Monthly Tax Review

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A Periodic Update for Professional Advisers

September 2013
(Copy Date 30 August 2013)
1. CAPITAL GAINS TAX

1.1 Main Residence Relief: Insufficient Permanence or Continuity of Occupation (Llewellyn)

The facts
Mr Llewellyn and his partner lived at 10 Netley Terrace, Southsea - a property purchased as tenants in common in 1976. By 1996, they had personal difficulties and he purchased 10 Henderson Road, Southsea in 1996, moving into the property with a sleeping bag and basic necessities. The house was in a poor state and it took a year to refurbish it. During that time Mr Llewellyn returned to Netley Terrace to collect mail and carry out work on that property.

By the summer of 1998, Mr Llewellyn's relationship with his partner had improved and he moved back to Netley Terrace, subsequently renting out Henderson Road. Letting continued until 2005 when, following further work to it, the property was put it up for sale, being sold in May 2007.

HMRC requested information to support the claim that only or main residence relief and lettings relief applied to Henderson Road, because their information was that Mr Llewellyn had lived permanently at Netley Terrace. Following various correspondence with the accountant, HMRC issued an amended self assessment refusing relief and, following reviews, the appeal against this came to the First-tier Tribunal.

The hearing and the decision
There was some dispute as to when Henderson Road was first occupied, but the Tribunal accepted that Mr Llewellyn moved there in November 1996, although living in very spartan conditions. It was noted, however, that he was still registered to vote at Netley Terrace and no other institutions appear to have been advised of an address change. In response to questions from HMRC, he also admitted that he gave Netley Terrace as his address when applying for a credit card. Rent records indicated that the property was let from October 1997.

The Tribunal accepted that Mr Llewellyn had occupied the property, but some degree of permanence or continuity was required. The Tribunal did not consider, on the balance of probabilities, that this had been satisfied and refused the relief.

The Tribunal concluded with ‘a procedural matter’. Despite both parties confirming that no witnesses were being called, HMRC had asked to put questions to Mr Llewellyn. He could have refused to answer, in which case it would have been left to the Tribunal to determine whether HMRC's application to question Mr Llewellyn should or should not be granted. Had this not been granted, there would have been no opportunity for HMRC to question him. The Tribunal did not think it fair for HMRC to wait until the hearing to ‘spring upon’ an individual a request to give evidence where that individual has been led to expect that this would not be required. The Tribunal decided not to comment on whether his accountant should have decided not to call Mr Llewellyn as a witness in support of his own case.

(Wade Llewellyn v HMRC (2013) TC 2726, reported at Taxation 15.08.13 p6).

2. INHERITANCE TAX

2.1 Discounted Gift Schemes: Matters of Valuation

Context
HMRC Brief 22/13 sets out HMRC’s view on how to calculate the value that will be subject to IHT for a Discounted Gift Scheme (DGS) held in a relevant property trust when the ten year anniversary charge arises for the trust. It also provides updated guidance on how the transfer value is to be calculated when a DGS is effected including providing clarification and revisions to the assumptions underlying the valuation.

The Brief is aimed at the trustees of a relevant property trust which holds a DGS and who are responsible for delivering an Inheritance Tax Account for the ten year anniversary. It is also aimed at the providers of DGSs who may wish to provide relevant values to their customers both when a DGS is effected and at subsequent Ten Year Anniversaries.

The intention of this Brief is to provide certainty for taxpayers and DGS providers in that a valuation prepared in accordance with this brief will be acceptable to HMRC.

Updated guidance on the calculation of transfer values when a Discounted Gift Scheme is effected

In May 2007 HMRC issued a Technical Note setting out the IHT treatment of DGSs. That note dealt with the transfer of value that arises when a DGS is effected. It also set out the valuation basis that HMRC considered appropriate in establishing the value transferred. Subsequent to that note amendments to the valuation rate of interest have been made (which are summarised in the Inheritance Tax Manual at IHTM 20656).

Following a European Court of Justice decision in March 2011 (the 'Test-Achats' case), the use of gender as a factor in setting insurance premiums is no longer permissible from 21 December 2012. As one of the main factors used to establish the value transferred when a DGS is effected is the cost of insuring the life of the individual who has effected the Scheme, the valuation basis needs
The ten year anniversary charge
The position at the date of a Ten Year Anniversary is somewhat different. At a Ten Year Anniversary the open market purchaser would not be concerned to insure the life of the settlor. Rather the purchaser’s concern would be in establishing the settlor's life expectancy. This would be affected by the settlor’s age, gender and state of health at that time and would use a different valuation basis from that used for valuing the retained rights when a DGS is effected.

