TECHNICAL BULLETIN

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HOW MANY INDIVIDUALS DOES IT TAKE TO MAKE A PERSON?

Under the corporation tax loan relationships rules, where an intercompany loan is formally forgiven then the general position is either:

1. Where the companies are under common control then the creditor does not obtain corporation tax relief but neither does the debtor suffer corporation tax on the amount forgiven, or
2. Where the companies are not under common control, the creditor obtains corporation tax relief, and the debtor is subject to corporation tax on the amount forgiven.

Companies are connected where they are controlled by the same person. This will be the case in a group situation but also where the same person, typically an individual, controls both the debtor and the creditor company.

Control is defined by section 472 Corporation Tax Act 2009 and is where a person can "secure that the company's affairs are conducted in accordance with his wishes". Control can be achieved by:

1. Holding a majority shareholding.
2. Holding a majority of the voting rights. This can be achieved directly or indirectly via the company's holding company.
3. As a result of other powers in a document, typically the Memorandum and Articles of Association.

Where a company only has one class of share, holding the majority of these will give control.

Voting rights have to be looked at where a company has more than one class of share in order to establish who actually has control. Some classes of share, such as preference shares, may carry no votes at all.

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A company's Articles of Association may give certain shareholders control, even although they do not own a majority of the shares.

The legislation talks about "a person" having control and nowhere does it say that "a person or persons acting together". The definition of control is therefore very narrow. HMRC in their manuals at CFM35120 makes a particularly useful statement. Where there is control exercised by more than one person, HMRC state that:

"Following section 6(c) of the Interpretation Act 1978 we accept that the word "person" can include "persons". But such persons will only meet the requirements of the legislation if together they can secure that company's affairs are controlled in accordance with their wishes. Whether this exists will be a question of fact in all cases. For example, there could be an oral or written agreement always to vote together, or the intention could be implied by the relationship between the parties".

For example, Mr A and Mr B each own 50% of the shares of Y Ltd. Mr A, Mr B and Mr C each own one third of the shares of Z Ltd.

No single person is able to secure that the companies affairs are controlled in accordance with their wishes. However, if for example, a shareholders agreement exists between Mr A and Mr B that they will always vote together to control the affairs of company Y and to control the affairs of company Z, HMRC should accept that company Y and company Z are under common control.

It would however be advisable if any such agreements between Mr A and Mr B were committed to writing in a document signed by both parties, and witnessed, in order to put matters beyond doubt.

ACCESS TO WORKING PAPERS WHEN YOUR CLIENT MOVES TO A DIFFERENT FIRM

Receipt of a professional clearance letter may not be the most welcome item in your inbox, but from a practical point of view, what does it mean in terms of information about tax which you need to give to the incoming adviser?

Information or intellectual property?

In pre-digital days, a list of information was simply that, but now information may come as part of electronic documents which includes calculations and other formulae.

For example, your firm may have designed a form which not only presents the information about your client's pension contributions, but actively calculates the options. It may show current year limits and thresholds based on that client's particular mix of income, and history of income and contributions.

Do you really want to send this information on to another firm? What do you need to do and what alternatives are available?

The code of ethics and Professional Conduct in Relation to Taxation (PCRT)

In addition to any terms in the engagement letter, professional conduct is overseen by the ICAS Code of Ethics and PCRT.

The code of ethics says (at R320.7)

When an existing or predecessor accountant is asked to respond to a communication from a proposed accountant, the existing or predecessor accountant shall:

(a) Comply with relevant laws and regulations governing the request; and

(b) Provide any information honestly and unambiguously.

Confidentiality is also a consideration. You should be satisfied that you have your client's consent to provide professional clearance and pass any information to an incoming accountant (para 320.7A1). It may be in some instances that the client will already hold the information being sought and could more efficiently supply the information to the incoming accountant themselves (para R320.7D).

As regards PCRT, all the five fundamental principles are relevant (Integrity, Objectivity, Professional competence and due care, Confidentiality and Professional behaviour).

The most immediately relevant are likely to be Integrity - to be straightforward and honest in all professional and business relationships;
and Objectivity - to not allow bias, conflict of interest or

undue influence of others to override professional or business judgements. But Confidentiality and Professional behaviour will also be relevant.

Making information available

Taking PCRT and the code of ethics together, it is clear that best professional practice means that appropriate, authorised, accurate and relevant information should be disclosed to an incoming accountant in a timely manner.

Yet there is no requirement to provide intellectual property created by your firm to a third party. A solution here might be to convert the information into a different format, where the computational element cannot be accessed. For example, a spreadsheet which includes formulae could be saved in portable document format (pdf), such that only the information, but not the calculations, are available to the recipient.

In some cases, there may be a trade-off between providing more information initially as against fielding follow up queries later, if less information is supplied at first.

Example

ABC and Co receives a professional clearance letter from XYZ LLP in respect of New Company Client Ltd.

One of the directors of New Company Client Ltd has complex pension arrangements and has income which fluctuates over £100,000, and so is liable to loss of personal allowance.

Your firm has designed an intelligent form which calculates the annual and lifetime allowances and works out the maximum contributions based on earnings. It also allows for interaction with personal allowance and the impact of Scottish Tax rates on different classes of income.

Rather than supply XYZ LLP with a copy of the intelligent form, ABC provides a pdf of the summary sheet showing actual contributions made in the most recent tax year.

Who owns what?

While in the simplest of cases it will be mainly a matter of the format in which information is provided, the position becomes more complex where a client is using spreadsheets, intelligent forms, or software which your firm has designed.

Each case will depend on its specific circumstances, but there is a difference in principle between systems designed by a firm for use with any client's data, and systems designed at a client's request for the client's specific circumstances. In the latter case care is needed as to the terms of the engagements and what intellectual property rights, if any, the client is acquiring.

Conclusion

As tax becomes increasingly complex and digital, firms will develop bespoke intelligent systems to assist when advising clients. Some of the information created will end up on a tax return to HMRC. It will therefore be within scope of information reasonably required by an incoming adviser.

Having an eye now to the need to provide information in the event of a client changing advisers, and how this might best be delivered, will pay dividends. It will reduce the chance of accidental loss of intellectual property and enable a considered, firm-wide response to be originated. This will facilitate compliance with all the relevant professional standards without compromising a firm's commercial interests.

