolvency Service to challenge directors who have inappropriately wound-up companies that have benefited from Government-backed loans during the coronavirus pandemic.

Background to investigations

The Insolvency Service regularly receives complaints about the conduct of former directors of companies which have been dissolved, i.e., companies which have ceased to exist as registered companies through being struck off the register of companies without a preceding formal insolvency process. In most cases those complaints concern one of the following areas:

Allowing or causing a company to be dissolved, effectively shedding its liabilities, with a new company continuing its business, using the same assets (such as location or vehicles), with the same individuals acting as directors. Some complaints relate to this happening multiple times, and this is sometimes known as ‘phoenixism’. The debts avoided in this way often include tax and civil penalties, liabilities to consumers, or employment tribunal awards.

Use of the company dissolution process to avoid the cost and scrutiny of formal liquidation proceedings (the process by which a liquidator is appointed, who realises the company’s assets and distributes them fairly to creditors).

Avoidance of investigation of conduct under the Company Directors Disqualification Act 1986 (CDDA86) or Company Directors Disqualification (Northern Ireland) Order 2002 (CDD(NI)O02).

Current position

The conduct of a company director may currently be considered by the Secretary of State or, in Northern Ireland, the Department for the Economy, through information obtained using the power to investigate live companies contained in the Companies Act 1985 (CA85) and the power to investigate the conduct of directors of insolvent companies under CDDA86 or CDD(NI)O02.

If the investigation determines that there is evidence that the director’s conduct has fallen below the expected standards of probity and competence which are appropriate for persons fit to be directors of companies, and public interest criteria are met, then an undertaking may be sought from the director or if not provided an application may be made to the court for a disqualification order to be made against them.

Investigations are usually triggered by receipt of a complaint, or in the case of an insolvent company, by a report on the conduct of the director submitted by an insolvency practitioner appointed to manage the affairs of an insolvent company, in accordance with a requirement under section 7A of CDDA86 or Article 10A of CDD(NI)O02. Live company investigations under the provisions of CA85 are undertaken by the Insolvency Service on behalf of the Secretary of State. Insolvent company investigations are undertaken by the Insolvency Service in Great Britain and Northern Ireland, on behalf of the Secretary of State or the Department for the Economy respectively.

Complaints about the operation or activities of a live company may be made to the Insolvency Service, whether in Great Britain or Northern Ireland, by members of the public. Those complaints are considered and reviewed to determine whether an investigation under CA85 is appropriate and in the public interest.

However, under the law as it currently stands, if a complaint is received about a dissolved company, it is not possible to investigate any further without taking steps to have the company restored to the register of companies, a process involving court proceedings which is complex, time consuming, and would be at the cost of the public purse.

Proposals

The Bill, if approved, will allow the conduct of former directors of dissolved companies to be investigated, without it being necessary to first restore the company to the register. It will not be necessary for the dissolved company to have been subject to insolvency proceedings in order for the power to investigate to apply.

The primary role of disqualification is to protect the business community and members of the public from individuals who have demonstrated that they are unfit to be concerned in the management of a limited company. It also acts as a deterrent to directors abusing the privileges of limited liability. In this respect, extending the disqualification regime to directors of dissolved companies will discourage the use of the dissolution process as a method of fraudulently avoiding repayment of Government-backed loans given to businesses to support them during the coronavirus pandemic, such as loans made under the Bounce Back Loans Scheme.

The proposal to create this new investigative power is not directly in response to fraudulent COVID activity as it was included in the Insolvency and Corporate Governance consultation, which ran between March and June 2018. The Government's response to the consultation, which was published in August 2018, noted that the majority of respondents (including ICAS) had been supportive of the proposal to widen existing powers to investigate the conduct of former directors of dissolved companies, and where appropriate to take action against them. The response also noted that, whilst the dissolution process is an important part of maintaining the integrity of the register of companies, it should not be used as an alternative to formal insolvency proceedings.