In order to try to minimise the administrative burden around providing DGS valuations, HMRC will accept Ten Year Anniversary valuations which are calculated using the same mortality and interest rate basis as is then in force for calculating the transfer value when a DGS is effected. This is set out in paragraph 2.2 below. This does not preclude valuations being submitted using alternative methods or valuation assumptions, but is intended to provide assurance that valuations calculated in accordance with this brief will be accepted by HMRC.

(Revenue & Customs Brief 22/13 6.08.13)

Further details are given in the 9 page Brief.

2.2 HMRC Trusts & Estates Newsletter August 2013

Contents
The latest issue of the thrice yearly newsletter has the following content:

- Finance Act 2013 – Changes to Inheritance Tax
- Forms R40 & R185
- Inheritance Tax treatment of compensation payments
- New Inheritance Tax forms for Scottish Estates
- When you need to tell HMRC about a trust [see Item 9.2 below]
- Inheritance Tax quarters calculator for trusts
- Amendments to Trusts & Estates manuals

Most of the material will be fairly familiar, though it is worth recording the article on compensation payments.

IHT treatment of compensation payments
HMRC Trusts & Estates are aware that the treatment of compensation payments for IHT purposes can cause some difficulties for taxpayers and their agents. In particular difficulties can arise where compensation is received after the date of death.

There can be many situations where compensation arises. But there are certain principles that when followed ensure compensation payments are treated appropriately.

The approach is the same whether it is a claim that is specific to an individual, for example where they have received poor financial advice, or where a more widespread issue has arisen and a financial institution is instigating its own investigations into a larger body of transactions.

The right to pursue a claim for compensation is an item of property and therefore an asset of the estate. The open market value of the right at the date of death depends on several factors, but is fundamentally down to what was known, or capable of being known, at the date of death about:

- the amount of compensation that might be reasonably anticipated, based on the information available,
- the likelihood of the claim being successful,
- the likely costs that would be expected to be incurred in obtaining a successful outcome, and
- the time delay between the date of death and the date when the compensation might reasonably be expected to be made.

The right to pursue a claim can be valuable whether or not the individual entitled to make the claim was aware of this right, provided that the information was capable of being known at the relevant date.

The open market value of the right to pursue the claim becomes more valuable as the outcome becomes more certain, so particular events can trigger a substantial increase in value.

Where personal representatives are aware of a potential claim at the date of death, they should record the existence of the claim on form IHT400 and provide as much information about the claim as they can. They should include a reasoned estimate of the open market value of the right to pursue the compensation where they are able to do so.

Guidance about the treatment of compensation payments can be found in the Inheritance Tax Manual at: IHTM10261 onwards, in particular the NHS continuing care scheme at: IHTM10270 and Equitable Life compensation payments at: IHTM10271.

(HMRC Trusts & Estates Newsletter 21.08.13)

2.3 Exceptioned Estates: A Reminder of the Definition

The replies to the query ‘Claim confusion’ (page 45) mention exception accounts for IHT purposes. One situation where an estate may not have to deliver an account under IHTA 1984 s216 is where this is a low value estate. HMRC’s Inheritance Tax Manual at IHTM 06012 explains that this is where ‘the gross value of the estate does not exceed the IHT nil-rate band. The conditions for these estates are that:
The deceased died on or after 6 April 2004, domiciled in the UK; and
the gross value of the estate, including: the deceased’s share of any jointly owned assets; any specified transfers; and any ‘specified exempt transfers’ does not exceed the nil rate band.

There are additional conditions that must be met if the estate is to be excepted in having to deliver a full account.

If the estate includes any assets held in trust, they are held in a single trust and the gross value does not exceed £150,000.
If the estate includes foreign assets, their gross value does not exceed £100,000.
If there are any ‘specified transfers’, their chargeable value does not exceed £150,000.
The deceased had not made a gift with reservation of benefit.
A charge does not arise under IHTA 1984 s151A to s1510 (IHT charge on an alternatively secured pension fund).

The rules about exempt excepted estates are at IHTM 06013. These are estates where there is no liability because the gross value of the estate does not exceed £1m and there is no tax to pay due to the spouse or partner exemption and/or the charity exemption.

The estate of a foreign domiciliary will qualify as an excepted estate (see IHTM06021) if they were:
domiciled outside the UK at death;
had never been domiciled in the UK during their lifetime;
had never been deemed domiciled in the UK for the purposes of IHTA 1984 s267; and
the value of their estate situated in the UK consists only of cash or quoted shares or securities passing under their Will or intestacy or by survivorship does not exceed (from 1 September 2006) £150,000.

(Taxation 1.08.13 p41)

2.4 Charities: STEP Model Clause for Extra IHT Relief is Now Online

Following consultation with HMRC, the STEP model clause, for when 10% or more of an estate is left to charity, resulting in a reduced rate of IHT, is now live on the STEP website. STEP would like to acknowledge the work of the UK Technical Committee, and particularly Owen Clutton TEP, in developing this model clause.