IR35 APPEAL LOST BY TAXPAYER

In the recent Upper Tribunal decision in Northern Light Solutions Ltd v R&C Commissioners (2021) UKUT 134(TCC) it was found that the First Tier Tribunal had not erred in law in upholding IR35 determinations covering tax years from 2012/13 to 2014/15.

Northern Light Solutions Ltd was the personal services company owned by Robert Lee to supply his services. Since incorporation, the company had provided Mr Lee's services to Nationwide Building Society for approximately seven years from 2008 albeit there was a six-month contract with Lloyds Bank. Northern Light had contracted with Nationwide through two employment agencies, whose contracts were materially the same with certain differences.

The First Tier Tribunal had considered the tests of mutuality of obligation, substitution, and control. Northern Light was given leave to appeal to the Upper Tribunal in respect of these three employment status indicators and also that of integration, referred to as the "part and parcel" test. The Upper Tribunal however refused to consider the last of these because no arguments had been presented on the point but instead, a wide-ranging argument based on other contractual arrangements, for which no leave to appeal had been given or granted.

The Main Facts

1. At the First Tier Tribunal, Mr Lee had given written and oral evidence. HMRC did not give witness evidence but relied instead on documents including notes of meetings in 2014 and 2016 with representatives of Nationwide and one of the agencies. Mr Lee had attended the 2014 meeting with his accountant as observers but remained silent. The meeting notes had been signed by representatives of Nationwide.
2. Although Northern Light had been providing services since 2008 to Nationwide, it was a series of contracts between two the earliest of which commenced on 1 February 2012 and the most recent ending on 19 December 2014, in respect of which determinations had been made. Northern Light had provided Mr Lee's services to Lloyds Bank between 1 November 2012 and 21 April 2013.
3. When considering a project, Nationwide would firstly consider whether its existing employees had the necessary skills and would try to use an existing contractor and only seek a new external contractor if an existing contractor was not suitable. Someone who had not provided services before did not "know the ropes" and extensive procedural issues had to be undertaken.
4. Mr Lee worked on Nationwide's premises in Swindon almost continuously but worked hours in excess of the 7.5 per day so that he could leave early on a Friday afternoon.
5. All work was subject to governance standards and Mr Lee had to adhere to the Nationwide change framework. This required him to complete a weekly report for the head of group programs and the report was also sent to the monthly project board.
6. On starting a contract, there was no induction training other than in relation to health and safety, and there was no ongoing training. Mr Lee would be provided with a contractor pass by Nationwide, and a laptop for security purposes. He would use a desk at Nationwide's offices on a flexible basis. He did not provide any equipment other than an office in his house and his own vehicle.
7. Mr Lee was contracted to work a "professional day" at a fixed rate, five days per week subject to statutory holidays. A professional day was 7.5 hours, and any additional days or hours would have to be agreed in advance and charged to Nationwide pro rata. Mr Lee did work extra hours but would not be paid for them.
8. Mr Lee was not subject to any appraisal, had no line management responsibilities for staff and there was no entitlement to employee benefits such as holiday, sickness, pensions, or any other benefit in kind.
9. Northern Light was required by the Nationwide contract to take out employers' liability insurance, public liability, and professional indemnity insurance.
10. Each contract between Northern Light and Nationwide was for a fixed period but Mr Lee worked at Nationwide continuously between 2007 and December 2014 apart from approximately two weeks in 2012, six weeks in 2014 and the duration of the Lloyds Bank contract.
11. The contracts were for a fixed term albeit there were termination rights on giving notice unless Northern Light failed to perform when the contract could be terminated immediately.
12. The contracts enabled Northern Light to provide a substitute, but the meeting notes recorded a statement by a Mr Pilkington of Nationwide that in practice it would be impractical due to the necessary restrictions on access to Nationwide's systems and restricted site access. A substitute would need to go through vetting checks and an interview and get up to speed. While Northern Light could propose a substitute, Nationwide, acting reasonably, could refuse.
13. The First Tier Tribunal had considered the terms of the hypothetical contract between Nationwide and Mr Lee and held that: they each had discretion as to whether to contract with one another; Mr Lee had a day rate with fixed hours and was entitled to additional pay for additional hours; he had to work at Nationwide's Swindon offices but could be required to work in other offices; the contract could be terminated with notice; Mr Lee was required to comply with Nationwide's processes; he could not be required to work on any other project other than the one for which he was contracted; he could provide a substitute; he was not entitled to holiday pay or other trappings of employment; there was no induction; there were no appraisals; Mr Lee had

no line management responsibilities; he was issued with a contractor pass rather than an employee pass; he had to effect contractor insurance of at least £1 million.

Upper Tribunal Discussion

The Upper Tribunal considered the mutuality of obligation, substitution and then control.

Northern's argument was that there could be no mutuality of obligation where Northern/ Mr Lee was engaged to perform a specific task and could not be required to perform anything else. This was rejected by the tribunal.

The tribunal agreed with the Judge's decision in the case of Cotswold Developments Construction Ltd v Williams (2006) IRLR181 that mutuality of obligation should usually be confined to the question of whether a contract for work in return for payment existed. The tribunal went on to say that "we see no reason why, when a contract terminates in accordance with its terms, the failure to supply further work by the engager (or by the worker to accept the offer of further work) compels the conclusion that the contract is a contract for services rather than a contract of employment. Until the contract is terminated there is clearly mutuality of obligation in the sense of an obligation to pay for work done and an obligation to do the work provided".

The Upper Tribunal also rejected the submissions of Northern Light regarding substitution applying a "dominant feature" test formulated by Lord Wilson in the Supreme Court in the case of Pimlico Plumbers Ltd v Smith (2017) EWCA Civ51. The tribunal were very cognisant of points in the notes of meetings. In relation to the October 2014 meeting:

- Nationwide stated that the contracts with Northern Light did not contain an unfettered right of substitution and
- AxPo (one of the agencies) confirmed that it would be very unusual for a substitute to be sent, that such a substitute would be subject to very strict checks, and Mr Lee could not just send a substitute. This would have to be agreed and had never happened.

