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Practical TAX Newsletter

R&D: The Misunderstood Tax Relief

David O'Keeffe explains why R&D relief is relevant.

What's in a name?

Many businesses, especially SMEs, are missing out on the benefits of R&D relief simply because they (and their advisers) do not realise the breadth of the definition of R&D. In many ways, the problem is the name – R&D: *research* and development. Many people see the word "research" and think of white-coated technicians in laboratories. "We don't do research, we make things", they say. The reality is so very different. An awful lot of things that might not be thought of as "R&D" in the more common use of the term, will satisfy the definition of R&D for tax purposes.

Official definition

R&D for tax purposes is defined primarily in the Department for Business, Innovation and Skills (BIS) publication *Guidelines on the Meaning of Research and Development for Tax Purposes*. The key paragraphs are:

> *"3. R&D for tax purposes takes place when a project seeks to achieve an advance in science or technology."*
>
> and
>
> *"4. The activities which directly contribute to achieving this advance in science or technology through the resolution of scientific or technological uncertainty are R&D."*

Even these words can lead some to assume that they don't undertake R&D. In practice, the meaning of these words (and, thus, the definition of R&D for tax purposes) is much wider than you might think and can cover activities such as:

- extending the overall knowledge or capability in a field of science or technology;
- creating a process, material, device, product or service which incorporates or represents an increase in overall knowledge or capability in a field of science or technology;
- making an appreciable improvement to an existing process, material, device, product or service through scientific or technological changes; or
- using science or technology to replicate the effect of an existing process, material, device, product or service in a new or appreciably improved way.

There is a lot of stuff in that list that falls well outside a classic view of "R&D".

Wide application

In my career I have prepared R&D tax relief claims for businesses in sectors including:

- airlines;
- banking;
- insurance;
- hedge funds;
- retail; and
- food manufacture.

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The challenge is to get people to look beyond the name of the relief, and focus on the definition, and how that relates to what they do in their business every day. Once they do that, they soon realise just how much R&D they are actually undertaking.

Consider posing these questions to your clients:

- Do you undertake projects to develop, create, change or enhance your products, processes or services?
- Do you have to overcome technological problems in order to succeed in those projects?
- Do you employ technologists to solve those technological problems?

If the answer is "yes" to any of these questions, then the business will probably be carrying out R&D for tax purposes. No matter how routine this work is for the business, it is worth giving careful consideration as to whether R&D relief could provide real cash savings.

Case Study 1

Recently, I was discussing R&D relief with a director of a manufacturing company. Initially, he was slightly reluctant to meet as he wasn't at all convinced they were doing any R&D. However, as we talked about the company's business, it became clear that they did a bit more than just "make things". The business is highly specialised. It uses high-tech computer controlled milling machines to manufacture specialist components. This doesn't mean what they do is R&D, but how they use those machines interested me.

The director told me how their customers are always looking to improve their own products, and that leads them to request greater accuracy, tighter tolerances, shorter turnaround times and stronger products. His technical team have to develop processes and techniques that would allow them to deliver the enhanced product, ensuring that it remained cost-effective. This involved developing new operating procedures as well as new manufacturing methods, and new tooling in some cases.

This was great news, as I was able to explain to the MD that this was exactly the sort of activity that might be capable of being classified as R&D for the purposes of the tax relief. Of course, there was a lot more work to be done to identify all of the qualifying activities, and get to the claim agreed by HMRC.

Just before the meeting finished, the MD casually announced that he had a software engineer working full time developing and programming the control systems for their specialist machines. In the end, a fair chunk of that individual's time was also included in the R&D tax relief claim.

Many people see the word "research" and think of white-coated technicians in laboratories.

Production trap

As an example of where care does need to be taken, particularly with manufacturing claims, we had to quantify and exclude a certain amount of time as being related to "production".

The issue with "production" stems from the wording in para 28(c) of the current version of the BIS guidelines, which state in broad terms that the production and distribution of goods and services do not directly contribute to the resolution of scientific or technological uncertainty and are not, therefore, R&D.

In 2009, HMRC began using this wording to reject as "production" many activities that had previously been accepted as R&D, such as pre-production trials. Following a long debate around the issue HMRC issued revised guidance which is now contained in the *Corporate Intangibles Research and Development Manual* at CIRD 81350. The key point is that (broadly) it is necessary to look for the activity/expenditure that is additional to the normal production activity and directly attributable to R&D.