Following the entry into force of the FA 2012 STEP set out below a model clause that can be used by persons wishing to leave a legacy qualifying for the reduced rate of inheritance tax to 36% where 10% or more of an estate is left is charity on death.

The FA 2012 Sch 33 inserts a new Sch 1A into IHTA 1984 making provision for the new relief.

The clause set out below is based on the draft clause submitted to HMRC in the course of the consultation process leading to the finalisation of the legislation.

MODEL CLAUSE

Leaving the minimum amount to charity required to qualify for the reduced rate of inheritance tax under IHTA 1984 Sch 1A

1.1 I give [name of charity] such a sum as together with any other gifts to charity made under my Will or any Codicil shall constitute a donated amount equal to 10% (10%) of the baseline amount in relation to the general component of my estate.

1.2 If relief under IHTA 1984 Sch 1A shall have been abolished at the time of my death or if Inheritance Tax shall have been abolished at that time this legacy shall instead of the amount specified in clause 1.1 above be a sum equal to [ ]% ([%]) of the residue of my estate.

1.3 My executors in making payment of the legacy given by this clause:
1.3.1 shall be entitled to accept in full discharge the receipt of the secretary, treasurer or other officer of the charity concerned;
1.3.2 may appropriate assets not otherwise specifically bequeathed to satisfy (or partly satisfy) this legacy without the consent of any beneficiary under my Will or any Codicil.

1.4 I hereby confer on my executors the power in their absolute discretion to make or withdraw an election under IHTA 1984 Sch 1A para 7 of in relation to any other eligible part of my estate whether or not the general component is the qualifying component and to make or withdraw an election under para 8 of that Schedule.

1.5 Terms in this clause have the same meaning as in IHTA Sch 1A and the reference to a gift to charity means a gift attributable to property to which IHTA 1984 s23 applies.

1.6 [The legacy given by this clause shall in no event:
1.6.1 be less than £[●] whether or not the lower rate of tax shall be applicable; and
1.6.2 exceed £[●] (the upper limit) even if in consequence of this restriction in the value of this legacy the lower rate of tax shall not apply. [If this proviso shall apply and in consequence the lower rate of tax shall not be applicable the amount of this legacy shall be equal to the amount of the upper limit [be reduced to £[●] [lapse].]

The wording in clause 1.1 and 1.6 is offered by HMRC in the Inheritance Tax Manual at IHTM 45008.
HMRC have published guidance on the new relief at IHTM 45000.

The HMRC guidance refers to the HMRC online charitable legacy calculator available on the HMRC website which can be used to calculate the amount of the legacy that would be left to charity using the model clause. The actual amount of the legacy on the person's death will, however, depend on the value of the estate at death and the exemptions, reliefs and nil rate band then available. Click here for the calculator.

The following points should be noted in relation to the use of the model clause and the calculator.

In some cases it will be possible to work out the amount of the legacy given by the model clause only by using the calculator. This will be the case, for example, where there is more than one component in the estate on death and where there is an available nil-rate band which needs to be allocated between the different components. In some cases initial calculations will be required, such as grossing up, before the calculator can be applied. The use of the model clause and the application of the calculator should be carefully considered in every case.

The calculator is designed to give the minimum amount required to be left to charity in order to attract the reduced rate of IHT under IHTA 1984 Sch 1A. The calculator will therefore not give a figure for a larger legacy.

In view of the fact that the calculator will be required in certain cases in order to work out the amount of the legacy left by the model clause it is important to consider the circumstances and assets when using the model clause. There may be cases where the model clause will not operate satisfactorily.

Drafting notes

Clause 1.1
The sub-clause set out below may be used in place of 1.1 above where it is desired to define the legacy under the Will as 10% (when added to other gifts to charity), not only of the general component but also of the survivorship component, the settled property component or reservation of benefit property as well. The appropriate wording should be included to achieve the desired result. For example, if the legacy is to be defined by reference to the baseline amount of the general component and the survivorship component the brackets around the words ‘survivorship component’ should be removed and the reference to the settled property component and reservation of benefit property should be deleted. If reservation of benefit property is to be included in defining the amount of the legacy, the additional words at the end of 1.5 should be added: and ‘reservation of benefit property’ means property that forms part of my estate by virtue of FA 1986 s102(3) (Gifts with Reservation).

It should be noted that this alternative clause merely defines the amount of legacy under the Will. Accordingly, in order for the relief to be available to other components in the estate and the gift with reservation property (if so desired) an election will need to be made under Sch 1A para 7 to merge the general component and the other relevant eligible part or parts.