The new powers will have retrospective effect. This will mean that the conduct of former directors of dissolved companies that took place prior to commencement of the measure may be investigated and, where appropriate, disqualification action may be taken regarding that conduct.

Former directors of dissolved companies against whom disqualification proceedings are taken will have the opportunity to offer disqualification undertakings to the Secretary of State, or as the case may be, the Department for the Economy, as is currently the case for directors of insolvent companies.

Where an application for a disqualification order is made to the court in respect of a former director of a dissolved company, the court will have a duty to make such an order if it is satisfied that the person has been a director, and that their conduct makes them unfit to be concerned in the management of a company. This mirrors the current position where such an application is made in respect of the director of an insolvent company.

A disqualification order made against a former director of a dissolved company, or a disqualification undertaking given by such a person, will be for a minimum period of 2 years and a maximum period of 15 years. This will mirror the periods currently prescribed where orders are made, or undertakings accepted in the case of directors of insolvent companies.

Sections 8ZA and 8ZB of the CDDA86 (and Articles 11A and 11B of the CDD(NI)O02), which allows a period of disqualification to be sought where a disqualified director of an insolvent company was subject to the influence of another person or was accustomed to acting under the instructions of another person, will be extended to include disqualified former directors of dissolved companies.

A disqualification order (or an undertaking which has been accepted) prohibits the subject from acting in the promotion, formation, or management of a company for the period of the order or undertaking, without the leave of the court. Breach of such an order or undertaking is a criminal offence under section 13 CDDA86 and Article 18 CDD(NI)O02.

The existing provisions contained in section 15A of CDDA86, and Article 19A of CDD(NI)O02, which allow compensation to be sought from directors subject to disqualification orders or undertakings where their actions can be shown to have caused loss to creditors of insolvent companies, will be extended to include former directors of dissolved companies, and will be expanded to include creditors of those companies. This will have retrospective effect, so that conduct which was considered in the disqualification proceedings and which took place prior to commencement of the measure can be considered for compensation.

Conclusion

While the proposed measures are to be welcomed, they will only be successful if the Insolvency Service has appropriate resources to carry out investigations and pursue disqualification undertakings or disqualification orders in some volume. Using current legislation, the Insolvency Service obtains a very consistent number of disqualification orders and undertakings. In the last seven years the number of orders and undertakings obtained annually has varied only marginally between 1,210 and 1,282. With the scale of fraud widely believed to have been committed in relation to Government-backed loans during the pandemic, this relatively small-scale targeted approach will need to be significantly extended for the new powers to have any meaningful impact.

TAX & HMRC UPDATES

Changes to the VAT Registration Service (VRS) – agents registering their clients for VAT

HMRC is moving to a new IT platform to improve how they handle customer records. The VAT Registration Service has been live for UK companies to register themselves since November 2020. Sole Traders are now in beta, and other entities are due to come onboard before the end of this year.

HMRC is now looking to introduce the VAT Registration Service to agents. Current plans are for agents to start to use the service this winter. Information on how to register and start to use new system will be published soon.

Registrations in the current process will need to be finalised before the switch over. HMRC will give agents plenty of time to finalise existing registrations and make them aware of a date for migrating to the new service.

Bulk appeals against ITSA late filing penalties due to COVID-19

Since 24 March 2021, tax agents were able to appeal in bulk against late filing penalties on behalf of their clients for 2019-20 tax returns filed after 28 February 2021. This bulk process allowed agents to submit appeals for up to 25 clients at a time when the reasonable excuse was due to Covid-19.

Agents can still claim reasonable excuse on behalf of their clients and, for decisions dated up to 30 September 2021, have the 3-month extended window to appeal. However, the bulk appeal process has not been available since 1 October 2021, so agents need to follow the usual process, using the SA370 or appealing online.

