CAPS TECHNICAL BULLETIN

CHANCELLOR'S 2014 AUTUMN STATEMENT

Working in tax, a regular question which arises is whether an unincorporated business should be incorporated into a limited company. Historically, the question, from a tax point of view, was answered based on the profit level and how much profit the proprietors were prepared to leave in the business. The top rates of income tax have always been higher than the rates of corporation tax and where a reasonable level of profit could be left in a company, to be taxed at the lower corporation tax rates, there was at the very least a deferral of tax payable until the proprietors wished to draw this by way of salary or dividend.

With the replacement of capital gains tax retirement relief, first by taper relief and then entrepreneurs' relief, two further tax advantages accrued to incorporation:

1. The goodwill of the business could be sold to the limited company at up to market value with capital gains tax at 10% being payable as a result of entrepreneurs' relief; and
2. In some instances, it was possible for the company to claim corporation tax relief on the amortisation of the goodwill.

From 3 December 2014, it is proposed that the entrepreneur's relief will not be available where goodwill is disposed of on incorporation to a close company which is a related party. Furthermore, it is also proposed that relief for corporation tax will be restricted on amortisation of goodwill which has been generated within the business and has been acquired from a related party.

Two strings from the incorporation bow have therefore been cut by this announcement in the Autumn Statement. However, a decision remains to be made on incorporation, and this will be based purely on income tax savings and the lower rate of corporation tax. Of course, there are also the commercial considerations which many business people are keen to take into account so as to reduce their exposure by taking advantage of the limited liability offered by a corporate structure.

The taxation of non-domiciled individuals who have been resident in the UK has been a recurring theme for the Chancellor for some years now. In this Autumn Statement, it is proposed that during the next parliament, the remittance basis charge will rise to £90,000 per annum for individuals who have been resident in the UK for 17 out of the last 20 years and to £60,000 for those who have been UK resident for 12 out of the last 14 years. Reading between the lines, it appears as if the Government is wishing to cut "avoidance" by individuals who have been resident in the UK for many years and in some instances, perhaps all of their lives. It is however likely that such individuals will reconfigure their investments, for example, by moving out of assets held directly, such as bank deposits and shares, and switching over instead to offshore investment bonds.

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ICAS

A surprise announcement was a change to Stamp Duty Land Tax for residential property purchases to make it progressive, with immediate effect. In other words, rather than a flat rate of 1% being applied to a £200,000 purchase price, the tax will from 4 December be calculated on £125,000 at 0% and £75,000 at 2%, a saving of £500. Purchasers of more modest houses will benefit while purchasers of high value houses will pay more as the SDLT on the incremental purchase price of over £1.5 million will be 12%.

The change in the SDLT rate application will therefore be in force in Scotland from 4 December 2014 to 31 March 2015, that is the final period of the SDLT regime until the new Land and Buildings Transactions Tax (LBTT) comes into effect from 1 April 2015. LBTT, also a progressive tax, but with fewer steps, will lead to greater exposure for those buying properties in the region above £325,000.

As already announced, there will be more flexibility in drawing from pension funds from April 2015 where, at the extreme, an individual will be able to draw his entire pension pot, albeit subject to Income Tax at his marginal rates.

The Chancellor announced some further relaxations:

1. Where an individual dies before age 75, the fund will be able to pass to the nominated beneficiary tax free whether it is in payment or not.
2. Where the individual has attained age 75 then withdrawals by beneficiaries will be taxed at their marginal Income Tax rates unless the fund is withdrawn as a lump sum when a rate of 45% will apply.
3. Where a joint life or guaranteed annuity has been purchased, receipts after death of the pensioner will be tax free in the hands of the beneficiaries.

Ending on a high, three more crumbs from the Chancellor's table:

1. The personal allowance will be £10,600 from 6 April 2015.
2. Trivial benefits in kind of under £50 will not be subject to the benefits legislation, replacing informal HM Revenue & Customs practice.
3. Where an individual dies and owns ISAs, these cannot pass to the surviving spouse. However, from 6 April 2015, the surviving spouse will be given an additional ISA allowance up to the amount of the deceased spouse's ISA value.

Overall, here we are, with a bit of the good, the bad, and the ugly, and no doubt to be followed by another massive Finance Bill in the spring.

TAX DEBT RECOVERY POWERS – SOME BACKTRACKING?

After considerable lobbying by ICAS and others, substantial new safeguards are to be introduced to the proposals for Direct Recovery of Debt (DRD) from taxpayers, along with delaying the process of implementation. Taxpayers in Scotland will not be brought into the first application of the regime, which in itself will not be until after the General Election. Overall, it is important to note that delay does not mean this proposal is going away – as a matter of principle, very few announcements from Chancellors ever do. In this instance, the postponement has come as a result of Government reflection and realisation that the proposal would benefit from the insights and contributions from those outside Whitehall and HM Revenue & Customs (HMRC). This is what a good consultation process can deliver, but at a significant cost in terms of time and effort in lobbying.

The wider benefit of the consultation process has provided HMRC with considerable new insights into the practical difficulties of many taxpayers in dealing with the tax system on a range of issues. The new HMRC Vulnerable Customers Unit is a welcome development, as is the proposal that DRD will be tried and tested on a small number of cases before being fully rolled out. The recognition that debt collection in Scotland operates from a different legal basis is sensible. It does not, however, take Scottish taxpayers out of debt collection proceedings, only out of this particular collection mechanism.

The response document can be viewed at: **www.gov.uk/government/uploads/system/uploads/attachment_data/file/377174/Direct_recovery_of_debts_-_Summary_of_responses.pdf**.

VIEWS SOUGHT ON FURTHER SCOTTISH DEVOLUTION – ICAS SUBMISSION TO THE SMITH COMMISSION

The issue of further devolution came to the fore after the “No” vote in the Scottish Independence Referendum on 18 September 2014. The Smith Commission, chaired by Lord Smith of Kelvin, was established on 19 September to facilitate talks on the devolution of further powers to the Scottish Parliament. It is expected that the ‘Heads of Agreement’ will be published some time in November by the Commission to lay down the framework to implement further devolved powers.

The Commission has consulted professional bodies widely in the process of setting out the scope of devolution, and ICAS was invited to make a submission to the commission, which it combined with an Ipsos-Mori poll of members. Of course there is more to devolution than just tax considerations but perhaps these are the ones at the front of practitioners’ minds when they wonder what might impact their practices and clients.

The key messages which came out of ICAS’ submission were that devolution should allow:

1. **Accountability of the Scottish Parliament** – including more use to be made of the powers that are already devolved and making the Scottish Parliament more accountable to Scottish Taxpayers.
2. **Retention of the single UK market** – in order for administrative costs for businesses with cross-border trade to be minimised and to maintain a single market in savings and investment.
3. **Economic growth and job creation** – which includes support for devolved air passenger duty to help open up more direct routes to possible export markets and possible powers to set a new minimum wage for Scotland.
4. **Devolution of tax powers** – but this must be considered carefully, bearing in mind the levels of complexity associated with adjusting tax rates and scope. Income tax, the main tax to be devolved initially, would need to see changes scoped in very gradually. VAT is an example of a tax that would not be easily readily devolved because deviation is not permitted within a member state by EU law. As for Corporation Tax, a lot has been made of Scotland possibly having a lower rate than the rest of the UK to promote inward investment. There is much more to it than this – the cross border implications are varied and complex.

ICAS’ member poll, as mentioned above, highlighted a general feeling of positivity from the membership towards devolution:

- 69% supported the Scottish Parliament making more use of existing devolved powers
- 88% believed that increased accountability for the Scottish Parliament is a key factor in determining which taxes should be devolved; and
- 68% of members favoured further devolution, although there was some variation regarding the extent to which this should happen.

The full ICAS response to the Commission is available to view at: **http://icas.org.uk/News/Media-Releases/ICAS-Submission-to-Smith-Commission/**.

HMRC CORRESPONDENCE WITH REPRESENTED TAXPAYERS

HM Revenue & Customs (HMRC) have issued an internal notice about how and when staff must correspond with represented taxpayers. This has arisen following concerns expressed by the professional bodies about HMRC’s use of ‘nudge letters’, which were sent only to the taxpayers without a copy being sent to their agents. ICAS participated in a series of workshops organised by HMRC and attended by agents which have led to the development of this notice. The workshops also highlighted to HMRC a number of issues, such as the need for a point of contact for agents in their Debt Management and Banking Directorate, which was set up in April 2014 (Agent Dedicated Line: 0300 2003887).

As part of the notice, HMRC explained that:

‘*HMRC has always recognised that agents perform a valuable role within the tax system helping some 8 million individuals and businesses to file returns and pay their taxes. This guidance is about contact between HMRC, represented customers and their agents, and sets out some high level principles to bear in mind, especially when issuing nudge/campaign type communications.*’

Guiding principles

- HMRC’s primary relationship is with the customer and therefore HMRC will always communicate directly with the customer.
- Once HMRC is fully digitised, all communications to customers will be capable of being copied to both the customer and their agent.
- In the meantime, HMRC staff issuing

non-routine correspondence to represented customers should consider the following:

1. Normally copy the communication to the agent, unless there are good reasons why that would not be appropriate;
2. Consider whether advising the professional bodies/Voluntary and Community Sector (VCS) about a campaign/nudge project might help deliver results more effectively (by enabling them to alert their members to be ready to help their clients respond);
3. Let the customer know if the agent has not been advised about a particular communication, (so that the customer can decide to do so if they so wish).

This guidance does not change existing ways of working; for example:

(i) in enquiry cases where, after the opening letter, further correspondence is usually with the agent; and

(ii) correspondence in relation to technical matters where HMRC's practice is usually to correspond with the agent only.