Having identified the issue with this client, we had to identify and quantify the extra time spent on R&D activity as against the time being spent on producing saleable product during the trials process.

Case Study 2

The company takes financial data from markets around the world, strips out the formatting and redistributes it in a user-friendly format for their clients. It has been in business for a long time and has developed robust systems that enabled them to deliver a reliable service and build a big client base.

When I first spoke to them, they felt their work was generally routine "systems maintenance", in order to keep up with changes made to both the source systems (ie those used by the suppliers of information at the various markets) and those of their clients. From talking with their technical team it became clear that the real challenge for the company was that their systems were technologically out-dated. However, because they had to interact with third party systems at both ends, it wasn't possible to simply change to a completely new computer system. They had to upgrade their old existing system in order to remain competitive and continue to deliver the service their customers demanded. The consequence of updating the old technology was that what they were doing amounted to "seeking an advance in technology" and thus qualified as R&D.

Payable credits

FA 2013, Sch 15 introduced the "above the line" (ATL) R&D expenditure credits with effect for expenditure incurred on and after 1 April 2013. This will enable more businesses to benefit from R&D relief, so it is important that those businesses and their advisers do not miss those opportunities. Large companies which have previously not bothered claiming for R&D because of a lack of corporation tax liability, will now be able to access a payable credit through the ATL regime.

Many SMEs are already taking advantage of the ability under the SME regime to claim a payable credit in situations where they have no, or insufficient, corporation tax liability. This is a great benefit for such companies as they would not otherwise be able to benefit from the R&D relief. It also allows them to access the cash at a time when cashflow may be a challenge, and funding is difficult to obtain.

PAYE liability cap

For accounting periods ending before 1 April 2012, such claims for payable credits were restricted by reference to the aggregate of the company's PAYE/NIC liabilities for payment periods ending in the year. This meant that companies with only a few employees, possibly using externally provided workers or subcontracting out the R&D activity, would have relatively high R&D costs but potentially very little in the way of PAYE/NIC liability. Those companies would find that they were limited in their ability to claim a payable credit. That restriction has now been completely removed.

In addition, the requirement for there to be a minimum qualifying spend of £10,000 on R&D per annum has been removed, also from 1 April 2012.

Ironically, having seen the PAYE/NIC cap removed from the SME regime, a similar restriction has been included in the new ATL regime. Hopefully, for the larger companies within that regime it won't pose quite such an issue!

Signs of improvement

The latest statistics released by HMRC suggest that take up of R&D relief, particularly amongst SMEs, is improving. This is good news but there are still too many businesses – of all sizes – missing out because they don't realise that what they are doing in their business is actually "R&D" for tax purposes. **TPT**

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A Trap With Share Option Schemes

Liz Hunter advises employers to take note.

The decision in *Benedict Manning v HMRC* [2013] UKFTT 252 (TC) reminds us of the importance for employers of notifying their employees of the requirement to promptly reimburse the employer for income tax payments made on the employees' behalf, following the exercise of an option under a share option scheme.

Technical background

Income tax is due on a chargeable event in relation to a share option. An example of a chargeable event is when an employee exercises a share option. This is the date on which he (usually) acquires the beneficial ownership of the shares. Whether a tax charge arises depends on the circumstances and where possible it is advisable to structure an award of shares so that no such charge arises.

Typical scenarios when a tax charge might arise include, and are not limited to:

- the exercise of an unapproved share option;
- the exercise of an option under a CSOP or EMI in circumstances when income tax is due; and
- shares ceasing to be subject to a SIP in circumstances when income tax is payable.

Whether any such tax charge is collected under self-assessment or PAYE, again depends on the circumstances and facts.

The trap

Where the underlying shares are considered to be readily convertible assets (broadly, there is a market for them), the employer is obliged to account to HMRC, via the usual PAYE route, for the income tax and NICs due at the exercise date. The employee must reimburse the employer in full within 90 days for the income tax accounted to HMRC, otherwise he becomes liable for a penal tax charge payable to HMRC. Essentially, the tax payments paid by the employer on the employee's behalf become treated as an income payment in themselves, and the employee has to pay the tax on the tax.

This is a punitive tax on tax charge.