Plastic packaging tax: update to guidance

HMRC's guidance has been updated to help businesses prepare for the new plastic packaging tax. It provides more information about the definition of packaging (including examples of items in scope of the tax), and when packaging becomes taxable. More information will be published later in the year. Agents representing businesses who may be affected by the tax should familiarise themselves with this guidance.

Extended Loss Carry Back for Businesses

A guidance note explaining the new rules for making extended loss carry back claims for companies and unincorporated businesses has been published, It also sets out the procedure for making such claims.

R&D SME Tax Credit claims processing

Businesses should submit Research and Development (R&D) claims as soon as possible to avoid a delay in receiving payments during the peak period between December and January. While HMRC aim to process 95% of R&D tax credit claims submitted online within 28 days of receipt, they may take longer.

The 28-day processing aim does not apply to claims not filed by the electronic portal, or where BACS details have been omitted or incorrectly supplied. Agents are requested not contact HMRC to chase claims. The status of any R&D claim is available on the company's online account. Payments processed will be visible within 24 hours, however they may be subject to a further security check before they are issued.

Capital Gains Tax (CGT) Payment for Property Disposals (PPD)

Two changes to the Capital Gains Tax (CGT) Payment for Property Disposals (PPD) service rules were announced in the recent Budget.

Time limits

If the completion date for the disposal was on or after 27 October 2021, sellers and agents will now have 60 days instead of 30 days to report and pay any tax due on UK land and property sales. This will allow more time for sellers to produce and provide accurate figures as well as sufficient time to engage with advisers. HMRC's IT system is currently being updated with the new time limit. Until the update is complete, there is a message on the system, so sellers are aware of this change when using the service.

Mixed use property

The rules have been clarified for UK residents so that, where a gain arises in relation to a mixed-use property, only the portion of the gain that is the residential property gain is to be reported and paid via PPD. A mixed-use property is one that has both residential and non-residential elements.

EMPLOYMENT STATUS REMAINS AS COMPLEX AS EVER

The number of employment tax cases concerning employment status is astounding and it seems that this complex area of tax and employment legislation is not getting any simpler for employers and agents as time goes by. In addition to the general expectations placed by HMRC on employers to decide whether someone is employed or self-employed for tax purposes, the revised off-payroll working regulations at Chapter 10 of ITEPA 2003 place even heavier burdens on engagers and fee-payers and require an in-depth knowledge of the law and HMRC guidance to navigate towards a correct decision. The two cases discussed here illustrate the ongoing complexity.

CASE 1 - HMRC v PROFESSIONAL GAME MATCH OFFICIALS LTD (PGMOL)

The case decision of HMRC v Professional Game Match Officials Ltd (PGMOL), issued on 17 September 2021 and which concerns the employment status of part-time professional football referees, has now been referred back to the First Tier Tribunal by the Court of Appeal. It is thought by many that the eventual final conclusions in this case may have an effect on other status cases pending decision, such as the 2019 case of *Mantides,* because PGMOL concentrates, in the main, on the principles of mutuality of obligation and control, which have been examined in some detail, and if the PGMOL case is to form a precedent, it will likely influence thinking in terms of how to consider these two principles in future.

The Court of Appeal decided that the FTT and UT had not placed a correct interpretation (i.e. they had "erred in law") on the key employment status concepts of Mutuality of Obligation and control (FTT on both concepts; UT only on Mutuality) – and the Court of Appeal directed that the case should be remitted back to the FTT to consider, on the basis of its original findings of fact, whether there were sufficient mutuality of obligation and control in the individual contracts for those contracts to be contracts of employment. The decision noted that it would not be appropriate for the Court of Appeal to make those assessments, which it said were "best made by a specialist fact-finding tribunal, not an appellate Court".

In recent cases heard in respect of IR35, Off-payroll working arrangements, and general employment status matters, the trend has been for the courts to place an increasing reliance on the *Ready Mixed Concrete* case; in other words "A contract of service exists if three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service.

This is not what happened here.

How did the FTT and UT "err in law"?