Regarding the October 2016 meeting:

- Nationwide were aware of Mr Lee's skillset, experience, and knowledge of Nationwide's processes as he had undertaken work in the past and did not require additional training.
- Mr Lee understood Nationwide's policies and they recruited him for subsequent engagements as he knew their processes.
- There was no need to keep explaining recruitment processes to Mr Lee because of repeated engagements. All he required was an overview of the project.
- Nationwide needed Mr Lee to be a project manager. If Nationwide wrote a description of the work Mr Lee was required to do it would go to many pages as there were too many things to list.
- While Mr Lee could send someone else to do the work, they would not get through security, they would not have a laptop nor knowledge of the work. The reality was that it was not going to happen.
- While the tribunal did not say so in so many words, their view appeared to be that while the contracts between Nationwide and Northern allowed for a substitute, in practice Nationwide would almost certainly reject a substitute as there would be a huge number of administrative procedures to take the substitute through.

The Upper Tribunal then went on to consider the control test advanced by the Judge in Ready Mixed Concrete that "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".

The Upper Tribunal rejected both of Northern Light's arguments that:

- The fundamental aspect of control was over what the employee did. Nationwide could not control what Mr Lee did because it did not require him to work on a project other than the one described in the contract.
- The First Tier Tribunal statement that the degree of control exercised by Nationwide was not inconsistent with him being a highly skilled professional employee did not amount to very much.

In rejecting both submissions, the Upper Tribunal preferred the findings of the First Tier Tribunal that:

- Mr Lee would be required to comply with Nationwide's processes and policies including the Change Framework.
- Mr Lee would complete a weekly report for the head of group programs and a report to the monthly project board.

- Nationwide had control over when Mr Lee worked, that is the 7.5-hour professional day, and where he worked, that is the Swindon office.
- The meeting notes indicated that Mr Lee was subject to Nationwide's overall control as the notes stated that "a manager within Nationwide was responsible for the delivery of the project work undertaken by Mr Lee. Mr Lee had to deliver the set targets, build the team to deliver the "what" and "when" required … Mr Lee managed his group of technicians on a daily basis. It was for (the manager) to divide the team as she saw fit and then give the work to each group within the team. Mr Lee was given a set piece of work to do by (the manager)". The notes also stated that "Nationwide have the right of control over Mr Lee/ Northern Light as to how the work is done, where, when and what …" The Upper Tribunal held that there was sufficient evidence before the First Tier Tribunal to justify its conclusion that Nationwide had control over Mr Lee.

This case is of interest as it is one of a rare number won by HMRC. There were a tome of unfortunate factors present for the taxpayer:

1. There were two meetings attended by HMRC and Nationwide, one which apparently included one of the agencies. Mr Lee and his accountant attended the first as observers and apparently, he did not contribute to the meeting. The Nationwide representatives in attendance would not have been "cross examined" during the meeting and they signed the notes. It appears that neither Mr Lee nor his accountant attended the second meeting.
2. Apparently Nationwide personnel refused to attend the First Tier Tribunal as witnesses and so could not be cross examined at that stage. The tribunal did seem to explore Mr Lee's evidence where it did not accord with the notes.
3. The Upper Tribunal did not allow points that had not been laid before the First Tier Tribunal to be introduced and the question arises as to whether a better case could have been put before the First Tier Tribunal as the Upper Tribunal felt that the facts heard by the First Tier Tribunal supported its decision in favour of HMRC.

IT Strategy

Many longer-term plans for your IT have been fast-tracked over the past 16 months. As more organisations start to return to the office, business owners face many decisions about their IT strategy moving forward.

Typically, many accountancy firms' technology choices have been driven by the products they have chosen over the years, perhaps by the relationship they have with software vendors, which can result in firms running lots of different packages with minimal data integration between different applications.

Based on our research and industry knowledge, this month we provide advice on areas to consider for the IT strategy of your firm or corporate enterprise for the new world of work. Having a clear IT strategy can be instrumental to your firm's growth and success.

Linking your IT Strategy to your Business Strategy

It is all too easy to just keep taking on shiny new IT products and adding them to your ever-growing list of business applications, without thinking how to make the most of IT to help deliver your overall business strategy. Now is an ideal time to stop, take stock, and identify your goals and the related benefits for your IT over the longer term. Our research reveals 55% of firms have changed their IT strategy since the impact of COVID-19, with examples such as accelerated adoption of remote working and cloud platforms.

Spend a day with your leadership team, ideally away from your normal work environment, discussing and documenting your longer-term vision for your organisation over the next 3, 5 and 10 years. Be creative in your thinking and consider how IT can support your overall aims for the business, your team, and your clients. Improving your IT can help to improve client experience. Your IT strategy should be aligned to your overall goals and objectives. As business leaders, it is now time for you to drive new technology to boost your longer-term business strategy.

Valuable Data Decisions

Along with the legal requirement to retain tax information for at least 6 years, accountants have to consider what to do with all the data accumulated over the years. The logical time to consider a data cleanse would be when you come to move to a new server, as you may only want to migrate essential information. To manage costs for your expanding storage needs, it is helpful to organise your data based on attributes like frequency-of-access and planned retention period to minimise costs. You could move historic data to cool blob storage in the Microsoft Azure cloud, for example. The cool access tier has lower storage costs and higher access costs compared to hot storage. This tier is intended for data that will remain in the cool tier for at least 30 days. An example usage scenario for the cool access tier could be older data not used frequently but expected to be available immediately when accessed.

There have been fundamental improvements made in terms of the business intelligence you can surface from the data you hold in your organisation. With an application such as Microsoft Power BI you can get valuable insights from your data. Business intelligence software enables you to make confident decisions using up-to-the-minute analytics, giving you more visibility into the data you hold across your systems. It builds on Excel concepts, but enables even more powerful data manipulation.

Plan for a Cyber Incident

It is vital your valuable and sensitive data is protected as cyber security becomes more important over time. Ensure your IT strategy is clear and explicit on how your data will be protected, and build security into every layer of your IT infrastructure and systems.

Tighten down user privileges across your systems so people only have access to what they need to perform their role, and no more. No one should be working day-to-day with full admin access to the system. Put security measures in place to ensure internal people cannot steal sensitive information and external hackers cannot break in.

Hybrid working brings new challenges with team members working more remotely and no longer secured by the corporate network firewall. A layered security approach utilising cloud technology such as endpoint detection and response (EDR) and a cloud security service, as well as simple changes like forced adoption of multi-factor authentication, will bolster your security.