Facts of the case

In October 2007 Mr Manning notified his employer of the exercise of his option to buy shares with a market value of over £100,000 at an exercise price of just over £7,000. His employer paid the tax and NICs on his behalf. Under the share option scheme, Manning was required to repay his employer upon receipt of a statement setting out how much he owed. His employer failed to send him this statement for several months.

The employer emailed Manning on 28 March 2008 advising him that he had not yet paid the tax in relation to the 2007 option exercise, and he replied saying he had never been advised of the amount payable. When Manning finally received the statement, he repaid his employer in full, on 11 April 2008, but, due to the employer notification delay, this repayment occurred more than 90 days after the initial payment was made to HMRC.

During a PAYE audit in 2011, HMRC became aware that Manning had repaid his employer outside the statutory time limit. HMRC assessed Manning to income tax of approximately £16,000 under ITEPA 2003, s 222, which he appealed. By this point the value of his shares had dropped to less than he had paid for them, leaving him significantly out of pocket.

ITEPA 2003, s 222 can apply where a payment is made in a "notional" form where it is not possible to deduct PAYE (such as a share acquisition). Irrespective of whether the employer has duly accounted to HMRC for the PAYE due (as they had done here), if the employee has not "made good" this amount of tax to his employer within 90 days of the relevant date, the employee will, under s 222, be liable for a further income tax charge on the amount of tax owed. This is a punitive tax on tax charge.

The decision

Mr Manning exercised his share option on 28 October 2007. The share plan stipulated that the employer was responsible for determining the amount of PAYE due. The option agreement also provided that, as a condition of the exercise of the option, the employee was required to pay the amount of any PAYE liability to the company within 30 days of exercise, or by the date the company had to account for the tax, whichever was earlier. As this had not happened, the tribunal concluded that Mr Manning did not acquire the shares until he in fact made payment to the company, meaning he was not 90 days late in reimbursing the company and the "grossed up" tax charge did not apply.

The tribunal's interpretation of the share plan rules was that Mr Manning's rights had lapsed when he failed (due to his employer's mistake) to pay the PAYE, due within 30 days of the exercise date: 28 October 2007. The tribunal concluded, somewhat bizarrely, that this was not therefore the actual date of exercise which was the relevant date for s 222 purposes.

The relevant chargeable event under ITEPA 2003, s 477 occurs only when a person acquires beneficial ownership of the shares. Accordingly, if beneficial ownership occurs only when an obligation to make good is satisfied, there is no relevant chargeable event unless and until the condition is satisfied. The date of exercise, and the relevant date for s 222 purposes, was therefore deemed instead to be 28 March 2008 and as the taxpayer made good the tax within 90 days of 28 March 2008, s 222 did not apply.

The tribunal justified its decision noting the statements of Lord Neuberger in *Chilcott and others v HMRC* [2010] EWCA Civ 1538 and [2011] that the court should at least consider, and if appropriate adopt, a construction of s 222 in favour of the taxpayer if such a construction was available.

What does this mean?

On its face, the decision seems to vindicate the carefully drafted option agreement, but whilst such provisions can be helpful, no employer will want to find itself having to rely on them. The tribunal was clearly sympathetic with Manning's plight and, as a result, reached a decision that, in my view, is susceptible to being reversed on appeal on the technicalities, albeit the current result seems to be a fair outcome for the taxpayer.

The Manning case questions HMRC's conduct and the approach taken in investigating ITEPA 2003, s 222 compliance

It is interesting to note that the tribunal (being sympathetic to the unrepresented taxpayer's plight) didn't deem Manning to have beneficial ownership of the shares until he had reimbursed the company on 11 April 2008. As HMRC generally views the date of exercise as the date on which beneficial ownership is acquired, but accepts that beneficial interest in shares normally only passes when an unconditional sale document is signed, it must be considered likely that this decision could be appealed by HMRC.

What should employers do?

Employers should ensure they have a watertight understanding of the procedural requirements of their own share option schemes, which will usually have been drafted in accordance with relevant legislation. At a minimum they should notify their employees of the requirement to reimburse within the 90-day window. The *Manning* case demonstrates that the onus is on the employer to communicate the PAYE liabilities on a timely basis as well as recouping them from the employee. It is therefore not adequate to simply notify the taxable values, it is equally important to ensure funds are recouped without delay.