LAND AND BUILDINGS TRANSACTION TAX – RATES AND THRESHOLDS ANNOUNCED

On 9 October 2014 the rates and thresholds were announced for one of Scotland's first devolved taxes, Land and Buildings Transaction Tax (LBTT), which will replace Stamp Duty Land Tax (SDLT) from 1 April 2015.

The aim of the new tax is to make the property tax system more equitable and to remove the "clustering" of prices, particularly at the £250k threshold where the tax payable under the old SDLT would jump from £2,500 on a £250,000 property (1% rate) to £7,800 on a £260,000 property (3% rate from £250,001). The new tax, it is hoped, will help remove these distortions in the housing market and create a more progressive system.

The new rates are set out below.

Domestic property purchases

Sale price £	Rate %
0 – 135,000	0
135,001 – 250,000	2
250,001 – 1,000,000	10
1,000,001+	12

Under these rates and thresholds, the tax payable is lower under LBTT until the sale price of the property hits £325,000 and then the amount payable under LBTT increases. This is likely to be felt most in the premium property market such as in central Edinburgh or Aberdeen. For example, a £500,000 property purchased after 1 April next year will create a £27,300 LBTT liability which is substantially more than the £15,000 charged under SDLT.

Non-residential property purchases

Sale price £	Rate %
0 – 150,000	0
150,001 – 350,000	3
350,001+	4.5

Non-residential leases (land or property)

Net present value of rent payable £	Rate %
0 – 150,000	0
150,001+	1

LBTT is also payable on lease premiums and the rates and thresholds mirror those of the Non-residential property purchases.

Firms with clients involved in the domestic property market, particularly those with large portfolios of buy-to-let property, should be aware of these changes and may wish to rethink the timing of potential sales or purchases. Particularly for those wanting to acquire high value property, there is a significant argument for bringing a purchase date forward to benefit from a lower tax bill.

More information on LBTT can be accessed at: **www.scotland.gov.uk/Topics/Government/Finance/scottishapproach/lbtt**.

Contractor loan settlement reminder

Clients can use the contractor loans settlement opportunity to bring their tax affairs up to date for a limited time. This opportunity relates to tax years up to 5 April 2011 and is open until 9 January 2015.

"ANY OTHER INFORMATION" IN TAX RETURNS – PROTECTION AGAINST DISCOVERY

Practitioners who have clients with large or unusual one-off items included within their tax computation figures are reminded that the "any other information" (or "white space") section on the form can be used to describe any such issues that are likely to be queried by HM Revenue & Customs. By using the box and making disclosures where they consider that such items may exist, practitioners can potentially protect their clients from "discovery" assessments.

The case of **Charlton, Corfield and Corfield v HM Revenue & Customs Commissioners [2011] UKFTT 467**, and on appeal to the Upper Tribunal by the Revenue under **[2012] UKFTT 770 (TCC)** focused on the validity of discovery assessments in respect of information that was available to the tax inspector by virtue of the disclosures already made on the appellants' tax returns. In this case, the white boxes contained information about tax avoidance schemes that the appellants had taken part in and because this information was made available at the time, discovery was not permitted and the appeals were upheld.

The full outcome of the case can be accessed at: **www.bailii.org/uk/cases/UKFTT/TC/2011/TC01317.html**.

A NOTE ON FILING AND PAYMENT DATES FOR CERTAIN PROPERTY TRUSTS – HMRC STATEMENT

HM Revenue & Customs (HMRC) released a statement on 27 October 2014 in relation to filing and payment dates for certain property trusts for Inheritance Tax (IHT) purposes.

The statement confirms that the information in Guide IHT113 on filing and payment dates is incorrect in respect of chargeable events arising on or after 6 April 2014. HMRC have promised to update this guide as soon as possible. The changes apply to all chargeable events arising on relevant property trusts on or after 6 April 2014.

When an event, on which IHT is payable, takes place on a relevant property trust, the date for filing the IHT return and paying the tax due has been changed to 6 months after the end of the month in which the charge arose. The change in the:

- filing date of the return will affect all relevant property trusts; and
- payment date of tax will affect relevant property trusts, where the charge to IHT arises between 5 April and 30 September.

Formerly, the payment due date was 30 April in the following year for IHT arising between 5 April and 30 September. For example, if the chargeable event took place on 10 May 2014, the filing and payment date would be 30 November 2014 (these changes were made as part of Finance Act 2014).

Further guidance on completing form IHT113 can be obtained at: **www.hmrc.gov.uk/cto/iht113_2.pdf**.

BUSINESS ENTITY TESTS TO BE SCRAPPED

HM Revenue & Customs (HMRC) have announced that the business entity tests (BETs) are going to be withdrawn after the IR35 Forum's review of IR35 found that the tests were:

- very little used
- not fulfilling their intended purpose

As a result, the BETs will be withdrawn from 6 April 2015. The tests will not be taken into account when HMRC opens an IR35 enquiry on or after 6 April 2015. If HMRC opens an enquiry before then, and a business can show to HMRC's satisfaction that it has taken the BETs with an outcome outside IR35 or in the "low risk" band, then HMRC will close the enquiry.

More information on the plans can be found at: **www.hmrc.gov.uk/news/ir35bet.htm**.

SHARES HELD BY PARTNERSHIPS AND LLPS – AVAILABILITY OF BUSINESS PROPERTY RELIEF

Taxguide 1/14 (TECH01/14 TAX) was released in January 2014 by the ICAEW Tax Faculty, the Chartered Institute of Taxation (CIOT) and the Society of Trust and Estate Practitioners (STEP).

The Taxguide provides guidance as agreed with HM Revenue & Customs (HMRC) over the availability of Business Property Relief (BPR) where shares are held in companies through a partnership or Limited Liability Partnership (LLP). The background to seeking clarification from HMRC is set out as being occasioned by the significant doubt over the availability of BPR where shares are held in companies through a partnership or an LLP; such shares would have been eligible for BPR had the shares been held directly by an individual. The three professional bodies highlight this anomaly to HMRC in their submission and the ensuing response is reflected in this Taxguide.

The document can be found on **www.icaew.com/en/technical/tax/tax-faculty/tax-guidance-notes** and can be accessed by clicking on "Taxguide 1/14 TECH 1/14".

In more specific terms, the Taxguide relates to the availability of BPR from Inheritance Tax in respect of:

(a) Interests in partnerships and limited liability partnerships, and
(b) Holdings of surplus cash by trading companies.

The foreword and guidance extends to 12 pages and is split into three sections:

Part A – is an analysis of the treatment of BPR for partnership/LLP interest as sent to HMRC for response, and sets out the current HMRC view where a partnership or LLP holds shares in underlying companies;

Part B – provides a number of examples of situations seen in practice and put to HMRC for their views, and HMRC's responses are published with their agreement;

Part C – provides guidance on HMRC's view of surplus cash held by companies, which is increasingly common in light of the current economic situation where companies have been building up cash reserves.

Tax treatments for Partnerships according to HMRC

Before entering the tax territory of IHT and BPR covered by the Taxguide, it is helpful to set out HMRC's position regarding the tax treatments of partnerships according to their manuals.

*'For tax purposes, a partnership is not regarded as a separate and distinct entity and we 'look through' to the persons making up the partnership. Partnerships are described as '**transparent**' for this reason. This treatment applies equally to all types of partnership, including both those without separate legal personality, eg English general partnerships, and those with separate legal personality, eg Scottish partnerships and Limited Liability Partnerships. Statutory provisions exist to ensure that partnerships with separate legal identity are taxed in the same way as general partnerships.' (Partnerships Manual (PM) 10700).*

This treatment is in contrast to how 'opaque' entities, such as companies, are taxed; an opaque entity is itself liable to tax on its income and gains. (PM10700)

Limited Partnerships (LPs) and Limited Liability Partnerships (LLPs) are generally treated in the same way as general partnerships for tax purposes. (PM50010)

As regards 'indirect, capital and transfer taxes and other tax obligations', the general transparency principle is given the following expression in HMRC manual [PM60410]:

'In line with other direct taxes, partnerships are treated as "transparent" for the purposes of IHT.'

By 'transparent', it means the structure of a partnership is disregarded, and the legal personality goes direct to the partners as individuals. The 'transparency' principle as stated in PM60410 refers to the IHT position of the individual partner, and is to be distinguished from the valuation of his share of partnership interest. The valuation of a partner's share of interest [see Inheritance Tax Manual (IHTM) 25102] takes the partnership as a whole to work out the proportionate share of the partner's interest for IHT purposes. The valuation of partnership interest in this manner is often referred to as an 'opaque' treatment. By 'opaque', the partnership is treated as a separate entity as a starting point for the purpose of working out the underlying interests of which a partner can be said to have a share.

In respect of treatment of an LLP, it would be misleading to say that s267A of Inheritance Tax Act (IHTA) 1984 provides for an LLP to be treated as a general partnership. Such a statement is misleading not least because it implies there is a statutory regime for partnerships and IHT, which is clearly not the case. What s267A provides is the position as regards how members of an LLP will be treated for IHT in relation to their partnership interest. In broad terms, HMRC treat members as if they are partners in a general partnership.

Finally, as a matter of general law, a partnership differs in some significant respects under English and Scots law. One major difference is that under English law, a partnership has no separate legal personality, and is sometimes described as 'transparent' for the purpose of general law. Under Scots law, a general partnership has a separate legal personality from its partners, and is sometimes referred to as 'opaque'. IHTM25102 on valuing partnership interest draws comparison between an English and Scottish partnership in this respect.

The Taxguide does not specifically address a Scottish partnership. It is likely that HMRC's response is not making a distinction in the treatment of shares held by a Scottish partnership from an English partnership; however, it will be prudent to check out the position as applied to a Scottish partnership with its own specific circumstances in each case.