1. **Mutuality of obligation**

Whilst the FTT considered that the ability to terminate the contract by one party or the other broke the mutuality of obligation concept, the Court of Appeal considered that this was irrelevant – it was sufficient that the contract existed at all to prove the existence of mutuality. Mutuality, as a standalone factor, did not convey the existence of an employment contract – it proved the existence of a contract – which could be one of employment or self-employment.

The Upper Tribunal had reached the same conclusions as the FTT on the issue of mutuality – that it had ceased to exist when the contract was terminated prematurely. The Court of Appeal concluded that they therefore also erred in law on this point. Added to this, the UT had been mistaken in aspects such as their interpretation of the relationship between individual and overarching contracts, and the presumption that an employer would be able to impose a form of sanction for breach of contract – but seeing as no such sanction existed, the referees could not be employed.

2. **Control**

Turning to the concept of control – the Court of Appeal said the FTT had erred by concluding there was insufficient control to deem the referees to be employees, for two reasons. At paras 126 and 127 of the decision, Lady Justice Laing opined that the FTT had asked itself the wrong questions – first, by asking whether "PGMOL had 'an even theoretical right to step in' while the referee was actually officiating" which was too narrow – instead, they should have considered the overarching contract "amounted to a sufficient framework of control".

Second, the FTT had erred by asking whether the training and assessment protocols had a significant impact on the level of control exerted over the referees. They concluded that it had not, when instead, Lady Justice Laing opined that it should have been possible for the FTT to realise that the training and assessment protocols provided an overarching framework for consistency of approach to refereeing – and thus, how the role was executed, by an ongoing and continuous process of review and reflection.

Added to this, the Court of Appeal decided the UT had been mistaken in their presumption that an employer would be able to impose a form of sanction for breach of contract – and seeing as no such sanction existed, the referees could not be employed. The Court of Appeal considered this to have been too narrow an interpretation, whereas consideration of the overarching nature of the contracts would have delivered a different result.

Cat amongst the pigeons

The Court of Appeal decided to refer the case back to the FTT so that it could consider, on the basis of its original findings of fact, whether there were sufficient mutuality of obligation and control in the individual contracts for those contracts to be contracts of employment.

The outcome remains to be seen, but this case does appear to be moving towards an HMRC victory following this judgement – and goes against what most status experts were thinking would happen.

One thing that is needed from this case is a precedent on how much weight mutuality of obligation actually carries when determining employment status so that tax advisers and employers understand what is required of them when making Status Determination Statements for off-payroll workers and when trying to grapple with and understand the employment status landscape generally.

CASE 2 – A LITTLE PIECE OF PARADISE LTD v HMRC

The latest in a growing collection of tax case decisions involving TV presenters has been released a year after it was heard at the First Tier Tribunal (FTT) in October 2020. This case concerns itself with Dave Clark, who is known for presenting sports slots on Sky.

Mr Clark has worked for both iterations of what is now Sky TV since July 1988. He initially invoiced the broadcaster as a self-employed worker but in June 2003, at the request of Sky, he formed a company called “A Little Piece of Paradise Ltd”. He then supplied his personal services to Sky as well as to other entities through the company (intermediary).

Following a review, HMRC issued determinations that deemed Mr Clark to have been within Chapter 8 ITEPA 2003 (IR35) during the tax years 2013/14 to 2017/18, amounting to £281,084 in PAYE and Classes 1 and 1A NICs. Interest and penalties would be added to this figure, but HMRC had not taken such matters as allowable expenses and pension contributions into account, so the eventual figure determined as payable is yet to be calculated.

The decision process

The First Tier Tribunal examined three mainstays of employment status: Mutuality of obligation, control and substitution. A fourth category of whether the presenter could be said to be sufficiently independent to be in business on his own account was also considered.