Although the liability does not fall on employers, a hefty tax bill, which could have been avoided by a simple notification to the employee of his liability and the potential consequences of failing to make it good, is likely to have a damaging effect on morale and could potentially be a breach of the implied term of trust and confidence between employer and employee.

This is particularly so where an employer's share option scheme is operated by a parent company based in another jurisdiction, where the technicalities of UK tax legislation may not be fully appreciated.

The *Manning* case questions HMRC's conduct and the approach taken in investigating ITEPA 2003, s 222 compliance. I would advise employers that if they have (as would be considered best practice) the right, under the terms of the share plan, to withhold shares to cover such a tax liability, then this course of action should be considered as an alternative to the pursuit of cash collection but that such withholding also needs to comply with the 90-day time limit.

What next?

The good news for employees and employers alike is the UK Government has announced, as part of the Office of Tax Simplification's review of share schemes, that it intends to consider repealing the 90-day time limit for tax reimbursement and replacing it with the date of 6 July following the end of the relevant tax year. This should ease the administrative and cash flow

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ADR in place

Alternative dispute resolution (ADR) is now part of the mainstream service offered by HMRC to small businesses and individuals. These comprise all taxpayers dealt with by the HMRC local compliance offices or public bodies units.

ADR can be used to help reach a solution on a tax dispute even before an appealable decision has been made by HMRC. The taxpayer, or the tax agent on their behalf, can apply using an online form on the HMRC website, for the dispute to be referred to the dispute resolution unit. Taking up ADR does not affect the taxpayer's rights to have an internal review or take the matter to appeal at tribunal.

ADR for large or complex cases was tested in a separate pilot, as those disputes may be mediated through ADR by trained HMRC people or external mediators. Large businesses who have a case worker or customer relationship manager within HMRC should contact that person first if they wish to use ADR.

HMRC performance

HMRC has published its performance statistics for the quarter to 30 June 2013 on its website under *Business Plan Indicators*. Comparisons can be made for the same quarter in 2012. The number of transactions carried out online has increased from 90.1% to 93.1%, but the performance for telephone and post services has slipped back.

The average waiting time for a call to be answered by HMRC is 6.5 minutes and only 57.7% of calls are handled within 5 minutes. The number of calls made to HMRC had been falling, to around 5.8 million in the quarter to 30 April 2013, but the total rose again in the quarter to 30 June 2013 to over 7 million. The top issues dealt with on the key helplines are:

- Taxes helpline: my PAYE code is wrong.
- Tax credits helpline: making a renewal.
- Online services helpline: requesting a user ID and password.
- Employer helpline: caller was given another number or transferred to another office.

Post handling has slipped back, with only 70.1% of letters cleared within 15 days, compared to 77.4% in the same quarter in 2012 and 85% for the quarter to 30 April 2013.

Credit card data

From 1 September 2013 HMRC can ask companies who process debit and credit card payments to hand over that data. This will allow HMRC to see how much a specific trade has taken in credit or debit card payments in a period, and the number of transactions in that period. The personal data of individual credit card holders will not be passed over.

HMRC asserts that this data will be invaluable in tackling fraud, as the value of credit card sales can be compared to turnover reported by businesses on VAT or tax returns. However, those gross sales figures will include VAT paid at varying rates, so will be difficult to match to net figures on VAT returns. Also the credit card sales will not include payments made by other means such as cash or PayPal.

Child benefit

It is estimated that around 500,000 parents who claim child benefit need to register for self-assessment before 5 October 2013. These individuals need to complete a self-assessment tax return for 2012/13 in order to pay the high income child benefit charge (HICBC) which claws-back child benefit paid for periods starting after 7 January 2013. Failure to declare the liability to pay the HICBC could lead to penalties.

Only the highest earner in the family is required to pay the HICBC, and then only if their annual adjusted net income (which is not the same as earnings), exceeds £50,000. HMRC has written to some of the parents affected, but not all, as it cannot correctly identify every person who would be liable to pay the charge. Those parents who have elected not to receive the child benefit due to the family after 7 January 2013, are not required to take further action.

Child benefit stops automatically on 31 August on or after the child's 16th birthday, but an entitlement to child benefit continues if the child is in approved education or training. The education must be at least 12 hours of supervised study per week, the training can include an apprenticeship. From September 2013 young people in England are required by law to remain in education or training until the end of the academic year in which they turn 17.