Part A

The relevant manuals from HMRC appear to indicate that BPR is not available where private company shares are held by a partnership or an LLP. These are shares which would have otherwise qualified for BPR relief if they had been held directly by an individual. The Taxguide highlights the situation where the sole or main activity of the partnership or the LLP is holding shares in unquoted trading companies, and HMRC's position is that no BPR is available on the disposal of these shares, as the business of the partnership or LLP is wholly or mainly one of holding investments. These shares, being in unquoted trading companies, would have qualified for BPR if they had been held directly by an individual. This is an anomaly that the Taxguide seeks to address.

A variation of this anomaly concerns the provisions under s105(4)(b), which allows the claim of BPR for shares in a holding company where certain conditions are met. As a general rule, BPR is denied to a company whose business is wholly or mainly that of making or holding investments s105(3). Notwithstanding the shares are in a trading company, the holding of shares in itself is still primarily an investment activity. However, if the company carries on a trade in addition to holding shares, it could have a hybrid business which is not "wholly or mainly" one of making or holding investments, and qualifies for BPR under s105(4)(b), but this will depend upon the facts.

In their response to Part A, HMRC state that they are proposing to amend the final part of IHTM 25094 – What is a Partnership; Limited Liability Partnerships, to read:

'*There has been an increase in the use of LLPs in commercial structures, and sometimes there can be a different outcome for BPR purposes than that available from a conventional corporate structure. In the case of an LLP simply taking the place of a holding company, s267A has the effect of preventing the LLP from benefiting from s105(4)(b). In cases where the LLP itself also carries on a qualifying business, the business may be regarded as a hybrid, and if the shares in the subsidiary companies are used in the business (rather than being held as investments), then it is possible that the interest in the LLP may qualify for relief if it does not fail the "wholly or mainly" test (IHTM 25264). The question of whether an asset is used in the business or held as an investment will be highly fact specific.*

For example, a professional farming partnership might be required to hold a minimum stake within a genetics company in order to get specific semen for their bovine herds, or in a crop company to get the best seed at the best price.

If this stake is not held as an investment but with the intention of ensuring that the trade continues and succeeds, then holding such a stake is unlikely to cause any restriction or removal of relief.'

HMRC accept that there is an anomaly for BPR purposes where a partnership or an LLP is used as the holding entity of one or more companies as compared with having a holding company. They state that this is what the legislation directs and is a result of the drafting of the provisions.

Part B

This contains eight examples of situations together with the response of HMRC. Some examples are of business structures commonly used in Venture Capital concerns.

A summary of the eight examples to be covered are as follows:

1. Where an LLP is used as the holding entity, with members of the LLP carrying out the management of the various subsidiary companies, HMRC's view is that "*as partnerships (and therefore LLPs) are not transparent for IHT purposes, we would be required to look at the business of the actual partnership/ LLP itself. As the business consists wholly or mainly of holding investments then relief would be denied under s105(3) IHTA 1984*".
2. Where there is a similar structure to Example 1 above, but the actual business of the group is carried on by the LLP with the subsidiary companies providing purely a number of ancillary services to the group, such as the provision of staff services, HMRC state "*in this regard, where the assets are held as investments, it is clear that their holding loan cannot be classified as "business" activity unless it can be shown the investments are used in the course of an LLP's business. However, it is possible in this scenario that if the investments are used in the LLP's business, then the business may well not fail the "wholly or mainly" test by virtue of the dominant nature of the business carried on in the LLP not being one of investment. The question of whether the investment is used in the LLP's business is highly fact specific*".

From this, it appears that, where, for example, a professional firm has set up a limited company to employ its staff and make a charge to the firm for the staff services then provided that the business being carried on by a professional firm is wholly or mainly the provision of professional services and not holding shares in a subsidiary then the value of a partner's interest in the firm can qualify for BPR.

3. It is popular to hold the property from which a trading company trades outside the company, perhaps in an LLP. If the property was held directly by the owners then BPR at 50% would be available provided that they control the company which uses the property in its business. BPR is not available on the value of the interest in the LLP as it is either dealing in land or buildings or holding investments. HMRC agree with this analysis.
4. An alternative structure, which addresses the risk point while maintaining the availability of BPR would be to interpose a new holding company between the trading company and the individual shareholders and for the property to be hived up to the holding company with the trading company continuing to use it in its trade.
5. It is common for trading entities to be required to be a member of an entity from which they acquire services/ products/intellectual property. The example, referred to at Part A above of a farming partnership holding a minimum stake within a genetics company in order to get specific semen for their bovine herds, or in a crop company to get the best seed at the best price, is given and the comment made that the stake is not held as an investment, and the motivation is to ensure that the trade continues and succeeds. The experience of members of the professional bodies is that Business Property Relief has not been denied in situations like this where the partnership carries on a trade and has no other activities. The response from HMRC is that they generally regard this situation as the same as Example 2 in that the partnership carries on mainly a farming trade and not an investment in shares activity although the precise facts are of key importance.
6. Where there is to be a joint venture, the joint venture itself is often undertaken in a company. Where the shareholders of the company are two partnerships or LLPs, HMRC confirm that BPR is not available for the interest in the partnership/LLP as the business carried on is wholly or mainly that of holding investments.
7. Again, to separate the risk, a partnership or LLP may own land and buildings and also the shares of a trading company which uses the land and buildings in its trade. HMRC confirm that BPR will be denied on the total value of the partnership or LLP.
8. Where there is a partnership or LLP (which is not excluded from relief by s105(3) IHT 1984) and its members are an individual and a company, then the individual will qualify for BPR in respect of his interest in the partnership and the shares in the corporate member would also qualify for relief.

Part C

Where a company holds cash in excess of the amount which it "normally holds" and there is no evidence of any specific project upon which the funds which will be expended, then BPR will be denied as the excess will be treated as an excepted asset. Guidance is given in IHTM 25352, IHTM 25342 and Share Valuation Manual (SVM) 111220. The question is put as to whether, in the current economic climate and as a cash buffer in case of any further downturn in its trade, the cash buffer would be viewed by HMRC as an excepted asset.

HMRC understand why additional cash may be retained but state that their guidance remains the same and, unless the cash is held for an identifiable future purpose, then it is likely to be viewed as an excepted asset and that retaining an excess buffer to weather the economic climate is not a sufficient reason for it not to be classified as an excepted asset.

This document is useful in obtaining clarification of HMRC's views in a number of scenarios and also in highlighting some pitfalls for the unwary and what may appear to be anomalies.

Where a partnership or an LLP owns shares in a trading company, then consideration should be given to the shares being held directly by individual partners.

HMRC's view in Part C is understandable, given that the cash buffer is there for a rainy day and not for a specific purpose. If this is of concern, it may be worth individual shareholders effecting some additional life assurance to provide funds to pay the Inheritance Tax on the part of the value of their shareholding which will not qualify for BPR.

ANNUAL TAX SUMMARIES FOR 24 MILLION – DETAILS OF CALCULATIONS AND HOW TAX IS SPENT

The Government has announced that approximately 24 million people are to receive their first Annual Tax Summary, the first of which are expected to be sent out from November onwards. The Annual Tax Summary aims to explain how the individual taxpayer's income tax and national insurance contributions have been calculated for the 2013/14 tax year, and how the tax contributions have been spent by the Government.

Of the recipients, 16 million are those individuals whose tax records have been updated recently by HM Revenue & Customs (HMRC); ie taxpayers who have received an updated tax code or calculation in the past two years. Individuals in this group will not receive the tax summary part if they have paid no income tax in the past year, or where HMRC have not finalised their tax position for the 2013/14 tax year.

The remaining 8 million people who have completed a self-assessment return will be allowed to view the summary digitally, if they have enrolled for HMRC's online services. The plan for the future is that HMRC will provide everyone with a personal digital tax account, which will include their own tax summary.

More information, including details of what can be found in the tax summary, can be found at: **www.gov.uk/government/publications/issue-briefing-tax-summaries/issue-briefing-tax-summaries**.

HMRC CAMPAIGNS AND TASKFORCES

Credit card sales campaign

After a period of lower activity, HM Revenue & Customs (HMRC) have launched their latest campaign which focuses on individuals or businesses who receive payment for goods via credit card but whose tax affairs may not be up-to-date. As usual, those wishing to "come clean" are encouraged to make a voluntary disclosure and, once they have done this and have received a notification from HMRC, they will have a fixed period to pay what they owe.

Unlike some other campaigns, it has not announced a closing date for those who wish to use it to notify HMRC. Its key features are:

- The taxpayer first has to notify HMRC of an intention to use the disclosure opportunity.
- The taxpayer will then be given a disclosure reference number and will have four months to calculate and pay the tax due, together with penalties and interest.
- HMRC will offer a payment plan to those with genuine difficulty paying the arrears in one sum.
- Calculation may be required going back up to four, six or twenty years, depending upon the reasons why the income was not declared.
- The level of penalties will vary depending upon the circumstances but will usually be lower if the taxpayer takes part in the Credit Card Sales Campaign than if they do not.

Named the "merchant acquirer" programme, indications so far have been positive and an interesting trend has been uncovered in some restaurants. For instance, little known to HMRC until the launch of this taskforce, operators sometimes have two credit card machines on-site, with one of these machines linked to a UK bank account, and the other to an overseas account to siphon off funds by not being included in the turnover, and thereby evading tax.

More information on the campaign can be found at: **www.gov.uk/creditcardsales**.

VAT: UNJUST ENRICHMENT – WHEN IS IT REASONABLE FOR HMRC TO REFUSE TO MAKE A REPAYMENT OF OVERPAID OUTPUT TAX

As a result of a number of both UK and European Court of Justice (ECJ) judgements, HM Revenue and Customs (HMRC) are entitled to apply the defence of unjust enrichment to certain claims of overpaid output tax; these are instances where the taxpayer as the supplier has erroneously charged output VAT on the goods or services supplied.