If you don't already have a well-documented and tested incident response plan, now's the time to create one. Ensure staff are continually provided with cyber security training specific to your organisation, and foster a no-blame culture of reporting cyber incidents from the top down.

Software choices

Vendors are continually developing new products; however it is important not to make your business fit the solution, or try to force fit new technologies to fit into your environment. Ensure the solution you choose solves a problem or enhances your offering to support your business growth. Make sure their solution fits your requirements and aligns with your business processes and operations.

Do not be driven by industry trends and commit to not taking on new systems unless they support what you are aiming to achieve as a business. Try to remain objective as to how their offering aligns with your overall business strategy.

Our research found most firms (85%) feel the software they use is fit for purpose. 40% of firms continually review, revise, and streamline the software they use, but a quarter never go through such a process. As we all embrace the digital revolution, it is crucial to stay up to date with the tools, technology and ideas driving the industry forward. We recommend attending events such as Accountex to educate yourself on what is at the forefront of accountancy and finance innovation.

There is no 'one size fits all' software solution for the accountancy sector. Firms tend to fall into one of two categories when deciding on their software strategy:

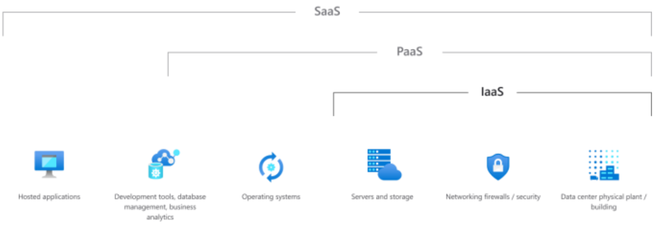
1. Single ERP system ties together all functions of your business; or
2. Best of breed

An ERP implementation is meant to streamline and centralise all your client and business data, providing you with a single source of truth. A best of breed strategy allows you to select your preferred products for each of the business functions. While best of breed systems can be less expensive at the outset and can help an SME grow, keep in mind that costs can add up as you integrate more components. With the increase in open APIs, it is becoming easier to tie together different systems, and connect directly to HMRC and Companies House, for example.

Cloud Architecture

Considering a move to the cloud should be discussed as part of your IT strategy planning session, so let us start by explaining the types of cloud architecture available:

1. **SaaS** – Software as a Service allows users to connect to and use cloud-based apps over the internet providing a complete software solution that you purchase on a pay-as-you-go basis, e.g. Microsoft Office 365, Xero Tax, Sage Final Accounts Production, Silverfin.
2. **PaaS** – Platform as a Service is designed to support the complete web application life cycle, e.g. Google App Engine, Azure SQL Database, AWS Elastic Beanstalk.
3. **IaaS** – Infrastructure as a Service delivers essential compute, storage and networking resources on demand so you can create platforms for your services, e.g. Microsoft Azure, iomart, Amazon Web Services (AWS).



Our research showed several firms see cloud as a future advancement to make their firm more efficient, especially in terms of ease of access and integration. It was also noted by a few that client service has improved since they have moved onto cloud bookkeeping and it was suggested, if you do not move to the cloud, you will be left behind and clients will move to a more forward-thinking firm.

In terms of moving from physical servers in your office to a cloud solution such as Microsoft Azure, we see momentum now increasing. More and more firms are choosing to pay for their monthly consumption of virtual servers, rather than replace physical servers.

Expert Advice

Our research revealed 30% of accountants feel they do not have enough awareness to make knowledgeable IT decisions. Whether you have internal, external, or a combination of both for your organisation's IT support, do you have someone to turn to for expert technology advice specific to your business sector? Does that person have knowledge across your industry and an awareness of new developments in cyber security, automation, business intelligence and artificial intelligence? You need to be confident they have a clear understanding of your business strategy and the technology available to enable innovative growth for your organisation. If you are thinking of moving your server to the cloud, it is worth getting advice from an expert on how to smoothly transit to new technology.

Developing your IT strategy is critical to continued growth and success. If you are looking for some independent advice, Lugo, as the ICAS IT Partner, can arrange a free meeting to discuss working as your Virtual IT Director. We also attend Accountex annually to ensure we bring the most up-to-date advice to our clients. For more information please email Liz.Smith@LugoIT.co.uk or click here to book an appointment at a time to suit you.

Look out for more insight into the key themes from Lugo's research in future ICAS Technical Bulletins.

If you would like to discuss any element of this research or enhance your own cyber resilience, please email Liz.Smith@LugoIT.co.uk

BUSINESS PROPERTY RELIEF ON SHARES IN THE HOLDING COMPANY OF A GROUP

Business property relief (BPR) for inheritance tax (IHT) purposes is available on shares in a company which is wholly or mainly a trading company and on shares in the holding company of a trading group.

For this purpose, mainly means more than 51%. The relief is available on any size shareholding, but the shares must have been held for at least a two-year period. Business property relief is not available on shares in companies which wholly or mainly deal in shares on securities or land and buildings or the making or holding of investments.

If a company is mainly a trading company then, subject to there being no excepted assets, the entire share value qualifies for BPR. If however the company is mainly an investment company then no part of the value of its shares qualifies for BPR. In the case of Farmer v IRC (1999 SpC216), the Special Commissioner looked at the following factors when considering "mainly":

- The overall context of the business.
- The capital employed in trading and the capital employed in investment.
- The management time spent on trading and the management time spent on investment.
- The turnover and profits derived from trading and the turnover and profits derived from investment.

All these factors were considered in the round.

The other leading case involving hybrid businesses is that of HMRC v AM Brander (as executor of the will of the late 4th Earl of Balfour) (2010 UK UT300 TCC), where the same principles as those in Farmer were applied.

Section 105 IHTA 1984 provides that shares in the holding company whose business consists wholly or mainly of being a holding company can qualify for BPR as long as at least one subsidiary carries on a qualifying trade.

The holding company may also hold shares in an investment subsidiary. In these circumstances however the value of the shares in the investment subsidiary must be removed from the value of the shares of the holding company with BPR being available on the balance of the value of the holding company shares.

It is quite common, in practice, for a trading company to utilise surplus cash in making property investments. The company may therefore change from one which is **wholly** a trading company to one which is **mainly** a trading company. Management may become concerned that, where commercial risks attach to the trade, the value of the investment properties would be exposed to risk were a catastrophe to occur in the trading business. For example, a civil engineering contract may be priced at a figure which turns out to be too low.