Mutuality of obligation: The Tribunal set out the terms of a hypothetical contract in line with the requirements set out by Park J in *Usetech*. Had a direct contract existed between Clark and Sky, the FTT found that although the three ‘framework agreements’ which covered the dates of the determinations were fixed term with no intention on either side to create an employment relationship, this intention was let down by the payment arrangements. The payments were made monthly for a fixed amount regardless of the number of hours worked, whether absences or overtime took place, as if they had been made to a regular employee, which in itself conferred an element of dependency by Mr Clark on the income, especially as there was very little time to carry out other work in return for payment elsewhere.

Overall, the Tribunal concluded that mutuality of obligation existed, using the definitions set out in the 1967 case of *Ready Mixed Concrete*. The submissions made by both sides were also clearly in agreement with this approach, since they had been made using the tripartite principles set down by McKenna J at para.515 in that case.

Control: Due to the existence of some additional clauses in the framework agreements which afforded the broadcaster significant amounts of control over Mr Clark, the Tribunal concluded that Sky had the last word on the broadcasting rights as well as how much (or how little) work Mr Clark could perform outside of Sky. In fact, it transpired that Mr Clark was very limited in how he carried out his work day-to-day, as even the production of the shows was tightly controlled. Over time the non-compete and non-solicitation clauses had been expanded significantly. Intellectual property assignation clauses and non-disclosure agreements sealed the deal. Not surprising, then, that the Tribunal concluded that sufficient control was exercised over Mr Clark to categorise him as being employed.

Substitution: Turning to the matter of right of substitution, an argument had been mounted by Mr Clark to show that another presenter, Rodd Studd, had taken Mr Clark's place occasionally. This was something of a misleading argument, however, because Mr Studd was actually a Sky employee, and had not been independently contracted by Mr Clark to stand in for him when he couldn't be there. Nor did Mr Clark pay Mr Studd out of his own fees when he stood in for him. Bearing in mind that the contracts did not contain any rights for Mr Clark to turn work down and appoint a substitute, Sky thus had the ultimate power to decide who could stand in, and even to decide whether Mr Clark was even permitted to be absent from work. The FTT referred to the comments made by Lord Wilson in *Pimlico Plumbers* regarding the test that best represents a contract of service – providing the services personally – when he said: "The sole test is, of course, the obligation of personal performance; any other so-called sole test would be an inappropriate usurpation of the sole test." Using this authority to dig deeper into the substitution element, the FTT then went back to *Usetech* to determine whether the right of substitution was one of fact or merely an illusion. They concluded it was the latter.

Independent contractor?

Although Mr Clark had gone to the trouble of taking out his own public liability insurance policy as well as using his own equipment and premises to undertake his preparatory work before a broadcast, this was not deemed by the FTT to sufficiently demonstrate that Mr Clark was taking a financial risk on a level with being in business on his own account because these activities did not allow him to lose or gain money from making detrimental or profitable business decisions. Indeed, Sky confirmed in its submissions that Mr Clark was not required to provide any of his own equipment to undertake his role as a presenter and specific research duties were not allocated to him: it was simply that he was an acknowledged expert and as such was expected to be completely up to date with all relevant developments in his field. The landmark case of *Hall v Lorimer* was once again referred to in this context as an aide to decision-making by the FTT.

Sword of Damocles

Paragraph 53 of the judgement notes an important change to the contracts of Sky presenters. It reads:

"In November 2018, an announcement letter was issued by Sky to 'Sky Sports Talent' to notify all 'on-air talent' (including Mr Clark) of the change to be implemented by April 2020. The change followed from the requirement by HMRC for the Public Sector Broadcasters (the BBC and Channel Four) to assess whether all their workers on PSC contracts should be treated as employees being extended to the private sector broadcasters like Sky. The announcement stated that:

'The assessment … is restrictive and means in practice, that nearly all on-air talent currently engaged via PSCs will no longer qualify as self-employed. Therefore, we have taken the decision that going forward we will no longer be able to engage on-air talent through PSCs or Sole Traders. […] The change will take effect from the end of your current PSC arrangement.'"