The basic principle of unjust enrichment is that if a taxpayer accounts for amounts by way of VAT or duties that are collected or charged in such a way that is contrary to EU community law, he is entitled to recover those amounts. Thus, where a VAT registered business makes supplies and treats them as standard rated in error, and it transpires that, in fact, the supplies ought to have been zero-rated or exempt from VAT in accordance with Community law, he is entitled to recover the overpaid output tax. However, the ECJ has accepted that claims need to be restricted in these instances as the claimant would be unjustly enriched.

This term is used to describe the situation where the payment of a claim would put the claimant in a better financial position than he would have been in had he not accounted for the VAT incorrectly in the first place.

In order to successfully demonstrate that a taxpayer would be unjustly enriched, Community law sets out that HMRC must prove that on the balance of probabilities, someone, other than the claimant, effectively bore the economic burden of the wrongly charged tax and that the claimant has suffered no economic loss or damage as a result of the supply being incorrectly treated. That someone is essentially the customer to whom the taxpayer as the supplier has erroneously charged VAT on the supplies. If HMRC are able to prove this, they will only make the repayment if the claimant agrees to reimburse the customer with the tax overcharged.

It is not necessary for the claimant to prove that he would not be unjustly enriched if the output VAT is repaid to him. It is wholly the responsibility of HMRC to prove the reverse. In other words, when it comes to limiting a claim on the grounds of unjust enrichment, the burden of proof rests with HMRC. HMRC appear to be using the defence of unjust enrichment increasingly to avoid making repayment claims. For instance, HMRC have refused to settle repayment claims following the decision in the case of **Bridport and West Dorset Golf Club (C-495/12)**. The case was in respect of output VAT charged on fees paid by visiting non-members, with the supply being determined as exempt by both the UK First-tier and Upper Tax Tribunals. The First-tier Tribunal ruled in favour of the Club, and HMRC appealed to the Upper Tribunal which decided the two substantive issues on the implementation of two articles in the EU Directive to the domestic law require a ruling from the ECJ. The ECJ judgement on the substantive issues is as follows:

Article 134(b) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as not excluding from the exemption in Article 132(1)(m) of that directive a supply of services consisting in the grant, by a non-profit-making body managing a golf course and offering a membership scheme, of the right to use that golf course to visiting non-members of that body.

Article 133(d) of Directive 2006/112 must be interpreted as not allowing the Member States, in circumstances such as those in the main proceedings, to exclude from the exemption in Article 132(1)(m) of that directive a supply of services consisting in the grant of the right to use the golf course managed by a non-profit-making body offering a membership scheme when that supply is provided to visiting non-members of that body.

On the first substantive issue therefore, it is held there can be no exclusion from exemption because the 'green fees' are income not arising directly from membership. On the second issue, it was held that it is an incorrect implementation of the Directive to apply a general exclusion which narrows the scope of the exemption to fees paid by members only. Based on the ruling which confirmed that the VAT exemption was to be extended to the fees charged to visiting non-members, the golf clubs had requested that they be reimbursed for the overpaid output VAT. HMRC's position is that the sports clubs that have submitted claims pending the outcome of the Bridport case would be unjustly enriched, unless the claimant clubs agree to repay the VAT refunded to each visitor for whom a claim has been made. It is understood that KPMG who have taken the case, are looking to a central resolution on the processing of the claims. It is expected that HMRC will issue a press release in connection with the case in due course and so further guidance on how the claim will proceed is awaited.

Proving that the customer bore the cost of the VAT charge is seldom easy for HMRC. Essentially, it would be necessary to demonstrate that the price of the relevant goods or services would have been lower, had the supplier known that no VAT was chargeable on the supply at the time that it was made. That is, the VAT charged was passed on to the customer. Obviously, if the supplier lowers the price charged for the goods or services following the change of VAT treatment, this might be deemed to be conclusive evidence for HMRC that in fact the customer did shoulder the VAT burden. Suppliers may consider doing this in order to improve their competitive edge, but it is not likely to be a common occurrence. If customers are used to paying £x for certain goods and services, they are likely to continue to do so, (suppliers might simply be slower to increase prices).

If VAT has been charged, then someone clearly has borne the VAT cost, whether it is the supplier or the customer, or perhaps more likely, a shared burden between the supplier and the customer. The existence and degree of unjust enrichment can only be proved if an economic analysis of all of the relevant circumstances is considered.

It is of course, equally worth considering that if HMRC refuse to repay the VAT overcharged on the grounds of unjust enrichment, then it is HMRC who are unjustly enriched.

THREE RECENT TAX CASES ON PAYMENTS RECEIVED FROM EMPLOYMENT

Krishna Moorthy v HMRC [2014] UKFTT 834 (TC)/TC03952

Point at issue: Whether a payment received for redundancy and "injury to feelings" should be treated as exempt for income tax purposes.

Background: Mr Moorthy, the appellant, was employed by Jacobs Engineering Ltd (and its predecessor company) since 2004 and rose to be the Executive Director of Operations by 2007. Moorthy was a member of the company's Local Government Services Executive Management Team (EMT). It was an important role for which Mr Moorthy received a salary of £111,000 plus an annual bonus in the form of shares worth between £15,000 and £20,000. Every year Jacobs Engineering held an Annual General Meeting which took place overseas. The company's Vice Presidents (VPs) were automatically invited to the meeting (Mr Moorthy was one level below a VP). It was generally accepted that those staff members who were invited to the AGM on three occasions could expect to be promoted to a VP. Mr Moorthy received his third invite in the summer of 2008.

In February 2009, all members of the EMT were called to a meeting at which they were told of a plan to restructure the business and that there would be fewer senior jobs and that the EMT members would need to apply for these jobs. Up until this point, Mr Moorthy stated that he had not felt being discriminated at any point during his time at Jacobs.

Unfortunately for Mr Moorthy, he was not successful in applying for one of these new posts and was made redundant on 12 March 2009. He had a 12-month notice period where he was placed on gardening leave and received his full salary (but not share bonus). Mr Moorthy's employment was terminated on 12 March 2010, and he received statutory redundancy pay of £10,640, from which no tax was deducted (although he believed that what he actually received amounted to £9,625).

Following his dismissal, Mr Moorthy commenced proceedings in the employment tribunal where he alleged unfair dismissal and age discrimination. One of the key factors which he cited was the age of the managers who were dismissed in relation to those who were retained. After significant to-ing and fro-ing, the parties engaged in mediation during January 2011 which resulted in Jacobs agreeing to pay Mr Moorthy "an ex gratia sum of £200,000 by way of compensation for loss of office and employment". The payment was without admission of liability by Jacobs.

The full £200,000 was received by Mr Moorthy in 2010/11 tax year. In his self-assessment return for that year he entered £200,000 under "pay from employment", £34,000 under "tax taken off pay in box 1" and, under employment expenses, a figure of £200,000. The reason for putting the £200,000 as expense, it seems, was that he had taken advice from an "accountant friend" in relation to this and the only way to trigger a repayment online was to enter a figure equal to the income as a deduction. The calculation showed a refund due totalling £33,883 which was blocked by HM Revenue & Customs' (HMRC) system. Mr Moorthy's representatives then entered into a lengthy dialogue with HMRC whereby they attempted to persuade them of the payment's non-taxability.

HMRC's argument hinged on their view that all of the discrimination complained of had allegedly taken place during the redundancy process and therefore any part of the compensation which could be attributed to injury to feelings fell to be taxed under section 401 of Income Tax (Earning and Pensions) Act 2003 (ITEPA) as received in connection with the termination of employment. HMRC then advised that an enquiry had been opened and sent the appellant a revised calculation which removed the expenses previously claimed and included £170,023 as taxable income.

HMRC issued a closure notice on 13 August 2013 where they removed the expenses of £200,000 from Mr Moorthy's return, but reduced the taxable income by £30,000 (under ITEPA s403) as an additional concession "in order to try and reach agreement". They were clear in saying that they did not believe that discrimination had taken place. Mr Moorthy appealed this decision and asked for a statutory review where the original decision was upheld. The reviewing officer did actually say that he considered that the full £200,000 should be liable to income tax rather than the reduced amount of £170,023 but that he would not "disturb that assessment". Mr Moorthy applied to the tribunal on 10 December 2013.

Argument: Moorthy's argument regarding the non-taxability of the payment hinged on the view that the payment had been made as a result of both age discrimination and to protect Jacob's reputation. His representative relied particularly on the case of **Oti-Obihara v HMRC [2010] UKFTT 568 TC (Oti-Obihara)** where the payment was looked at in the context of that part which represents discrimination and that which relates to financial loss. The view being that payment for financial loss would be taxable under ITEPA s401 and that relating to discrimination would not. In the case of Oti-Obihara, the appellant was dismissed without gardening leave and so there was an element of compensation for financial loss which was taxable. The appellant argued that, in effect, Moorthy's financial loss was more or less fully addressed by his 12 months gardening leave on full pay and therefore the payment for £200,000 should be treated as relating to "*discrimination and other infringements of rights*". In other words, it should be exempt.

The other aspect related to reputation. Moorthy argued that the payment was made partly to protect Jacobs' reputation as the business operated in a marketplace where it tendered for a number of public sector contracts. Public sector contractors are known for their awareness around equal opportunities, and had an admission of discrimination been made public then this could have damaged Jacobs' chances of winning further work.

HMRC's argument was that the payment had been received directly or indirectly in consideration or in consequence of, or otherwise in connection with the termination of Mr Moorthy's employment. Therefore, the full amount was taxable under ITEPA s401 (except for the £30,000 one-off redundancy allowance of which £10,640 had already been paid in the previous year).

It is worth noting that for it to fall within s401 there only needed to be a loose connection with the termination. It is a very wide provision. The wording in s401 of ITEPA brings into charge a payment which is "*directly or indirectly in consideration or in consequence of, or otherwise in connection with*" the termination of a person's employment.