In these circumstances, a new holding company is often interposed between the shareholders and the trading company with the property investment business hived up to the new holding company. The holding company then carries on an investment business in its own right, but has a wholly owned trading subsidiary. The holding company shares could still qualify for BPR provided that the value of the shares in the trading subsidiary is greater than the value of the investment business.

This is a better position from an IHT point of view than if, instead, a new holding company was formed with both the trading subsidiary and a new subsidiary to which the investment properties were transferred.

In cases where the holding company has both trading subsidiaries and investment subsidiaries, and the value of the investment subsidiaries exceeds that of the trading subsidiaries, then the holding company will be the holding company of mainly an investment group and BPR will not be available on its shares at all.

In the latter circumstances, the shareholders may consider a demerger whereby a separate trading group and an investment group would be formed, and the shareholders would hold shares in both. The shares in the trading group should qualify for BPR, while those in the investment group would not.

Another scenario may be that certain shareholders would like to hold shares in the trading group only, while others would like to hold shares in the investment group only, and a demerger could achieve this outcome. This would allow those keen to drive the trade forward to do so, while those who would prefer to be involved in more passive activities could own the investment group shares.

CORPORATION TAX TRADING LOSSES: TEMPORARY 3-YEAR CARRY-BACK

Written by Paul Davies from Evolve Partner Croner-i

Introduction

As one of many measures designed to assist businesses suffering economic harm from the coronavirus outbreak, Finance Act 2021, s. 18 and Sch. 2 introduces a temporary extension, to three years, of the normal 12-month trading loss carry-back period. The temporary extension applies to trading losses arising in accounting periods ending in the two-year period **1 April 2020** to **31 March 2022**.

Normal rules apply subject to exceptions

The rules will work by allowing the normal trading loss carry-back rules to continue to apply, subject to certain restrictions, as if the carry-back period were **three years** instead of **12 months**. This means that all the normal carry-back rules continue to apply including the requirements that:

- losses must be carried back and relieved against profits of more recent periods first; and
- the amount of loss carried back to the 12-month period ending immediately before the loss-making period (CY-1) is **unrestricted**.

Carry-back restriction

The main exception is that the amount of losses carried-back to periods before CY-1 (i.e., to carry-back years CY-2 and CY-3) is restricted, for a stand-alone company, to a maximum of:

- £2 million out of the total of all trading losses arising in all accounting periods ending in the period **1 April 2020 to 31 March 2021**; and
- £2 million out of the total of all trading losses arising in all accounting periods ending in the period **1 April 2021 to 31 March 2022**.

So, if a company has two loss-making accounting periods, both ending within the period 1 April 2020 and 31 March 2021, the total amount that may be carried-back to period CY-2 (and, in turn, to period CY-3 should any losses remain) is restricted to a maximum of £2 million of the total of the trading losses arising in both of those accounting periods. Likewise, for the period 1 April 2021 to 31 March 2022.

For **groups** of companies, each of the £2 million maximum carry-back amounts must be shared with other group members except (somewhat unexpectedly perhaps) where all claims by group members are de minimis claims. In that case, the group limit does not apply, and the number of de minimis claims that can be made is **unrestricted** even if they exceed £2 million. Where the cap does apply, it applies to both de minimis and non-de minimis claims.

Example (adapted from HMRC policy paper)

Company B incurs trading profits and losses as follows:

- CY+1: £5.55 million (loss)
- CY+0: £2.125 million (loss)
- CY-1: £1.1 million (profit)
- CY-2: £3.225 million (profit)

	CY-2	**CY-1**	**CY+0**	**CY+1**
	£'000	**£'000**	**£'000**	**£'000**
Trading profits / losses	3,225	1,100	-2,125	-5,550
CY+0 losses				
• Unrestricted carry-back against most recent 12 months		-1,100	1,100	
• Extended carry-back (max. £2m)	-1,025		1,025	
Sub-total	**2,200**	**NIL**	**NIL**	**-5,550**

CY+1 losses	CY-2	CY-1	CY+0	CY+1
• Unrestricted carry-back against most recent 12 months			NIL	NIL
• Extended carry-back (max. £2m)	-2,000			2,000
Profits chargeable	**200**	**NIL**	**NIL**	**NIL**
Unused trading losses	**N/A**	**N/A**	**NIL**	**-3,550**

If a claim is made:

CY+0 losses

- CY+0 losses must first be carried back, without restriction, to relieve the £1,100,000 profits in CY-1 under normal rules.
- Remaining CY+0 losses of £1,025,000 are then carried-back to the extended carry-back period, and offset first against CY-2 profits, leaving profits remaining in CY-2 of £2,200,000.
- Had those remaining losses exceeded £2 million, the amount carried-back would have been restricted to £2 million.

CY+1 losses

- CY+1 losses must first be carried back to CY+0 under the normal unrestricted one-year carry-back rule. In this example however, there are no CY+0 profits to relieve.
- Next, CY+1 losses must be carried back under extended carry-back rule to offset CY-1 profits first, then profits of CY-2 if any losses remain.
- The CY-1 profits have been relieved in full by the CY+0 losses so the only remaining period that may be relieved by CY+1 losses is CY-2.
- CY-2 profits of £3,225,000 have already been relieved by £1,025,000 of CY+0 losses leaving £2,200,000 available for relief, however the amount that may be carried-back is restricted to a maximum of £2,000,000 under the extended carry-back rules.
- The remaining £3,550,000 of unrelieved CY+1 losses will be carried forward for relief under CTA 2010, s. 45A or s. 45B (post 1-April 2017 losses carried-forward against total profits and trading profits respectively).

Time limit

The time limit for an extended carry-back claim depends on whether or not a claim is **de minimis**.

- In accordance with normal rules, a claim for extended relief must be made within two years of the end of the accounting period in which the loss arises.
- A **non-de minimis 2020 claim** may not be made before 31 March 2021.
- A **non-de minimis 2021 claim** may not be made before 31 March 2022.
- A **non-de minimis claim** must be made in the company tax return for the loss-making accounting period, in which case returns for carry-back periods are treated as amended accordingly.
- A **non-de minimis 2020 (2021) claim** by a member of a **2020 (2021) group** must be in accordance with the amount specified in a **2020 (2021) loss carry-back allocation statement** filed with HMRC in accordance with SI 2021/707 (effective 6 July 2021).