In order to continue to receive the child benefit due for a child aged 16 or over, the parent claimant must contact the child benefit office at HMRC. Similar rules apply for claimants of child tax credit where the child concerned has reached age 16. In that case the claimant must contact the Tax Credit office. Although child benefit and child tax credit are both administered by HMRC, two phone calls will be required, as one section of HMRC cannot pass the relevant information to another part.

Tax credit over payments

The Low Incomes Tax Reform Group (LITRG) is urging tax credit claimants to check their 2012/13 final award notices without delay. Claimants now have only

disadvantages of the current system.

Meanwhile the *Manning* case evidences the importance of on-going compliance and effective and efficient share plan administration. This is a high risk area where employers can easily get caught out. In particular where there are conditions of exercise and/or there is a delay between the option exercise and the formalities of transfer being completed. This is a compliance function that can be outsourced to professionals. **TPT**

Liz Hunter

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three months to challenge the figures, and have to carry on paying back any overpayment demanded whilst HMRC considers the disputes figures. However, if HMRC is shown to have made a mistake and failed to meet their responsibilities but the claimant has met all of theirs, then HMRC will write off the overpayment debt and the claimant will not have to repay it.

New HMRC guidance

Form 64-8

There is a "catch 22" with taxpayers who are new to self-assessment. The tax agent cannot use the online system to apply for authorisation to act for the taxpayer, as a UTR number has not been issued for the taxpayer. If a paper 64-8 authorisation form is submitted, it won't be processed until HMRC has set-up a record for the taxpayer and issued a UTR.

The solution is to complicate the application for self-assessment or notification of self-employment (forms SA1, CWF1, SA400, etc.) and staple that form to the form 64-8, submitting the two together to the HMRC central agent authorisation team (CAAT). A specialist team within CAAT should deal with those forms together.

Tax agent strategy

The latest HMRC briefing note on tax agent strategy confirms there will be no further consultation paper at this stage. However, the following future developments are highlighted:

- Agent registration service under which all agent firms will apply for a unique agent reference.
- New pilots to test the quality of information held on HMRC systems about agents, and the tax compliance histories of their clients.
- A single digital tax platform to operate across all tax regimes to be used by taxpayers and tax agents.

Employer shareholders

Two technical guidance papers have been released concerning employee shareholder shares which can be awarded to employees from 1 September 2013:

- Capital gains tax exemption for employee shares; and
- Income tax treatment of employee shares – including the benefit exemption.

Employers are advised that to obtain an agreed value of shares awarded to employees they should submit form VAL232 to the HMRC Shares and Assets Valuation Office (SAV). Such an agreed valuation will be valid for only 60 days. If the shares are not awarded to employees within that period the company should write to SAV and request that the valuation should be renewed.

HMRC publications

Statutory residence test

The guidance note on the statutory residence test (RDR3) has been revised to reflect the law as included in FA 2013.

Toolkits

The HMRC toolkit that deals with the small profits rate and marginal relief for corporation tax has been revised and refreshed.

ATED return

The return to be used to report a charge due, or claim relief, for the annual tax on enveloped dwellings (ATED) has been revised. The help areas are improved and the authorisation of an agent for ATED is now a separate procedure to be carried out by letter or email to:

ATED Processing Team
3rd Floor
Crown House
Birch Street
WOLVERHAMPTON
West Midlands
WV1 4JX
Email:ATEDadditionalinfo.CTIAA@hmrc.gsi.gov.uk

Training videos

The following new videos have been loaded onto the HMRC channel on YouTube:

- "How to use HMRC's agent toolkits"; and
- "HMRC Agent Services".

Gift aid donations

A new helpsheet, *The Gift Aid Small Donations Scheme*, is designed for charities and community amateur sports clubs to refer to when claiming top-up payments from HMRC in respect of small cash donations.

Advisory fuel rates

The advisory fuel rates to be used when reimbursing employees with the cost of fuel for business journeys in company cars, have been revised for journeys taken on and after 1 September 2013:

Engine size	Petrol	LPG
1400cc or less	15p	10p
1401cc to 2000cc	18p	11p
Over 2000cc	26p	16p

Engine size	Diesel	
1600cc or less	12p	
1601cc to 2000cc	15p	
Over 2000cc	18p	

Hybrid cars are treated as either petrol or diesel cars for this purpose.