Decision: The key fact in relation to this case concerns the discrimination. Because Mr Moorthy stated that he had not suffered any discrimination before he was informed that he was at risk of redundancy, the payment of £200k falls to having been made "*directly or indirectly in consideration or in consequence of, or otherwise in connection with*" the termination of Mr Moorthy's employment. In Oti-Obihara, the appellant had suffered discrimination long before the redundancy process began and therefore this is not a like-for-like comparison.

The age discrimination also appears to have taken place during the redundancy selection process rather than before it. Accordingly, the tribunal dismissed Mr Moorthy's appeal. Furthermore, the tribunal found that the concessions made by HMRC to exempt the £30,000 in the process of negotiation was out with their management power, and accordingly reinstated the £30,000 exempt by HMRC during negotiations as relating to "hurt to feelings". Referring to the concessions made under HMRC's general care and management powers conferred by TMA s.1, the tribunal cites the judgement by Lord Hoffmann in **Wilkinson v HMRC [2006] STC 270 at [21]**, that these powers cannot be construed '*so widely as to enable the commissioners to concede, by extra-statutory concession, an allowance which Parliament could have granted but did not grant.*'

Apart from the £30,000, the tribunal also added the £10,640 in relation to the previous year which had been erroneously treated as a redundancy payment. Mr Moorthy's tax liability was therefore increased after the tribunal ruling compared to the position he would have been at the end of the negotiation process with HMRC.

Commentary: The broad brush nature of the legislation was also evident in the recent case of **Graeme Forsyth v HMRC [2014] UKFTT 915 (TC 04029)** where the appellant, Mr Forsyth, ceased his employment with Nestle UK Limited and was given a payment of £29,783 in return for him leaving their occupational healthcare scheme. Mr Forsyth contended that the payment should be treated as chargeable to capital gains tax as it related to the surrender of a right to medical care, but HMRC argued successfully that it should be treated as income and subject to PAYE.

The taxpayer has been made significantly worse off as a result of this appeal, with his taxable income uplifted by £40,640 to in excess of £180,000. Of course, the taxpayer was made aware that this outcome was a possibility. He might feel rather aggrieved all the same.

Ted Sparrey v HMRC [2014] UKFTT 823 (TC)/TC03940

Point at issue: Whether the taxpayer was liable for underpaid income tax not deducted from his previous employment and whether the requisite level of care had been taken by the previous employer and payroll provider in ensuring that deductions were correct.

Background: Mr Sparrey, the appellant, left his job with Trintech in October 2008 to take up a role with Adra Match (AM). On leaving this employment he was provided with a P45 which stated his tax code as being 375L and contained a month 1 indicator. On beginning his employment with AM, the appellant passed the P45 to their payroll agent, Goodwille (G). The appellant's pay in the first month of employment, November, was calculated incorrectly (it had been treated as if he had no other earnings in the year) and this issue continued for the remainder of the accounting year. The result of this was an underpayment of £5,036 which was the subject of the dispute. The appellant was informed of this underpayment when he was issued with form P800T in February 2011.

Argument: On receiving the P800T, the appellant immediately wrote to HMRC and contended that his former employer (he no longer worked for AM) had been negligent in their operation of the payroll.

After a period of correspondence between HMRC and Goodwille, during which time the payroll agent attempted to understand how there had been an underpayment of tax, they concluded that the reason for the incorrect tax being paid was attributable to the information given on the P45, which the payroll agent had received in relation to the appellant's employment at Trintech. The error on the P45, Goodwille maintained, was not to state any previous pay or tax. They acknowledged that although they used the correct tax code, they omitted to mark it appropriately to ensure it was operated on a week 1/month 1 basis and that the error was made in "good faith".

After this period of correspondence, HMRC contacted Goodwille to inform them that there was an option, under Regulation 72 (5) Condition A that would enable the obligation to be transferred to the employee, provided that they could demonstrate that they took reasonable care to comply with the regulations, and the failure to deduct the correct amount of tax was an error made in "good faith". In order to ascertain whether or not reasonable care had been taken, Goodwille were asked to answer a number of questions:

- Why they had failed to ensure that the P45 details were entered correctly
- Why they had failed to operate PAYE on a cumulative basis
- What percentage of employee records were reviewed
- Who conducted the reviews and how often
- How many people were on the payroll
- How many amendments were made
- How many P6 or P9 coding notices were issued each year

Goodwille's response was received by HMRC and one interesting point which Goodwille made was that P45 details were checked for accuracy, entered onto the payroll system and filed online with HMRC shortly afterwards. The failure, on this occasion, was down to human error.

Further information came to light in relation to a telephone call which took place between HMRC and the author of Goodwille's response letter. This person had not been employed by Goodwille at the time when the underpayments occurred, and the details in the letter reflected the current procedures operating within Goodwille, and not those in operation at the material time in 2008 (4 years previous). She mentioned that the person who operated the payroll during 2008 had left the company but that this was not included in the letter at the request of her manager. She went on to ask that details of the conversation not be mentioned in any correspondence.

Based on the information provided to them by Goodwille, HMRC contacted AM to confirm that they were not liable to pay the under deducted tax because they had taken reasonable care.

Mr Sparrey was informed by letter dated 12 July 2012 of HMRC's finding and he responded by letter, expressing surprise at the judgment, particularly that AM had taken reasonable care and had sufficient checks and balances in place. HMRC responded to this and upheld their original finding. The appellant responded again, this time stating that he disagreed with the reason that was given for the incorrect tax being deducted (the explanation given was that the appellant had been given a duplicate personal allowance). This letter was treated as a request for a review and the case was referred to an independent review team.

The outcome of this review was communicated to the appellant on 4 October 2012. The team upheld the decision based on their belief that reasonable care had been taken and this was an isolated error. No mention was made of any checks and balances being in place.

The appellant appealed to the tribunal on 30 October 2012.

One of the key submissions made by the appellant relates to the fact that when he was recruited to join AM he was required to present two recent payslips and so they should have been aware of the fact that he had a previous job and had earned income during the year.

Consideration was given as to whether extra statutory concession A19 could be applied. (As a reminder, this concession applies when the taxpayer could reasonably have believed their tax affairs to be in order and they were informed more than 12 months after the end of the tax years in which HMRC received the information indicating that more tax was due). In this case, although the underpayment arose in the 2008/09 tax year and was not notified to the taxpayer until March 2011, because HMRC did not receive the information indicating that more tax was due until it received the employer's annual return in 2009/10. This year ended on 5 April 2010, which is less than 12 months before the taxpayer was notified in March 2011, so concession A19 cannot apply.

Judgement: In making their judgement, the court expressed surprise that the explanation about the incomplete P45 did not merit further enquiry (particularly regarding what the failure was or why the error occurred). They went on to say that the explanation about the coding revealed a misunderstanding about why the total under deduction occurred. They went on to state that "it is surprising if they as an agent dealing with tax affairs routinely did not query whether a new employee starting employment mid-way through a tax year really had no previous payments in that year. The Appellant received significant payments and it is surprising if this did not trigger an enquiry about his previous position".

The appeal was therefore allowed.

Commentary: It looks from the outset that this is a story of poor communication between an employer and their payroll agent and HMRC mistakenly believing that an agent had acted competently in the past because they appeared to be taking reasonable care at the present time (with no evidence regarding previous practices and an unwillingness to disclose details of these). HMRC also seemed to be unwilling to get to the bottom of the reasons for the error in the first place and went for the easy target who was, in this case, a taxpayer who was well within his rights to believe that his tax affairs had been dealt with properly.

Payroll agents need to maintain close communications with their clients and, in this case, a new start was introduced onto the payroll without the required level of information. It seems likely that HMRC will go back to the employer for the underpayment of tax supposed to have been borne by the employee. This means AM will be asked to pay an additional £5,036. No employers would like to find themselves in this position.

Martin v Revenue & Customs Commissioners [2014] UKUT 429 (TCC)

Point at issue: Whether an individual's signing-on bonus should be treated as earnings and whether subsequent repayment of a proportion of this bonus should be treated as negative taxable earnings.

Background: The taxpayer took on a position with JLT in November 2005 and signed a contract which would see him employed for a period of 5 years. He was paid a signing-on bonus of £250,000.

This bonus was paid in November 2005 as part of the taxpayers first month's pay and was subject to PAYE and employees National Insurance deductions, receiving a net sum of £147,500 in relation to this bonus. In August 2006, the taxpayer resigned, giving 12 months' notice, to expire on 1 August 2007. He therefore became liable to repay JLT £162,500.

On first appeal to the First-tier Tribunal, the tribunal decided on two aspects:

(i) dismissed the taxpayer's contention that his earnings for 2005/06 were reduced by £162,500, so that the amount that was taxable was only £87,500; and

(ii) accepted his contention that the payments in 2006/07 gave rise to negative earnings in that year.

The taxpayer appealed the decision against the first aspect, and the Revenue appealed the decision on the second aspect, and the case was allowed to progress to the Upper Tribunal as two appeals, one by the original appellant Martin, and the second appeal by HMRC. The issues before the Upper Tribunal were as follows:

1. Whether the taxpayer made a payment to JLT totalling £162,500 on the basis that it had not been earned, thus rendering the taxpayer's return for the year of receipt incorrect and amenable; the amendment if made would therefore give rise to a repayment of tax; and
2. What constituted the amount of "net taxable earnings" under section 11 Income Tax (Earnings and Pensions) Act 2003.

Decision: Both appeals were dismissed. In the case of the first appeal, the structure of the contract was that the issue of repayment was dealt with. The judgement held that "*the contract was not structured as to give the taxpayer an accruing right to payment of a bonus with payment on account being made of the full amount at the beginning of the five year period. Further, if it had been structured in that way, the contract would have needed to make provision for the immediate payment of the balance in the cases where, under the contract as was in fact signed, there was no obligation to repay*". This supports the conclusion that the £162,500 repaid by the taxpayer to JLT in the period October 2006 to January 2007 had not reduced the amount of earnings per his 2005/06 tax return and had not entitled him to amend that return to reflect the payments. This then leads us to the dismissal of the second appeal (in that it follows on directly from the findings of the first). The Tribunal rejected HMRC's argument and ruled that earnings generally can be either positive or negative and in this case the repayment was 'negative earnings'. Positive and negative taxable earnings from any employment need to be aggregated to arrive at a total which may be positive or negative and may create a loss relievable under s 128 ITA 2007.