A **2020 claim** for these purposes means an extended trading loss carry-back claim made in respect of a loss incurred in an accounting period that ends in the period 1 April 2020 to 31 March 2021. **2021 claim** is similarly defined in relation to the period 1 April 2021 to 31 March 2022.

As the rules require non-de minimis claims only to be made in a tax return, it follows that de minimis claims can be made outside of a return. Note however that a de minimis claim requires, not only that the actual claim is less than £200,000, but also that the claim is not **capable**, under the assumptions described below, of exceeding £200,000.

Likewise, the submission of a loss carry-back allocation statement will only be required where any company in the group makes a claim that exceeds the de minimis limit. The group reporting requirement will not be triggered if all companies in the group make de minimis claims.

Meaning of de minimis claim

A **2020 claim** is a **de minimis 2020 claim** if the **total relief given** for all 2020 claims (including any already made) is **under £200,000**, and that would still be the case if:

1. the company claims all available capital allowances (or any other allowances) that would increase the losses claimed;
2. the company does not make any group relief surrenders; and
3. the claim is for all relief available to the company under CTA 2010, s. 37 (sideways relief and carry-back relief) in respect of the claim loss.

A 2021 claim is a de minimis 2021 claim if the same condition is met in relation to 2021 claims.

Example

The HMRC Policy Paper considers, as an example, a company with £400,000 of trading losses in its accounting period ended 31 March 2021. It can claim a further £40,000 of capital allowances and has prior year trading profits of:

- CY-1: £150,000
- CY-2: £100,000
- CY-3: £75,000

In assessing whether the claim is de minimis, it must be assumed that the company claims the additional capital allowances of £40,000 making losses of £440,000 in total. From this is deducted the unrestricted carry-back to CY-1 of £150,000 which is irrelevant in determining whether a claim is de minimis. The remaining losses of £290,000 are above the de minimis limit but, because the maximum possible carry-back to the extended carry-back period is only £175,000 by virtue of the available profits in those periods, the claim is de minimis.

Anti-avoidance

Finally, be aware of the associated anti-avoidance provisions. A company may not make a **2020 claim** or **2021 claim** if the main purpose (or one of the main purposes) of it ceasing to be a member of a **group** at **any time** in the period 1 April 2020 to 31 March 2021 is to increase the total amount of relief given as a result of the claim. Group, as before, takes its meaning from the **corporate interest restriction** definition in CTA 2010, s. 269ZZB.

STARTING A BUSINESS - A STEP BY STEP GUIDE TO STARTING AND FINANCING A NEW BUSINESS.

The ICAS business start-up guide is a visual and user-friendly publication designed to help aspiring business people on the way to setting up and running a successful company.

The guide has been prepared by ICAS Members with a breadth of entrepreneurial and business experience, including investors, entrepreneurs, and directors.

It aims to help those committed to starting their own enterprise with tips on:

- Sourcing advice, support, and mentoring
- Preparing a business plan
- Identifying appropriate funding and increasing your chances of getting it
- Accessing further business start-up resources and guidance

The business start-up guide spans the range of resources and help available from both the private and public sector. It flags key things to consider when preparing a robust business plan - like knowing your market, working out how much cash you are likely to need, reducing your risk - and how to avoid the perils and pitfalls, such as hidden costs.

The guide includes a series of 'pre-flight' checks for small enterprises seeking to get off the ground, in areas such as tax relief entitlement, cashflow, raising investment, contingency planning, and business structures.

It also focuses on alternative funding models by explaining investment opportunities such as crowdfunding and the use of social media.

The guide has been prepared by the Business Policy Panel of ICAS – a group of senior CAs with a wealth of business experience who contribute their time on a voluntary basis to support ICAS.

ICAS AUDIT NEWS

The Summer 2021 issue of the ICAS Audit News can be found here.

As well as an update on 2021 Audit Monitoring visits, the mandatory audit quality course 'Keeping Audit on the Right Track', and a reminder about 'Emphasis of matter' paragraphs, the issue also contains articles on:

- BEIS's consultation on UK audit reform
- The FRC's Strategy for 2021/22
- IAASB's upcoming consideration of ISA for Less Complex Entities (LCE)
- Audit firm queries around the revised ISA (UK) 700 and reporting on 'irregularities'
- Common issues from audit monitoring visits on the audit of pension schemes
- FRC's revised auditing standard for the auditor's responsibilities relating to fraud
- The revised practice note for the audit of housing associations in the United Kingdom
- The extension of the application period for accounting requirements covering COVID-19-related rent

TAX & HMRC UPDATES

SEISS communications from HMRC

HMRC have updated their guidance on how to recognise whether communications appearing to come from HMRC is genuine to include contact from HMRC with information about claiming the fifth Self-Employment Income Support (SEISS) grant.

View the updated guidance here.

Online trust management service guidance

HMRC have updated their guidance on authorising an agent to access the trust.

View the guidance **here**.

New guidance from HMRC on GAAR

HMRC's General Anti-abuse Rule (GAAR) guidance has been updated to help recognise abusive tax arrangements and the processes for counteracting them.

Parts A, B, C and E have been added and apply from 16 July 2021.

Part D effective 11 September 2020 remains unchanged.

View the updated guidance here.

HMRC Agent Update 86 published

The latest version of HMRC's Agent Update has been published and can be found here.

FLEXIBLE WORKING IS COMING

ICAS members with payroll/employment taxes/remuneration planning and HR clients may wish to make clients aware that the government has announced its intention to introduce legislation making flexible working the default position for all, unless an employer has a good reason not to. It is also understood that this will be included in the forthcoming Employment Bill though – so a date is not yet set for commencement.

On 30 June 2021, Tulip Siddiq MP tabled a **Flexible Working Bill** in the House of Commons, which, if passed, would result in all staff being entitled to flexible working from day one of employment, rather than after 26 weeks of working for the same employer, as is the case at present.

Under the proposals, employers would be required to offer flexible working arrangements within employment contracts, as well as to set out the flexibility available in the role in a job advert. It is thought the measures would have a variety of benefits on the wider economy and particularly for marginalised groups, including those who are on low incomes.