‘I give [name of charity] such a sum as, together with any other gifts to charity made under my will or any codicil and also any property passing to charity forming part of such of the survivorship component and settled property component as are comprised in my estate, shall constitute a donated amount equal to 10% (10%) of the baseline amount in relation to the aggregate of the general component and [survivorship component] [and] [settled property component] [and reservation of benefit property] of my estate.’

Clause 1.2
A legacy of a specified percentage of residue is given by this clause in substitution for the legacy in clause 1.1 if the relief in Sch 1A or IHT has been abolished by the time of the testator’s death. This default position should be carefully considered and a percentage other than 10% or some other figure may be felt appropriate.

Clause 1.6
This clause is entirely optional and is included purely to assist in addressing issues that may be relevant to the person making a Will. The clause should be amended or omitted entirely as appropriate.

Firstly, clause 1.6.1 provides that the legacy shall not be less than a specified amount even if the relief is not applicable due to the net value of the estate being below the IHT threshold with no IHT therefore being payable. Clause 1.6.1 is included as there may be a wish to include the legacy or some part of the legacy irrespective of whether the relief applies or not.

Clause 1.6.2 is designed to cover the risk that due to a reduction in value of the estate between the making of the Will and death, or for other reasons, the charity legacy may constitute too large a proportion of the estate. This could adversely affect the financial security of the deceased’s family or dependants following the death. Clause 1.6.2 therefore specifies a maximum figure. This may of course result in the reduced rate of IHT not being available (because the legacy will be less than the 10% proportion required) and the clause contains additional optional wording enabling the choice to be made that the legacy should either be equal to the specified amount or be reduced or should lapse. The appropriate wording should be included to achieve the desired result.

Disclaimer
The model clause and accompanying notes are made available by STEP to be used for general
reference purposes when drafting Wills and other testamentary documents. Specific facts and circumstances may mean that use of the model clause is inappropriate for a particular client or clients and could even engender losses. Careful and detailed consideration should therefore be given to its use in any particular case. STEP are not legal advisers and do not have or owe any duty of a legal or professional adviser. STEP and any person involved in the preparation of the model clause and accompanying notes shall not be liable for any loss to any person arising out of or in connection with the use of the model clause and accompanying notes.

(STEP release, reported in STEP UK News Digest 8.08.13)

2.5 Scottish Estates: New Inheritance Tax Forms

HMRC have published updated forms and guidance notes:
- C1 – Confirmation Inventory
- C2 – Inventory continued
- C5(OUK)(2006) – Return of estate information (Person domiciled abroad & their UK assets consisted of cash/and or quoted stocks & shares only, gross value less than £150,000)
- C5(SE)(2006) – Information about small estate
- Integrated Inventory - contains form C1 confirmation and form C2 continuation

Forms C5(OUK)(2006) and C5(SE)(2006) are now online only forms.

(HMRC website What's New? 12.08.13)

3. STAMP TAXES

3.1 SDLT Avoidance Scheme Fails (DV3)

The facts

A company entered into a contract with L&G to buy an interest in the head leasehold in a property in Regent Street for £65.1m. To avoid paying SDLT on the transaction, a scheme was entered into. The taxpayer (DV3), a limited partnership, was formed in the British Virgin Islands and a contract of sub-sale made on 30 November between the company and DV3. Under the contract, the company agreed to sell the head leasehold interest in the property to DV3 for £65.1m. Two separate transactions took place as a result of the scheme: the sale to the company by L&G, then the sale to DV3 by the company.

HMRC said that DV3 was liable for SDLT on the acquisition of the property. DV3 appealed, claiming that the subsale fell within FA 2003 s45 and Sch 15 para 10, as a result of which no tax was due. The First-tier Tribunal decided in favour of DV3 and the Upper Tribunal upheld that decision. HMRC appealed.

The Court of Appeal said the contract between L&G and the company was the original contract and the contract between the company and DV3 was a secondary contract. The original contract was completed at the same time as the secondary contract. In those circumstances, s45(3) provided that the completion of the original contract had to be disregarded. The company therefore had not acquired a chargeable interest by entering into the contract with L&G.

When the second transaction took place, s44(3) applied to DV3’s acquisition of the interest in the property. Sch 15 para 10 did not apply because the company did not acquire a chargeable interest in the property. DV3 could not therefore claim the exemption and was liable to SDLT.

HMRC’s appeal was allowed.

(DV3 RS Ltd Partnership v CRC, Court of Appeal, 25 July 2013, reported in Taxation 8.08.13 p7)

3.2 SDLT: Claims for Refunds Court of Appeal Decision

Background

On 26 June 2013 the Court of Appeal released its judgment in cases A3/2012/2784 and 2808, The Pollen Estate Trustee Company Limited and King’s College London v HMRC (see MTR 08/13 Item 3.3). The substance of that judgment was that, when a charity purchases property jointly with another person who is not a charity (‘non-charity purchaser’), relief from SDLT under FA 2003 Sch 8 para 1 is available on the charity’s share of the property. Relief is subject to a test based on the extent to which the charity’s share is used for charitable purposes.