Stamp taxes helplines

The following stamp taxes helpline numbers have been changed:

SDLT helpline	0300 200 3510
SDRT helpline	0300 200 3510
Stamp duty helpline	0300 200 3510
SDLT forms orderline	0300 200 3511

The old 0845 numbers will work for the next 18 months.

DOTAS confidentiality hallmark

Draft guidance has been released to accompany the proposed amended DOTAS confidentiality hallmark (see TPT34-15).

ISA bulletins

Bulletins numbered 54 and 55 were released together and contain articles on:

- junior ISA applications; and
- qualifying investments for ISAs.

points of law

GR Solutions Ltd v HMRC [2013] UKUT 278 (TCC)

Class 1A NICs due

Ray Hall was the director of GR Solutions Ltd. In April 2004 he purchased a BMW X5 car for £53,645. In December 2004 he sold a 90% share in the car to GR Solutions Ltd for £48,636, but continued to use the car for private and business journeys. He made a 10% contribution towards the running costs and paid the company 10% of the total fuel costs for the car.

The company paid for fuel, but did not report a car benefit or pay Class 1A NICs in respect of the car. HMRC issued a ruling that GR Solutions was required to pay Class 1A NICs in respect of the car and the fuel.

The First-tier Tribunal dismissed the company's appeal, holding that the fact that Ray Hall owned 10% of the car did not avoid the liability to NICs. The Upper Tribunal upheld this decision, applying the principles laid down by Pumfrey J in *Christensen v Vasili* [2004] STC 935.

I & P Phillips v HMRC TC2756

Bank statements must be delivered

HMRC issued notices under TMA 1970, s 19A to Mr & Mrs Phillips who operated a property lettings business. The notices required the production of personal bank statements and statements of money market transactions.

The First-tier Tribunal upheld the requirement to produce bank statements. Judge Kempster observed that the couple's business was "run through a bank account that also includes items of personal expenditure", and held that "details of the transactions in that bank account are reasonably required by HMRC, as they relate at least in part to transactions of the letting business". However, he allowed the appeal against the requirement to produce money market statements, finding that "it would be unduly onerous to require the appellants to provide those other documents".

IH Bhatti v HMRC TC2757

Property was partnership asset

I Bhatti was in partnership with his two brothers (M and A Bhatti), trading as Central Properties. The three brothers had submitted tax returns indicating that they were carrying on a property business in partnership. Various properties were acquired and disposed of, with the names of M and A Bhatti as the registered proprietors, but not that of I Bhatti. However, a trust deed signed by all three brothers indicated the properties were held as partnership assets.

I Bhatti appealed against a discovery assessment charging CGT on the disposal of a property, contending that he had been an employee rather than a partner. The tribunal concluded the properties were partnership assets, and dismissed the appeal.

Employer advice

RTI reminders

HMRC is writing to around 120,000 employers who have yet to make a report under RTI. Many of these employers will have also received a reminder letter in June 2013.

HMRC is asking employers and their tax agents to either close unused PAYE schemes, or register the scheme as an annual scheme, if it is in place solely to report the payment of expenses. Employers who have already registered their PAYE scheme as an annual scheme will not receive a RTI reminder letter.

RTI and student loans

Certain employees who are paying-off student loans, have been contacted by the Student Loan Company (SLC) who say that it has been notified by HMRC that the individual is no longer employed. The SLC asks for further details to be supplied regarding the individual's employment status.

The reality is that the individual has not changed jobs and is still employed. The error has been caused by RTI software which has interpreted the employment as ceasing when a small change has been made to the employee's details, such as their payroll number. The affected individuals have to contact the SLC to explain they have not ceased employment or changed employer. Both HMRC and the SLC are changing their systems to correct the reported errors.

Regulations

Insurance

The Insurance Companies (Amendment to Schedule 17 to the Finance Act 2012 (Transitional Provision) Regulations 2013 (SI 2013/224) come into effect on 30 September 2013. They correct a mismatch between the transitional rules to the corporate tax regime for life insurance companies and the transfers of insurance business rules.

International tax

OECD progress report

The OECD presented a detailed progress report on tax evasions and avoidance to the G20 meeting of world leaders in St. Petersburg. This covered three areas:

- progress by the Global Forum on transparency and exchange of information for tax purposes;
- the base erosion and profit shifting action plan; and
- the move to a global standard for automatic exchange of information.