NATIONAL INSURANCE CONTRIBUTIONS BILL 2021

The Bill, which passed through Parliament in July 2021 without amendment, deals with the following matters:

• Introduces a new secondary Class 1 National Insurance contributions (NICs) relief for employers of newly employed Freeport employees – across the UK between 6 April 2022 and 5 April 2026 inclusive.

• Introduces a new secondary Class 1 NICs relief for employers of armed forces veterans.

• Introduces an exemption for self-isolation support scheme payments from Class 2 and Class 4 NICs.

• Widens the existing power to make regulations that impose requirements to disclose information in relation to arrangements that aim to avoid NICs.

Freeports

Freeports are businesses operating with physical premises located in a ‘Freeport Tax Site’.

A Freeport employee is an employed earner of a Freeport employer who spends 60% or more of their employed time in a single Freeport Tax Site in which their employer has a business premises.

Great Britain ‘Freeport Tax Sites’ are defined in Finance Bill 2021 and NI ‘Freeport Tax Sites’ will be defined in a future Finance Bill.

A new zero rate of secondary Class 1 NICs is to apply in Great Britain (Clauses 1 to 4) and NI (clause 5) for 36 months up to the Upper Secondary Threshold from day 1 of the employment for Freeport employers, which can be claimed through RTI.

A review of the effectiveness of the measure will be carried out prior to April 2026 to see whether the measure should continue to apply.

Veterans

A new relief from secondary Class 1 NICs is available to new veteran employments at any time between 6 April 2021 to 5 April 2024 inclusive, for 12 months, starting from the first day of a veteran’s first civilian employment after leaving the regular armed forces. Subsequent and concurrent employers can also benefit from the relief during this period. The relief can be claimed through RTI from 6 April 2022, and transitional arrangements are in place to enable employers to claim the relief retrospectively in relation to the 2021-22 tax year.

For this purpose, a ‘veteran’ is someone who has completed at least one day of basic training in the armed forces. The relief will be reviewed during 2023 to measure its effectiveness – it may be continued if deemed successful.

Self-isolation support scheme payments

Lump sum payments of £500 can be claimed under separate, but similar, schemes in England, Wales, and Scotland in respect of people who have been asked to self-isolate by the relevant authority subject to jurisdictional criteria where they cannot work from home and will suffer financial consequences

In England, the scheme was available from September 2020 and in Scotland and Wales from October 2020 – all are administered by local authorities.

Where the claimant is employed, the payments are classified as taxable emoluments and therefore, technically liable to employee and employer Class 1 NICs. However, the Chancellor legislated to exempt the payments from Class 1 (employee and employer) and Class 1A (employer) NICs so as to avoid impracticable administrative burdens for employers and local authorities. The relevant regulations (S.I. 2020/1065 and 2020/1532) were adjusted to facilitate this.

The self-employed also benefit from the exemption from Classes 2 and 4 NICs where they fall to be taxed as trading income in respect of the self-employed and are taxed under Chapter 2, Part 2 of the Income Tax (Trading and Other Income) Act 2005 (ITTOIA 05).

In all other circumstances, Class 4 NICs is payable on profits chargeable to income tax under Chapter 2, Part 2 ITTOIA 05 in the same manner as any income tax is chargeable in respect of those profits. Class 2 NICs are payable in respect of profits that are chargeable to Class 4 NICs.

Disclosure of contributions avoidance arrangements - NICs

The Disclosure of tax avoidance schemes (DOTAS) regime was introduced in 2004, designed to oblige promoters of tax and NICs avoidance to make disclosures of their schemes to HMRC.

As part of Budget 2020, the UK government announced a further package of measures strengthening sanctions on promoters, marketers and enablers of avoidance and giving HMRC additional powers relating to informing the taxpayers involved. Since then, legislation has been introduced as part of Finance Bill 2021.

The relevant regulations can be found at section 132A of SSAA 1992, which allows the DOTAS legislation to be replicated for NICs.

Legislation governing NICs generally

The relevant legislation can be found at:

- Social Security Contributions and Benefits Act 1992 (SSCBA 1992).
- Social Security Contributions and Benefits (Northern Ireland) Act 1992 (SSCB(NI)A 1992).
- The Social Security Administration Act 1992 (SSAA 1992).
- The Social Security Administration (Northern Ireland) Act 1992.
- The Social Security (Contributions) Regulations 2001 (SI 2001/1004)

THE IMPORTANCE OF KEEPING RECORDS

Background

In 2017, Mr Storey submitted Self-Assessment returns for three tax years (not subject to a notice of assessment) – 2014/15, 2015/16 and 2016/17 which contained claims in relation to his employment as a scaffolder for expenses, totalling almost £32,000.

In June 2018, HMRC opened Section 9A TMA 1970 enquiries into each of the three returns, specifically asking for evidence in support of the claims. Letters were sent to both the taxpayer and the agent.

What's the Storey?

Having received no response, HMRC wrote to the taxpayer and the agent again, stating that they would be removing the claims from the tax returns, and inserting some benefits in kind which had been omitted, which they were aware of from their receipt of forms P11D from Mr Storey's employer for the year 2015/16. These included car benefit of £555 and fuel benefit of £470.

HMRC then received a schedule from the agent which set out car mileage, clothing, and tools expenses for the taxpayer. Mr Storey was driving his own car, a Vauxhall Insignia, on business during his employment, as well as incurring expenses on specialist scaffolder's clothing and tools/equipment.

After further enquiries by HMRC as to evidentiary support, the agent informed HMRC that there were no mileage or other records and that the mileage claims, claimed using the Approved Mileage Allowance Payments (AMAPs) rates (for private car drivers driving their own cars on business) and other expenses had been assembled to the best of Mr Storey's memory, adding that a company van had also been used at some point during the period of the claim. (AMAPs payments cannot be used for company cars or vans).

Memory lapse

HMRC's inquiry revealed that Mr Storey's memory may have been playing tricks on him when the mileage claims showing that over 60,000 miles travelled in the car throughout the period in question were not corroborated by the MOT readings, which logged 38,343 miles travelled in total.

In addition, almost £2,000 had been claimed for food expenses per annum, as well as flat-rate allowances and accounting fees to the tune of £650 for all years. None of the expenses could be accounted for and it was not even clear whether any of the travel referred to was business-related due to the lack of information from both the employer and the employee and his agent.