Commentary: This is a very interesting and timely case. There has been an increase in the use of remuneration clawback clauses as a result of moves to align reward and risks in line with the demands of regulatory bodies and institutional investors.

The decision confirms that the amounts repaid should be treated as negative earnings for PAYE but at the moment the PAYE regulations do not authorise a negative payroll entry. HMRC will have to address this issue.

NIC cannot be recovered in relation to negative earnings without a change in the legislation. This is because NIC is only recoverable where an error was made at the time of payment which will not be the case where there is a clawback of remuneration.

The decision should encourage employers to structure future clawbacks on a gross rather than net basis, taking advice as appropriate. Guidance from HMRC on this area is expected as the case has highlighted the tax issues for both the taxpayer and HMRC and the need to update the PAYE regulations.

TAX QUERY

Query: *I act for a medical partnership where the surgery premises are owned by the three more senior partners. The other two partners are younger and, as a result of house mortgages and family commitments, they have not been in a position to purchase a share in the property. The senior partner will retire in two years and has asked what the options are with regard to the surgery, and the tax implications. He is a higher rate taxpayer and will continue to be so as a result of his NHS pension.*

Answer: There are two main options:

1. Sell his share in the surgery to some or all of the remaining partners or to a third party.
2. Retain his interest in the surgery and receive a rent from the Practice.

If the other two senior partners are also close to retirement then they may not wish to buy an even greater interest in the surgery. The more obvious answer would be for the junior partners to borrow, if possible, to buy the share of the senior partner. Income Tax relief should be available on any interest paid on a loan to invest in the partnership, or a loan to acquire a property which is rented out.

It will be important to determine how the property is owned:

(a) Is it a partnership asset within the partnership agreement, giving the senior partners the right to all of the capital profit on a disposal or;

(b) Is the surgery owned by the three senior partners outwith the partnership?

In the former case, Entrepreneurs' Relief should be available if the senior partner is disposing of an interest in the partnership on his retiral. Otherwise, Entrepreneurs' Relief may be available to him as an associated disposal where he sells his interest in the surgery at the time he retires. Entrepreneurs' Relief may not be available at all, or in a reduced amount, if the senior partner has received rent from the Practice in respect of the use of the property.

Another point for the senior partner to consider is that the proceeds he receives on sale will potentially be liable to Inheritance Tax. Valuable relief under the terms of Business Property Relief will be available, either at 100% if the surgery is a partnership asset, or at 50% if the property is owned personally. Business Property Relief and partnerships are considered in some detail elsewhere in this issue.

If it is not possible to effect a sale of his interest in the surgery, the senior partner could retain his interest and receive a rent from the Practice. His rental profit will be subject to Income Tax at his 40% marginal rate. If he is married, and his wife is subject to Income Tax at a lower rate, he could consider gifting his share in the surgery to her.

The interest in the surgery will be fully exposed to Inheritance Tax after retiral and, if he wishes to carry out some IHT planning, he could consider gifting his interest to children or grandchildren, or perhaps a Trust for their benefit. Holdover relief should be available under either s165 or s260 Taxation of Capital Gains Act (TCGA) 1992 but the timing of the gift will be important if it is to qualify for relief under s165 as an interest in an asset used in a profession, and not an interest in an investment property which will be the case post-retiral.

The partners could consider setting up a company to own the property and sell or gift the property to the company. s165 relief may be available in respect of a gift of the property but the partners will receive no cash proceeds. A sale may give rise to a capital gain, subject to Entrepreneurs' Relief and the consideration could be left outstanding on loan account and repayable by the company from its after-tax profits. Depending on the value, the company may be liable for Stamp Duty Land Tax. The shares will not qualify for Inheritance Tax Business Property Relief.

There is a lot to consider here and a meeting with the three property owning partners is likely to prove useful in order to narrow down the possible options.

CHARITIES URGED TO GET ONLINE

A large proportion of the annual compliance burden for a charity can now be completed online; for some filings, (for example accounts at Companies House) online filing is mandatory. Furthermore, charity reporting requirements to various public bodies, such as the Charity Commission (CC) in England and Wales, the Office of the Scottish Charity Regulator (OSCR) in Scotland, and HM Revenue & Customs (HMRC) is also getting increasingly online-based.

OSCR online

OSCR has had an online facility since 2012, and the system enables charities to file annual returns, supplementary monitoring returns, and trustees' annual reports and accounts online. Online filing is not compulsory, but OSCR has emphasised the benefits of using the facility on its website:

- Secure and more convenient to use;
- Ability to save progress and return at a later date;
- The system ensures that only complete and accurate information can be submitted (reducing errors and corrections);
- Ability to attach the trustees' annual report and accounts in PDF format.

OSCR has also developed tutorials which show users how to log in, update details and file annual returns, amongst other things. More information on the online service and signing up information can be accessed at: **www.oscr.org.uk/about-oscr/oscr-online/**.

OSCR has recently conducted a public consultation on changes to its regulatory approach, setting out proposed changes to the information which charities must provide.

Other anticipated changes are:

- the establishment of a register of trustees;
- the implementation of a serious incident reporting regime; and
- plans to publish annual reports and accounts of all Scottish Charitable Incorporated Organisations and charities with income of above £25,000 on the OSCR website.

The consultation also mentions the evolving approach to online filing, although there is no indication as to when these changes may be implemented. OSCR's consultation paper is at: **www.oscr.org.uk/news-and-events/latest-news/targeted-regulation-consultation/** and a submission in response to it has been made by ICAS' charities committee.

OSCR is encouraging as many charities as possible to use OSCR online filing, and recently supported "Get online week", which is an initiative aimed at inspiring people across the UK to get online and develop new skills.

Charity Commission online

The CC's online function is accessed via .GOV at: **www.gov.uk/government/organisations/charity-commission**.

The online service enables charities to update their details and file their annual returns, annual reports and accounts. There is guidance available on the information needed to complete annual filings, with Companies House and HMRC filings services also signposted. The resource has moved from its previous location to the .GOV address.

HMRC

The HMRC online function for charities hinges in the main around repayment claims for Gift Aid and for the Gift Aid Small Donations Scheme (GASDS) which can be filed online. Full "charities online" information can be accessed at: **www.hmrc.gov.uk/charities/online/index.htm.** Claims for GASDS can be made along with claims for Gift Aid. More information is available on this at: **www.hmrc.gov.uk/charities/gasds/how-to-claim.htm**.

Importantly, there is also a "charities for agents" online service, which can be accessed at: **www.hmrc.gov.uk/charities/online/agents.htm**.

HMRC explains the rationale for developing an online facility for Gift Aid repayments:

- Faster and more accurate claims due to saving on postal costs/time and the service's built-in checks that identify mistakes;
- Acknowledgment of claim, whereby an on-screen reference number is generated to notify that a claim has been submitted successfully.
- Easier Gift-Aid records for sponsored events to facilitate the adding together of small donations by aggregating up to a total of £1,000 for donations of £20 or less.

Charities' tax returns (where these are required or requested) may be filed online, with the benefit of a longer deadline on 31 January following the end of the tax year, compared to 31 October for paper returns.

Companies House annual filings

Charitable companies must file accounts and annual returns online with Companies House each year and further information and guidance can be found at: **http://companieshouse.gov.uk/about/gbhtml/gp2.shtml**. Preparers of charity accounts should ensure that these accounts are iXBRL compliant.

AUTO ENROLMENT FOCUS

Pensions regulator releases essential guide to auto-enrolment

The Pensions Regulator has released its essential guide to auto-enrolment. The guidance, which is aimed at employers, provides a very useful overview of the key considerations that employers need to take into account in advance of their staging date.

The guide can be accessed at: **www.thepensionsregulator.gov.uk/employers/e-brochure/index.html#10** and practitioners should make themselves aware of the key points so that they can help and guide clients who have not yet made the necessary arrangements for their employees.

Automatic enrolment: what accountants need to know about staging dates

The law regarding workplace pensions has changed and employers will have to enrol certain staff automatically into a pension scheme if they earn more than £833 per month and are between 22 and State Pension Age. More than a million small employers are likely to be required to complete their automatic enrolment responsibilities over the next four years, with the first small and micro employers (those with less than 50 employees) needing to be ready to provide a pension for their workers by the summer of 2015.

The setting of staging date

The first important fact in giving advice regarding automatic enrolment concerns the staging date that may apply depending on how the employer is being classified. The staging date is the date set in law and is when an employer's legal duty to implement automatic enrolment comes into force.

The staging date is based on the number of persons in an employer's largest PAYE scheme. This number is based on the information held by the regulator from HMRC at 1 April 2012 and not on current staff numbers. Those employers with fewer than 50 members of staff in their PAYE schemes will reach their staging date between 1 June 2015 and 1 April 2017.

New employers

An employer who first pays PAYE in respect of a worker from 1 April 2012 up to, and including 30 September 2017, is classified as a 'new employer' and will have a staging date between 1 May 2017 and 1 February 2018. The staging date is not based on the number of persons in the employer's largest PAYE scheme but by the date the employer first pays PAYE in respect of any worker.

Employers only have one staging date

Each employer has only one staging date, however, some employers are part of a complex corporate or group structure and this may affect their staging date. The Pensions Regulator (TPR) recommends employers in these structures consult the Pensions Regulator website for further information.