Implications

In light of that judgment, HMRC invite claims for any overpaid SDLT from charities that purchased a property jointly with a non-charity purchaser, satisfied the relevant conditions, but did not claim the relief. Relief is limited to circumstances where the charity used the greater part of its share of the property for a charitable purpose.

Where HMRC has opened an enquiry into the relevant land transaction return they will contact you to discuss the details of your case.

Time limit for making a claim

FA 2003 s68 provides that claims for charities relief must be made in a land transaction return or in an amendment to a return. Under FA 2003
Sch 10 para 6, an amendment can be made no later than 12 months after the filing date for the return. The filing date for a land transaction return is 30 days after the effective date of the transaction (this is normally the completion date). Claims made after the expiry of the 12 month amendment period will be time-barred.

Procedure for amending a return
Purchasers who wish to make an amendment to their land transaction return should write to:
Birmingham Stamp Office
9th Floor
City Centre House
30 Union Street
Birmingham
B2 4AR

Details of the amendment and the unique transaction reference number (UTRN) for the original land transaction return should be included in the letter.

If you are claiming a refund you must provide the contract for the land transaction and documents to show the size of your share (such as a trust deed or agreement) and the charitable purposes for which the property will be used. You can find more information about making an amendment to a land transaction return.

Amount of SDLT due on the non-charity proportion of property
The judges in the Court of Appeal confirmed HMRC’s view that a joint purchase is the acquisition of one chargeable interest for SDLT purposes. Under FA 2003 s55 of the, the rate of SDLT applicable to a chargeable transaction is calculated by reference to the chargeable consideration for the entire interest purchased.

It follows that, in the cases described, while the charity (if it meets the conditions) will pay no SDLT on its share, and while the non-charity pays SDLT only on its share of the interest, the applicable rate of tax is that which would be applicable to the total chargeable consideration for the purchase.

Example
A charity and a non-charity jointly purchase a non-residential property for £800,000, each owning a 50% undivided share in the property. The charity intends to use its portion of the property wholly for charitable purposes. Under s55 the SDLT due on the purchase is £32,000 (£800,000 x 4%). Charities relief is available on £16,000 of this, with £16,000 SDLT payable on the proportion of the interest held by the non-charity purchaser.

Interest on SDLT refunds
Repayment interest at the rate applicable under FA 1989 s178 will be paid on the amount of any repayment, calculated from the time at which the SDLT was paid.

3.3 Stamp Taxes Bulletin 2/2013
The content of the latest Bulletin is as follows:

Land
1. ATED return is now available
2. General Anti Abuse Rule (GAAR)
3. Group Relief Finance Act 2003 Sch 7 Part 1
4. Power of Attorney
5. Pre-completion transactions rules
6. SDLT1 completion for new or replacement leases – entering the correct amount at box 14 ‘total amount of tax due’
7. Recent updates to the SDLT Manual

Shares
8. Relief from Stamp Duty under FA 1986 s75/77 in connection with Company Reconstructions

The existence of Item 1 is a reminder that ATED is formally seen as a stamp tax in terms of categorisation.

(HMRC website What’s New? 20.08.13)

3.4 SDLT Group Relief (FA 2003 Sch 7 Part 1): Meeting Note Published

Introduction
This note summarises the key points arising out of a meeting between representative bodies (the British Property Federation, the Chartered Institute of Taxation, the Law Society and the Stamp Taxes Practitioners’ Group) with HMRC Stamp Taxes on 3 July 2013. It is published with the agreement of HMRC Stamp Taxes.

Background
The meeting arose out of uncertainty surrounding HMRC Stamp Taxes’ current approach to the availability of SDLT group relief, and in particular the application of the targeted anti-avoidance rule (TAAR) in FA 2003 Sch 7 para 2(4A), in the context of intra-group asset transfers following corporate acquisitions. It follows on from the increased focus on SDLT compliance by HMRC adopting a risk-based methodology to identify where HMRC compliance activity needs to be directed. Group relief has been identified as a risk area and as a consequence a number of enquiries have been raised. The concern expressed by representative bodies is that, while wholly respecting the compliance process, genuine commercial transactions have stalled in the face of uncertainty over the application of the TAAR to certain common transaction patterns.

Legislative context
FA 2003 Sch 7 para 2 provides for a number of restrictions on the availability of group relief including provisions similar to those applying to Stamp Duty group relief under FA 1930 s42 and FA 1967 s27. SDLT group relief can also be clawed back in certain circumstances, and the clawback rules are subject to

(HMRC website What’s New? 19.08.13)
additional anti-avoidance rules introduced in FA (No 2) 2005 and FA 2008 to combat particular SDLT avoidance schemes entered into by a vendor group prior to sale.