This is a telling event in the fact pattern of this case and shows that there was a conscious effort on the part of Sky to unpick arrangements that could potentially be caught under IR35.

Conclusion

Whilst this case appears to be a standard run of the mill status case it does emphasise that the *Ready Mixed Concrete* case and the staples of mutuality, control and substitution are the abiding key issues employment tax practitioners still need to be mindful of when advising clients, and that they should not be thrown off balance by red herrings such as unstable substitution arguments or the notion that provision of equipment can demonstrate that a person is automatically in business on their own account or bearing significant financial risk.

CJRS AND OFFSETTING

In the spring of 2021, HMRC set up a CJRS Forum which comprises around 80 stakeholder participants who have expertise in CJRS legislation, policy, and claims. The meetings take place once a month, with ad hoc additional meetings when necessary to deal with any emergent issues.

You may wonder why the CJRS Forum was not set up until Spring 2021. No sensible answer is available – but essentially the tax and payroll policy experts from all around the UK were involved in an informal forum throughout March 2020 to May 2021 with dialogue taking place on a near-daily basis to facilitate the creation of the CJRS scheme, review the legislation and manage the claiming portal and comms etc.

From the date of the first meeting of the CJRS Forum in May 2021, there have been discussions around what would happen at the end of the scheme i.e. would the Job Support Scheme (JSS) and Job Retention Bonus (JRB) be resurrected, or be scrapped?

JSS and JRB scrapped

The extension of the CJRS scheme to the end of September 2021 effectively sounded the death knell for both the JSS and JRB, because the government consider that the extension to the CJRS scheme is generous enough and does not warrant further assistance, especially now that the vaccination programme is almost complete.

ICAS notes that there has been confusion over this amongst employers and agents, but without any publication of a government policy statement it has not been possible to publish guidance on this issue until now.

Meanings and interpretations

Another main topic of discussion at the CJRS Forum has been the subject of offsetting overclaims and underclaims against each other for any particular claim, which then led on to discussions around the definition of a claim. HMRC's original conclusion was that a claim was per employee, not per pay period, which could have had widespread implications for employers as well as for auditors preparing statutory accounts and corporate finance professionals handling due diligence exercises for M&A transactions.

Following a letter sent by a collective of professional bodies (PBs) to HM Treasury and HMRC to formally dispute HMRC's interpretation of the definition of a claim and the position on under and overclaims, HMRC changed their stance on the definition of a claim and published guidance to agree with the stance taken by the PBs on 11 October 2021.

What is a "CJRS claim"?

HMRC's published guidance states:

When working out the amount you've overclaimed for in a claim period, you can include all employees in that single claim period.

This means if you've overclaimed for one employee, you can offset this by an amount, equal to any amounts that you've underclaimed for another employee included in the same claim period. You cannot offset an overclaim made in one claim period against an underclaim from another claim period.

Where you have underclaimed for any employee, you must make that value good to the employee. This is because it is a requirement of the Coronavirus Job Retention Scheme that the employee receives a minimum of 80% of reference pay.

You must repay any balancing overclaim after offsets for any period to HMRC.

Example of offsetting an amount you've overclaimed

A Ltd claimed £4,000 for 1 June 2021 to 30 June 2021. This comprised of £2,000 for Employee 1 and £2,000 for Employee 2.
A Ltd reviewed the claim after the amendment deadline and identified that Employee 1 should have received £2,500 and Employee 2 should have received £1,500.

The £500 overclaim for Employee 1 can be offset against the £500 underclaim for Employee 2. This means A Ltd does not have an overclaim for the period from 1 June 2021 to 30 June 2021 as long as they pay Employee 1 the additional £500 they should have received in respect of that period.

Conclusion

It is certainly a relief that HMRC has changed its interpretation; but care still needs to be taken by employers to ensure that their claims are correct – because a compliance review programme is underway in respect of CJRS.

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