For most employers, using the regulator's staging date tool is the easiest and quickest way to find out. If an employer has more than one PAYE scheme then the earliest date will apply. **www.tpr.gov.uk/staging-date**.

Twelve months before their staging date, the regulator will write to employers prompting them to take action. Employers can nominate a secondary contact for the regulator to contact and this could be their accountant. **www.tpr.gov.uk/nominate**.

Postponement doesn't change the staging date

Postponement does not change the staging date but delays the requirement to assess workers. On the last day of the postponement period, which is a maximum of three months, the employer must assess the worker and determine which workers need to be automatically enrolled. However, an employer may wish to tackle this in advance as it could take some time depending on the number of workers and the type of workforce. **www.tpr.gov.uk/postponement**.

The first task for an employer is to carry out a quick check of their workers

Employers will need to carry out an initial assessment of their workforce. This is to see if they are likely to have any workers on their staging date who are old enough and earn enough to be automatically enrolled. Employers who already provide a pension scheme for their workers will need to decide whether they want to use this scheme to meet their duties for existing members. The regulator recommends an employer without pension provision should have a scheme in place by their staging date. Employers with payroll providers should also check that the provider can help them and test their systems in advance to ensure there are no last minute glitches.

An employer should have a scheme in place from the staging date

Having completed the initial assessment of their workforce, an employer will know whether they are likely to have an automatic enrolment duty. If so, they will need an appropriate scheme to fulfil their duty. The Pensions Regulator recommends employers have a pension scheme in place six months before the staging date to ensure the enrolment will take place on time. Employers should check to ensure any existing arrangements can be used to meet the employer duties from the staging date, which may involve checking with the pension scheme provider, adjusting entry and contribution requirements.

Staging dates can be pushed back, but this is the exception and not the rule

Normally it is not possible to move an employer's staging date to a later date. However, for employers who had fewer than 50 workers on 1 April 2012, it may be possible to select a modified staging date based upon a table shown on TPR's website. **www.tpr.gov.uk/employers/exceptions**.

Staging dates can be brought forward but not subsequently pushed back if time runs out

The employer may choose one of the earlier staging dates, which can be found at: **www.tpr.gov.uk/employers/bringing-your-staging-date-forward** but will need to check with the pension scheme provider that they agree to the scheme being used from an earlier date. Employers should also check with their payroll provider that they can accommodate the staging date being brought forward. The employer must also advise the regulator that they are bringing their staging date forward, giving at least one calendar month's notice. Once an employer's staging date has changed it cannot be put back to the original date.

Using a different PAYE reference will not change the staging date

Using a different PAYE code will not change the staging date. Even a change of ownership would not change this. However, where the employer has no workers on the staging date, then the employer duties will not apply. Any employers who share a single PAYE scheme with other employers will all have the same staging date, determined by their PAYE scheme. An employer who uses multiple PAYE schemes will have a staging date determined by the largest PAYE scheme. This will be the case even if the majority of the employer's workers are not in that PAYE scheme.

Final thoughts

'Automatic enrolment' means planning ahead, and practitioners, particularly those with a large number of payroll clients, can take a pro-active role in helping the clients to get ready by the staging date. Our recommendation is to take charge of the auto-enrolment issue in your practice, and direct and refer the client when it comes to scheme choice. Remember that advising on scheme choice is not a regulated activity (although advising individuals is), and you will need a licence for investment business if you direct clients in making a scheme choice. By taking a pro-active role, you will be much better equipped to ensure that the whole process is administered efficiently, while enhancing the prospect for revenue generation.

Further information

The Pensions Regulator has produced the very handy "Essential Guide to Automatic Enrolment" which highlights the key issues which must be addressed by employers. It can be accessed at: **www.thepensionsregulator.gov.uk/employers/e-brochure/index.html#2**.

Pensions regulator baring teeth – first penalties for auto enrolment non-compliance

The Pensions Regulator has issued its first three fixed penalty notices for non-compliance with auto-enrolment requirements. The penalties, for £400, were issued under section 40 of the Pensions Act 2008 for failure to comply with an Unpaid Contributions Notice or a Compliance Notice.

More information on what happens when you do not comply can be obtained at: **www.thepensionsregulator.gov.uk//employers/what-happens-if-i-dont-comply.aspx**.

ACCOUNTING AND AUDITING QUERIES

Query: *I am the Financial Director client of a large private manufacturing company. In recent years the company has been expanding and has started importing some of its raw materials from overseas. The company normally enters into forward contracts to purchase these materials.*

The company has not taken advantage of the fair value option under the Companies Act 2006 and therefore it does not apply either:

(i) Financial Reporting Standard (FRS) 26 (International Accounting Standard (IAS) 39) 'Financial instruments: Recognition and Measurement', or
(ii) FRS 23 (IAS 21) 'The effects of changes in foreign exchange rates'.

Under Statement of Standard Accounting Practice (SSAP) 20 'Foreign Currency Translation' the company takes advantage of the option to account for the transaction at the outset, using the forward contract rate. Will it be possible to continue with this accounting treatment when FRS 102 becomes applicable for accounting periods commencing on or after 1 January 2015?

Answer: The company will not be able to continue with this treatment, since translating an item at the contracted rate under the terms of a relevant contract is a form of 'hedge accounting' that is not permitted under FRS 102.

The use by the company of a forward contract means that it is making use of a derivative. Derivatives are not basic financial instruments, and therefore the company has to account for the derivative element of this transaction under the provisions of section 12 of FRS 102. It will also have to comply with the requirements of section 30 of FRS 102 'Foreign Currency Translation'. Section 30 of FRS 102 requires all transactions on initial recognition to be translated at the spot exchange rate between the functional currency (pounds sterling in this case) and the foreign currency applicable at the date of the transaction. At the end of each reporting period, an entity shall translate foreign currency monetary items using the closing rate.

Any exchange gains or losses arising on settlement of monetary items or on translating monetary items at rates different from those at which they were translated on initial recognition during the period or in previous periods are required to be reported in the profit and loss account in the period in which they arise. In circumstances when another section of FRS 102 requires a gain or loss on a non-monetary item to be recognised in other comprehensive income, an entity shall recognise any exchange component of that gain or loss in other comprehensive income. Conversely, when a gain or loss on a non-monetary item is recognised in profit or loss, an entity shall recognise any exchange component of that gain or loss in profit or loss.

Under the current UK accounting standards as governed by SSAP20, there are two options for accounting for foreign exchange transactions: (1) with reference to 'Forward Contract Rate'; (2) with reference to 'Spot Rates'. Unlike SSAP 20, there is no option in FRS 102 to use the contracted forward rate at the transaction or balance sheet date. For an entity that does not currently apply the SSAP 20 option of using the forward contract rate, the only difference in the accounting for the foreign exchange transaction between current UK accounting standards and FRS 102 is the recognition of a derivative (the forward foreign exchange contract) under FRS 102. This is illustrated in the example below.

Example

Company X has a year-end date of 30 September and purchases goods for €80,000 on 1 August 2015, with a settlement date of 31 October 2015. At the same time as placing the order, the company enters into a forward contract to purchase €80,000 on 31 October 2015 at a contracted rate of €1.20:£1 (forward rate).

The applicable spot rates as at 1 August, 30 September and 31 October, 2015 are shown below.

Date	Euros (€)	£
1 Aug 2015	1.19	1
30 Sept 2015	1.22	1
31 Oct 2015	1.24	1

Using the Forward Contract Rate

Under SSAP 20, many entities, including the company in question, would have accounted for the above transaction using the exchange rate specified in the forward contract. Please remember that this approach will no longer be permissible under FRS 102.

1 August 2015 – Inception of Transaction
Dr Purchases £66,667 Cr Creditors £66,667 (using the forward contract rate of €1.2 to the £).

30 September 2015 – Year End Date
No accounting entries required as SSAP 20 permits foreign currency monetary liabilities to be measured at the contracted rate.

At 31 October – Settlement Date
Creditor is settled at the forward rate (£1:€1.2)
Dr Creditors £66,667
Cr Bank £66,667

Therefore no gains or losses are reported in relation to this contract. As noted above this method of accounting is not permitted by FRS 102. The method results in a lower purchases charge figure to the profit and loss account as it in effect includes the foreign exchange gain (purchases of €80,000 are translated at the contract rate of €1.2:£1 rather than that at the date of the transaction €1.19:1) ie a lower charge to the cost of sales figure by £560.

Alternative Method Under SSAP 20 (Using the Spot Rates)

This requires the use of the spot rate at the transaction date and the re-translation of the monetary amount at the year-end date as illustrated below.

At 1 August 2015
Creditor – Recognise £67,227 at the transaction date spot rate (£1: 1.19 euros)
Dr Purchases £67,227
Cr Creditors £67,227

At 30 September 2015
Creditor – Retranslate at y/e spot rate (£1:1.22 euros) (Gain = £67,227 - £65,574 = £1,653)
Dr Creditors £1,653
Cr Foreign Exchange gain £1,653

At 31 October 2015
Creditor – Retranslate at settlement date spot rate (£1: 1.24 euros) (Gain = £65,574 - £64,516 = £1,058)
Dr Creditors £1,058
Cr Foreign Exchange Gain £1,058

Payment in respect of forward contract
Amount paid = €80,000/1.2 = £66,667
Dr Creditors £64,516
Dr Loss on Derivative £2,151
Cr Bank £66,667

Therefore, in the year to 30 September 2015, a foreign exchange gain of £1,653 is reported in the profit and loss account.

In the year to 30 September 2016 a foreign exchange gain of £1,058 is reported in the profit and loss account. A loss of £2,151 on the derivative contract is also reported.

The aggregate overall gain is £560.

FRS 102 Method

This is very similar to that shown immediately above, but requires that the derivative contract is accounted for separately.