In addition from 20 July 2005, group relief is not available if the transaction is not effected for bona fide commercial reasons or the transaction forms part of arrangements of which the main purpose, or one of the main purposes, is the avoidance of tax (FA 2003 Sch 7 para 2(4A)). ‘Tax’ means in addition to SDLT, Stamp Duty, Income Tax, Corporation Tax and Capital Gains Tax (Sch 7 para 2(5)).

The aim of the measure and the context in which it was introduced was considered by the Economic Secretary to the Treasury during the Finance Bill debates in Standing Committee B of 30 June 2005 at column 298 onwards.

Concern over the breadth of the FA 2003 Sch 7 para 2(4A) and its application to commercial transactions led to the issue of guidance in the form of a list of transactions where group relief would not be denied, now included in the HMRC SDLT Manual at SDLTM 23040. (Guidance on Stamp Duty group relief can also be found in SP3/98 and for SDLT in Tax Bulletin 70.)

This list provides examples of where, although a tax advantage might be obtained by the purchaser’s group, SDLT group relief will not be denied subject to the overriding caveat that ‘the transactions do not form part of any larger scheme or arrangement which might have tax consequences’.

In determining whether the transaction forms part of arrangements of which the main purpose, or one of the main purposes, is the avoidance of tax, it is necessary to consider relevant case law.

Whether or not a sequence of steps constitutes avoidance is also informed by FA 2003 ss75A - 75C. HMRC Stamp Taxes acknowledge that deciding to sell shares rather than land so as to pay less tax or SDLT (see paragraph D2.2.1 of HMRC’s General Anti-Abuse Rule Guidance as approved by the Advisory Panel with effect from 15 April 2013) represents a straightforward legislative choice and is not, of itself, objectionable.

**HMRC’s approach**
HMRC’s aim is to give a consistent message to all taxpayers. Where it is possible to identify fact patterns that do not fall within the scope of the TAAR and therefore do not present a risk, HMRC are happy to make this clear. The current guidance including the list of transactions where group relief would not be denied continues to reflect HMRC’s position. However, there are, as always, a spectrum of scenarios involving a transaction or transactions for which group relief may be claimed and in respect of which HMRC may wish to raise an enquiry. In any case where an avoidance scheme is disclosed or there is evidence suggesting the implementation of an avoidance scheme, HMRC will raise an enquiry.

To promote greater certainty in HMRC Stamp Taxes’ approach in the application of Sch 7 para2 (4A) (b), HMRC Stamp Taxes confirmed the following, with the overriding caveat that the presence of steps in addition to those described below may indicate, when taken together, that there are arrangements of which the main purpose or one of the main purposes is avoidance of tax:

- A business may choose to acquire a property-owning company as opposed to acquiring the property from that company. The purchaser may, after acquiring the company, transfer the property out of the company acquired and into a different company in the purchasing group. HMRC do not regard that of itself, and subject to the list of transactions mentioned above, as resulting in the avoidance of tax such that para 2(4A)(b) would be in point, even if the acquisition of the property-owning company and the subsequent intra-group transfer of the property formed part of the same arrangements.

- The purchaser may, after acquiring the company and transferring the property intra-group, liquidate wind-up or strike-off the company acquired. HMRC do not regard that of itself as resulting in, or being evidence of, the avoidance of tax such that para 2(4A)(b) would be in point, even if the liquidation, winding-up or striking-off formed part of the same arrangements that also included the acquisition and the intra-group transfer.

- In the scenarios described above, the para 2(4A)(b) analysis would be the same even if the purchaser only became a member of a group for SDLT purposes as a result of the acquisition of the property-owning company.

(HMRC website What’s New? 7.08.13)

### 3.5 Tax Policy: Wales May be Given Powers to Amend SDLT

The UK Government is planning to allow Wales to replace SDLT with some other type of property tax. This is already happening in Scotland, but a similar move for Wales would have a bigger effect because, unlike Scotland, its border with England is heavily populated.

The Government will consult on the proposed devolution of SDLT to the National Assembly for Wales. Chief Secretary to the Treasury, Danny Alexander has told Parliament.
Following the report by the Commission on Devolution in Wales (Silk Commission), the Government has decided to consult, particularly with the business community, given the populous nature of the border between Wales and England and the potential implications for the construction industry and housing market.

This will further inform the Government’s response to the Commission’s report on increasing the financial accountability of the Assembly and Welsh Government.

Danny Alexander said: ‘This is an important final step to enable us to respond to the Silk Commission’s recommendations. There is a very strong case for devolving fiscal and economic levers to the Welsh Government, but it is right that we fully understand the potential impacts so that we can ensure that the decisions we take are right for Wales and for the UK as a whole’.