In addition to endorsing the work of the OECD in these areas, the declaration from the G20 meeting called on all countries to join the *Multilateral Convention on Mutual Administrative Assistance on Tax Matters*. The declaration also set out how the OECD and other international organisations can help developing countries to build their tax administrative capacity and participate in the new international tax arrangements.

FACTA agreement

The commencement of the Foreign Account Tax Compliance Act (FATCA) has been deferred until 30 June 2014. As a result of this and other changes the guidance notes accompanying the International Tax Compliance (United States of America) Regulations 2013 have been updated.

points of law

PI Murtagh v HMRC TC2754

No trade, no losses

Mr Murtagh traded in partnership as a pharmacist until 2006 when he sold his business. Following that sale he acted as a golfing manager for his two sons and allegedly a third player, who were all professional golfers. He submitted tax returns for the years 2005/06 to 2008/09 claiming loss relief on the basis that he was carrying on a trade of managing professional golfers.

HMRC rejected the claim and the First-tier Tribunal dismissed Murtagh's appeal, finding that he did not undertake a trade on a commercial basis or with a view to a profit. His activities were directed at fostering his sons' careers, and did not constitute "a trading venture".

The Pollen Estate Trustee Co Ltd v HMRC [2013] EWCA Civ 753

SDLT refund due

The Pollen Estate Trustee Company Ltd acquired four properties. It submitted a claim for repayment of SDLT, contending that it had made the acquisitions as a bare trustee for the beneficiaries of a trust, and that as two of those beneficiaries were UK charities, it should be entitled to relief under FA 2003, Sch 8 in respect of the proportion of the properties which was attributable to those charitable beneficiaries. HMRC rejected the claim but the Court of Appeal unanimously allowed the company's appeal.

Lewison LJ held that Sch 8, para 1(1) should be construed as providing that a land transaction was exempt from charge to the extent that the purchaser was a charity, providing that the conditions were met. Exemption should apply to "that proportion of the beneficial interest that is attributable to the undivided share held by the charity for qualifying charitable purposes". Such an interpretation was "necessary in order to give effect to what must have been Parliament's intention as regards the taxation of charities".

HMRC has issued an information note with details of how charities can claim refunds of SDLT following the decision in this case, see: www.lexisurl.com/SDLTrefund.

Mertrux Ltd v HMRC [2013] EWCA Civ 821

Rollover relief not due

Mertrux Ltd held a car dealership selling Mercedes cars. In 2003 it sold this business in return for consideration of £1,705,502. Mertrux claimed rollover relief on the basis that the gain arose from the disposal of its goodwill.

HMRC disallowed 50% of the claim on the basis that only 50% of the consideration should be treated as attributable to goodwill and that 50% was compensation for the loss of M's agreement with the car manufacturer, which did not qualify for rollover relief under TCGA 1992, s 155.

The Court of Appeal unanimously dismissed Mertrux's appeal. Patten LJ observed that part of the payment (described as a "territory release payment") "became payable under a variation of the franchise agreement which reserves the right to control the use of the Mercedes mark". On the evidence, this could not "have been the subject of a claim for compensation by Mertrux as a result of the termination of the franchise and, for that reason, the territory release payment cannot be treated as a payment derived from an asset belonging to Mertrux". Mertrux could not "assert an interest of its own in the goodwill which it was surrendering on the termination of the agreement. The compensation for both aspects of the dealership was therefore, on the face of the agreement, calculated as the amount of lost profit attributable to the period in question." Therefore the territory release payment was "compensation for the loss of the right to trade under the dealership agreement" and was chargeable under TCGA 1992, s 22.

S Kutcha v HMRC TC2769

Taxable scholarships

Mr Kutcha is a director of RA Cowan & Partners Ltd, which employed his two sons while they attended university and for several years before and after their university courses. The sons' salary payments were paid through the payroll and subject to tax and NICs in the correct manner. However, the company also sort to take advantage of tax exemption for scholarship income (ITTOA 2005, s 776), for the periods the sons attended their university courses.

HMRC issued assessments on Kutcha, charging tax on the basis that the payments to his sons were taxable benefits for him. HMRC convinced the First-tier Tribunal that the scholarships for Kutcha's sons were provided because of his employment (not the sons' employment). As a result the company had to pay Class 1A NIC on the scholarship amounts and Kutcha senior was taxed personally on the tax-exempt amounts paid to his sons.

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