Date	Spot rate (£1:€X)	Forward rate to 31 Oct 2015 (£1:€X)
1 Aug 2015	1.19	1.20
30 Sept 2015	1.22	1.23
31 Oct 2015	1.24	N/A

The accounting entries are as follows:

1 August 2015 – Inception of Transaction
Creditor – Recognise £67,227 at the transaction date spot rate (£1: 1.19 euros)
Dr Purchases £67,227
Cr Creditors £67,227
The fair value of the forward contract is zero.

30 September 2015 – Year End Date
Creditor – Retranslate at y/e spot rate (£1:1.22 euros)
Dr Creditors £1,653
Cr Foreign Exchange gain £1,653

Derivative – Recognise at fair value
Dr Loss on derivative £1,626
Cr Derivative – Liability £1,626
For simplicity, the loss is calculated as the difference between €80,000 at the contract rate of €1.20 to £1 (£66,667) and the year-end forward rate of £1:€1.23 (£65,041), giving a loss of £1,626.

At 31 October – Settlement Date
Creditor – Retranslate at settlement date spot rate (£1: 1.24 euros)
Dr Creditors £1,058
Cr Foreign Exchange Gain £1,058

For simplicity, the gain is calculated as the difference between €80,000 at the settlement date spot rate of £1:€1.24 (£64,516) and €80,000 at the y/e forward rate of £1:€1.23 (£65,041) giving a gain of £525.

Derivative – Recognise at fair value
Dr Loss on Derivative £525
Cr Derivative Liability £525

Payment of Creditor
Dr Creditors £64,516
Dr Derivative Liability £2,151
Cr Bank £66,667

Therefore, in the year to 30 September 2015, a foreign exchange gain of £1,653 is reported in the profit and loss account. A loss on the derivative contract of £1,626 is also reported.

In the year to 30 September 2016 a foreign exchange gain of £1,058 is reported in the profit and loss account. A loss of £525 on the derivative contract is also reported.

The aggregate overall gain is £560.

Summary

The ultimate impact of FRS 102 will be to require recognition of the derivative and this will have an impact on the amounts reported in the profit and loss account in different reporting periods where the transaction straddles an entity's year-end date. FRS 102 requires all derivatives to be recognised at fair value with changes in fair value recognised in profit or loss.

Query: *I am a partner in a firm of chartered accountants. One of my clients, a medium-sized private company, currently revalues its two office premises in accordance with the provisions contained in Financial Reporting Standard (FRS) 15 'Tangible Fixed Assets'. The directors of the company have asked me whether on transition to FRS 102, any reliefs are available that would enable the company not to have to revalue its properties every five years, and with an interim valuation every 3 years.*

Answer: Yes, there is such a specific transitional relief contained in paragraph 35.10 (d) of section 35 'Transition to this FRS' of FRS 102, which allows companies to adopt a previous revaluation of a tangible fixed asset as "deemed cost".

Where an entity on first adopting FRS 102 elects to use a previous revaluation (or fair value) as the deemed cost of the asset, deferred tax should be recognised and recorded in the related revaluation reserve. Additionally, even though the company will be applying the cost model under FRS 102, in terms of the Companies Act 2006, it will still have revalued assets and so the related disclosure requirements for the alternative accounting rules under the Act must be complied with on an ongoing basis ie the amount of fixed assets held at valuation; year of valuation; basis adopted; historical cost equivalents for revalued assets; the amount of revaluation reserve and transfers from that reserve to realised reserves.

Additionally, where the date of valuation of the asset concerned is before the transition date, then it can be argued that the deemed cost should be depreciated from that particular valuation date.

BIS CONSULT ON PLANS FOR BENEFICIAL OWNERSHIP REGISTER

Many of us are probably already aware of the plans afoot to make business ownership information more transparent for the purposes of fairness, and to discourage artificial corporate arrangements, and to make it easier to identify the perpetrators of financial wrongdoing.

The Department for Business, Innovation & Skills (BIS) have published a consultation paper to gauge views on implementation of requirements to bring about information transparency in business ownership. The consultation also considers what guidance will be required to help companies understand and comply with the new requirements.

An example of a new compliance requirement is the maintaining and filing of a register to disclose "People with Significant Control" (PSC) over the company, of which records are to be lodged with Companies House. The consultation paper also seeks views on two other key aspects about PSC register filing:-

1. The way a PSC's control over a company should be recorded on the PSC register;
2. The way that some PSC data will need to be protected from public disclosure.

ASK RON ABOUT IT – COMING TO TECHNICAL BULLETIN FOR 2015

Technical Bulletin will be including a new IT column from 2015 and we want you to share your IT problems so that we can educate the readership.

Cyber matters are never far from the headlines at the moment and this is one practice management issue that is not going to go away.

The column will be written by Ron Weatherup from Lugo IT, who specialise in helping and supporting accountants with their IT needs. Send any questions you may have to: **practicesupport@icas.org.uk**.

MONEY LAUNDERING UPDATE

Anti-terrorism obligations – a reminder for practitioners in dangerous times

It seems that the risk of terrorist acts being committed closer to home is on the rise and accountants need to be mindful that they can play a role in protecting the world from terrorism. Practitioners will no doubt be aware of their obligations under the Money Laundering Regulations 2007 and the Proceeds of Crime Act (POCA) 2002, which has a direct impact on day-to-day client work.

Together with these two Acts, the Terrorism Act (TACT) 2000 forms a third "pillar" of legislation governing practitioners' obligations under Money Laundering Requirements, and firms must be aware of the list of offences set out under sections 19 – 22A of TACT 2000, which include:-

- Fund raising for the purposes of terrorism (money that is given, lent or made available);
- Using or possessing funds for the purposes of terrorism;
- Entering into fund-raising arrangements associated with terrorism;
- Money laundering involving concealment, removal from the jurisdiction or transfer to nominees of terrorist property.

The full legislation can be accessed at: **http://www.legislation.gov.uk/ukpga/2000/11/contents**.

Persons in the regulated sector are required under Part 7 of POCA and TACT to submit a Suspicious Activity Report (SAR) in respect of information that comes to them in the course of their business, in cases where they know, or suspect or have reasonable grounds for knowing or suspecting, that a person is engaged in, or attempting, money laundering or terrorist financing.

A SAR must be submitted as soon as is practicable. Guidance on submitting a SAR can be obtained at: **www.nationalcrimeagency.gov.uk/publications/116-submitting-a-sar-within-the-regulated-sector/file**.

The potential penalties for being in contravention of TACT are severe. The maximum prison sentence for conviction on an indictable offence is 14 years with an unlimited fine and this should be enough of an incentive for CAs to be on their guard and vigilant as always.

HM Treasury update on high risk and non-cooperative jurisdictions

The following jurisdictions are classified as high risk (and so enhanced customer due diligence (CDD) is required for clients operating here):

Algeria, Democratic People's Republic of Korea, Ecuador, Indonesia, Iran and Myanmar.

The following jurisdictions are also considered to pose significant risks for AML purposes, and firms may wish to apply enhanced CDD:

Afghanistan, Albania, Angola, Cambodia, Guyana, Iraq, Kuwait, Lao PDR, Namibia, Nicaragua, Pakistan, Panama, Papua New Guinea, Sudan, Syria, Uganda, Yemen & Zimbabwe.

Equivalence update

HM Treasury has released an updated list of equivalent jurisdictions for AML purposes which are shown in Table 1 below.

Countries in the European Economic Area are treated as equivalent for AML purposes. Croatia joined the EU in 2013. Gibraltar's status as an overseas British territory that is part of the European Union means that it is subject to the 2007 Anti-Money Laundering directive and is therefore treated as equivalent.

Table 1

EU		
Austria	Belgium	Bulgaria
Cyprus	Czech Republic	Denmark
Estonia	Finland	France
Germany	Greece	Hungary
Ireland	Italy	Latvia
Lithuania	Luxembourg	Malta
Netherlands	Poland	Portugal
Romania	Slovakia	Slovenia
Spain	Sweden	UK
EEA		
Iceland	Liechtenstein	Norway
Other		
Croatia	Gibraltar	

MONEY LAUNDERING QUERY

Query: *I have had a potential new client approach me and I would like to obtain your advice. They have registered a Limited Company in the UK to trade marine/shipping products. The clients are a husband and wife, and are Nigerian, although reside in the UK. The Nigerian wife recently came to my office for a meeting with her daughter.*

She explained that, due to their nationality, some large corporates (such as Shell which is one of their clients) may not want to do business with them, and they had therefore asked one of their family friends who is British to be the sole director and shareholder of the company.

They have asked for a solicitor recommendation to draft the agreement, whereby this friend will hold the shares on their behalf (in trust).

They have also requested to use our client bank account for payments. The reason for doing this, I am told, is so that their friend does not have control over the bank account as a signatory.

What would be your advice to us as a practice with regard to money laundering, and also what information should we obtain other than the standard ID documents?

Answer: The level of customer due diligence to apply must be determined by the procedures that you have put in place in your firm. However, from the information you have given I would say as a minimum you would need to identify the company, its sole director/shareholder and the husband and wife as the 100% beneficial owners.

The background suggests to me that this case should be treated as one of high risk which may require enhanced diligence if that is in accordance with the procedures you have established in your firm. Given that you are dealing with foreign nationals, I would suggest you use a full scope electronic identification system that will flag up Politically exposed persons (PEPs), possible sanctions, etc.

Although you have asked only for AML procedural advice, it would be remiss of me not to point out to you my other concerns. The jurisdiction of origin of the individuals is highly suspect and is a well-known source of regular fraudulent activity. The request to use your client account to receive their payments is highly questionable. Why can't they open an account with a UK bank for the company? There are many risks for you in allowing your client account to be used in this way, not the least of which is the possibility, should things go wrong, of falling foul of Section 328 of the Proceeds of Crime Act 2002 " Making arrangements to facilitate the proceeds of crime". That offence carries a jail term of up to 14 years, an unlimited fine, or both.

TECHNICAL BULLETIN

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