Secretary of State for Wales, Rt Hon David Jones, said: ‘The recommendations made by the Silk Commission in Part I of its work have extensive implications not only for Wales, but for the whole of the UK, so it is essential that we give full consideration to all of its implications. All interested parties should take this opportunity to express their views in this short consultation on the potential consequences of devolving SDLT, to help fully inform the government’s response to the Commission’s first report.’

(HM Treasury release reported at STEP UK News Digest 5.08.13)

4. PERSONAL INCOME TAX

4.1 Qualifying Life Assurance Policies

New annual premium limit of £3,600
HMRC have published guidance on the new annual premium limit for qualifying policies with effect from 6 April 2013. These FAQs are aimed at those who have qualifying policies or who are thinking of taking out a qualifying policy and have or will have, periods of residence outside the UK.

(HMRC website What’s New? 30.07.13)

4.2 Pensions: Fixed Protection 2014

Updated guidance, a new tool and forms have been published so that pension scheme members who qualify can apply for fixed protection 2014 of their pension savings lifetime allowance.

You must apply for fixed protection 2014 by 5 April 2014.

Using the Online form
You will need to know your National Insurance number to use the form. Help completing the form is available on screen - wherever you see icons with question marks, additional help and information will appear in a new window.

You cannot save this form and go back to it later.

HMRC will acknowledge receipt of your application by email. Please keep this as proof of your application.

Security of your information
Using this online form to apply for fixed protection 2014 is secure. But any reply to you will not be, so it will not include or request confidential information. If necessary HMRC will reply by letter.

Apply for fixed protection 2014 by post
If you do not want to use the online service, or you do not have a National Insurance number, follow the link to a paper version of this form. Your application must be received by HMRC by 5 April 2014.

(HMRC website What’s New? 12.08.13)

4.3 Pensions: New QROPS Forms

HMRC have published new versions of QROPS (Qualifying Recognised Overseas Pensions Schemes) forms:
- APSS 262 - Transferring UK tax-relieved pension assets
- APSS 263 - Member information.

The forms have been amended due to new Registered Pension Schemes (Provision of Information)(Amendment) Regulations 2013 (SI1742/13).

The new regulations for recognised transfers apply to transfer requests made by the member from 12 August 2013.

For member transfer requests made before 12 August 2013 you may not have the information you
need to complete questions 6 and 9 on new form APSS262.

Question:
- 6 - member’s date of birth
- 9 - the date the member left the UK, if their principal residential address is overseas

If you do not have the information to complete these questions please provide a covering letter to the form stating this. You will only be able to do this up to 12 October 2013. From 13 October 2013 the form must be fully completed.

(HMRC website What's New? 12.08.13)

4.4 Seed Enterprise Investment Scheme: Compliance Statement Updated

HMRC have issued an updated, easier to use version of form SEIS1.

(HMRC website What's New? 14.08.13)

4.5 Charities Online: Sign up by 30 September

HMRC are writing to all charities who have claimed Gift Aid in the last three years to encourage them to sign up for the Charities Online service by 30 September 2013. After this date, HMRC will stop accepting Gift Aid repayment claims on R68(i) forms.

Follow the link to find out about ‘Making a claim using Charities Online’.

(HMRC website What's New? 19.08.13)

4.6 Non-UK Doms: HMRC Suspend ‘Nudge’ Letter-writing Campaign

On 24 July 2013 HMRC announced that they were planning to write to UK resident non-UK domiciliaries who pay tax on the remittance basis, to ensure they were declaring all remittances to the UK. However, they are now reported to have postponed the ‘nudge’ campaign, because the ICAEW (and others) complained that it by-passed the taxpayers’ advisers and was misleading.

The mailing was to be an example of what is sometimes called a ‘nudge campaign’, by which HMRC attempt to remind taxpayers of their duties by ‘educating’ them in their interpretation of tax law. In this case, HMRC were reminding recipients that the part of their foreign income that is remitted to the UK is liable to UK income tax – and that the term ‘remittance’ can cover transactions that the taxpayer might not have expected it to.

HMRC announced their plans to interested parties in an email sent on 24 July, indicating that the letters would be despatched before the end of the month. When the ICAEW learned of this, it immediately complained that this left no time for tax advisers to warn their clients about the letters. In fact, by this time some taxpayer had already received their letters.

ICAEW considers that direct communications of this type from HMRC to taxpayers tend to undermine the relationship between client and agent. More time ought to have been allowed between the announcement of the letter-writing campaign and the sending of the letters, it says. Also, agents should be sent a copy of the letter sent to their client, or at least the letter should warn the taxpayer that his agent has not seen it.

The Institute also drew attention to some slightly misleading statement in the letters, although the mistakes are of emphasis rather than fact.