Assessments, repayments and appeals

Over the course of 2017 and 2018, HMRC issued assessments totalling £15,000 and wrongly issued a repayment totalling £13,000, which would need to be repaid. Penalties were mitigated by 80% and totalled £2,300.

After asking for a review which was carried out and upheld by HMRC, the taxpayer then appealed to the Tribunal in April 2019, arguing that although he had not kept proper records, his expenses were nevertheless correct and justifiable and he disputed the reduction being made to the claim.

The task

The Tribunal was asked to consider:

(1) was the mileage claimed capable of being classified as business mileage – i.e., incurred in the performance of Mr Storey's duties;

(2) did the mileage expenses qualify for a deduction under S. 231 ITEPA 2003;

(3) were the expenses eligible for relief under S. 336 ITEPA 2003 – i.e. were they "wholly, exclusively and necessarily" incurred in the proper performance of Mr Storey's duties;

(4) was a Sch. 24 FA 2007 penalty applicable.

Decision time

Unsurprisingly, the tribunal was unable to uphold the claims made by the taxpayer in (1) (2) and (3) above due to the "dearth" of records and substantiation of any kind that the expenses had even been incurred. As to (4), however, the Tribunal concluded that due to the lack of suitable and appropriate guidance for employees to follow (or anyone who may need to make a self-assessment return in the absence of payments by their employer with no tax knowledge), the penalty should be suspended provided the tax liability was repaid immediately.

The last word

The Tribunal found it necessary to comment on the lack of available guidance to assist people in Mr Storey's position as follows: "Having made the above findings, we pause to air our concern that HMRC should urgently publish detailed guidance to assist and cater for employees who find themselves falling a lacuna of having submit to expenses by way of self-assessment returns where there has been no consideration of the same by their employer etc. in calculating an employee's tax liability. It is not hard to envisage that there may be many tradesmen who incur expenses who might benefit from guidance as to how to keep records and the types of evidence they ought to submit, as well as educating these individuals as to the obligations that fall upon their employers so that they are made aware of not merely their obligations to the Respondent but their rights as well."

Conclusion

This is one of those cases that should never have ended up at Tribunal – but the comments made by the Tribunal Judge regarding the lack of suitable guidance for unrepresented taxpayers is a valid one and it is hoped that in the ongoing reform of the Tax Administration Framework, these comments will be heeded by HMRC.

WHAT HAPPENED TO THE EMPLOYMENT BILL, AND WHAT IS REPLACING IT?

In the 2021 Queen's speech, a collective sigh of disappointment went around as observers realised that there was no provision for the Employment Bill which was supposed to have been included in the previous Queen's speech of December 2019, but which was delayed due to Covid and Brexit. It is unlikely that the

Bill, which contained, amongst other things, key aspects relating to the right for workers on zero-hours arrangements to request a more predictable contract that more accurately reflected the hours they actually work, will not be likely to be enacted now until at least 2022.

The main impact on employment legislation of Brexit is that, due to the ending of the jurisdiction of the EU Court of Justice, the UK no longer needs to bring EU law into the sphere of UK law. Existing EU employment legislation is being immersed into UK law, and although key EU Employment Tribunal case decisions on complex areas such as discrimination, working time and TUPE and discrimination are likely to remain of relevance to the UK courts, they can now choose to depart from them.

Instead of an Employment Bill this year, certain key employment legislation, NMW and tax measures have nevertheless been enacted which accountants and tax advisers also need to be aware of, in the event they spot a client who may be inadvertently affected by any of them over the coming months, or for whom they operate a payroll and/or HR consulting service. The new immigration-based laws are particularly relevant due to the punitive penalty system if employers get it wrong.

For the avoidance of doubt, no ICAS member should attempt to answer client queries relating to employment law – the client should be referred to a qualified HR practitioner or employment lawyer, unless the ICAS member is themselves suitably qualified and regulated in this area. The key issues are as follows:

- **1 January 2021 –** Free movement of workers ended. Anyone wishing to work in the UK must now comply with the UK points-based immigration system which applies to all new arrivals of non-British citizens to the UK.
- **1 April 2021** - The rates of the national minimum wage increase, including an increase in the national living wage from £8.72 to £8.91 per hour. The national living wage is extended to workers aged 23 (rather than 25, which is the qualifying age before 1 April 2021).
- **4 April 2021** - The weekly rates of statutory maternity pay, paternity pay, shared parental pay, adoption pay, and parental bereavement pay increase from £151.20 to £151.97.
- **6 April 2021** - The weekly rate of statutory sick pay increases from £95.85 to £96.35.
- **6 April 2021** - Reforms to the rules on off-payroll working now also apply to private-sector organisations, following a year's delay on the original commencement date due to Covid.
- **31 May 2021** - Workers became entitled to take steps to protect themselves in circumstances which might represent a health and safety risk, specifically: "in circumstances of danger which the employee reasonably believed to be serious and imminent and which [they] could not reasonably be expected to avert, [they] left or … (while the danger persisted) refused to return to [their] place of work". By taking such steps in 'reasonable' circumstances, employees are protected from 'detriment', which can include not being paid for refusing to attend the workplace.

  Note that the perceived danger presented by coronavirus could still be classified as 'serious or imminent' to an unvaccinated person. Nevertheless, the employee's action is less likely to be considered 'reasonable' if the employer has fulfilled its obligations under government guidance to reduce workplace risk to the "lowest reasonably practicable level".
- **30 June 2021** - Employers can continue to employ EU citizens until this date provided that they are already living or working in the UK by 31st December 2020.
- **1 July 2021** – EU citizens must obtain 'settled' or 'pre-settled' status to work in the UK beyond this date. Failure to obtain this status by the prescribed date will result in them being automatically classified as illegal workers - and it is an offence to emplo

TECHNICAL BULLETIN

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SUBSCRIPTIONS & ENQUIRIES

Jeanette Rorison Customer Champion, Practice Support practicesupport@icas.com

Contact us

CA House, 21 Haymarket Yards, Edinburgh, UK, EH12 5BH
+44 (0) 131 347 0100
connect@icas.com | icas.com

@ICASaccounting ICAS – The Professional Body of CAs