‘We understand that HMRC has suspended despatch of further letters,’ said the ICAEW statement. ‘A working party is being set up to consider how best to deal with future situations when HMRC wants to contact the taxpayer direct’.

(STEP release, reported in STEP UK News Digest 5.08.13)

Correspondence from the CIOT

The CIOT comments were sent to HMRC 2 August 2013, commenting on the proposed Remittance basis ‘educational nudge letter’. This submission is available below in Adobe (PDF) format, together with:

- HMRC’s Corporate Comms alert on 24 July saying that they were about to send ‘nudge’ letters to taxpayers who are taxed on the remittance basis and who are liable to pay the remittance basis charge;
- [The accompanying remittance basis factsheet;]
- HMRC’s Corporate Comms further alert on 25 July; and
- Draft accompanying letter due to go to taxpayers.

As the HMRC first alert issued to the professional bodies confirmed these were going only to taxpayers, and not, where represented, to their agents, the CIOT immediately reverted to HMRC and objected to agents not being copied in. This seemed contrary to the spirit of the ‘agent protocol’ agreed with HMRC earlier this year when it was agreed that letters would usually go to the agent unless HMRC believes that an agent is not representing the best interests of the client. Concerns were also expressed about the content of the factsheet, hence this attached letter. The CIOT are pleased to note that, when despatched, letters will now be copied to agents.

(CIOT website http://www.tax.org.uk/tax-policy/public-submissions/2013/remittance_basis130802)
Further comment from Peter Vaines
HMRC have written an explanatory letter to individuals who have claimed the remittance basis to assist them in getting their tax returns right by explaining the meaning of a remittance. Given the almost unbelievably complexity of the legislation, Peter thinks this is extremely helpful.

HMRC provide a number of examples where a remittance of foreign income arises in circumstances which perhaps might be overlooked by the taxpayer. However, some of the examples are perhaps a little arguable - and certainly should not be accepted out of hand without further consideration.

For example, HMRC say that a remittance occurs when: ‘You transfer some of your foreign income to the UK account of a registered charity.’

This is certainly arguable, but if you have a choice, it would obviously be safer to pay the money to a foreign account of the charity, if it has one.

Similarly, they say a remittance occurs when: ‘You buy shares in a UK registered PLC from a foreign broker with your foreign income.’

Again this is arguable - although possibly that may be of limited relevance because it is likely to be regarded as a remittance when the investment is sold anyway.

The comments regarding the use of credit cards are interesting. HMRC say that a remittance occurs when: ‘You use a credit card issued by a foreign bank in the UK for day to day expenditure and pay the credit card bill using your foreign income.’

The crucial factor here is the payment of the credit card bill using the foreign income. The reasoning is that you are effectively spending your foreign income in the UK via the medium of a credit card.

HMRC go on to say that a remittance also applies when: ‘You use a credit card issued by a UK bank while on holiday abroad and pay the credit card bill using your foreign income.’

The reasoning here is that the use of the UK credit card creates a debt in the UK and the discharge of that debt by the foreign income represents a remittance.

Accordingly, for those wishing to avoid problems with remittances it is obviously preferable to ensure that any UK credit card is discharged by funds which are not foreign income; similarly it would be best to avoid using any foreign credit cards in the UK.

(Squire Sanders UK Tax Bulleting July 2013 pp7-8)

4.7 Statutory Residence Test
HMRC’s Guidance Note revised
HMRC have issued a 106 page Guidance Note reflecting the new SRT that was legislated in FA 2013.

(HMRC website What’s New? 28.08.13)

Flow charts prepared by Tolley Exam Training
In the latest issue of Taxation Editor Mike Truman introduces three flow charts on residence from Tolley Exam Training:
1. Residence Flow Chart Part 1
2. Residence Flow Chart Part 2
3. ‘Only or Main Home’ Flow Chart

(Taxation 29.08.13 pp15-18)

5. BUSINESS TAX

5.1 Deductibility of Temporary Accommodation Costs for Actor (Healy)

Mr Healy is a professional actor who lives in Cheshire with his wife. He accepted a role in a play at a London theatre. He rented a flat which was just over a mile from the theatre. He claimed a deduction of £32,503 in respect of the rent of the flat, and also claimed deductions of £8,174 in respect of travelling (by taxi) and subsistence (meals in restaurants). HMRC rejected the claim and Mr Healy appealed.

The First-tier Tribunal (FTT) held that the expenditure on restaurant meals was not wholly and exclusively for the purpose of his profession, and Mr Healy had not submitted sufficient evidence in support of his claim for taxi fares, so these items were not deductible.

With regard to the rent of the flat, Judge King allowed Mr Healy's appeal, but the Upper Tribunal remitted the case for rehearing, observing that 'the FTT needed to consider whether, in all the circumstances of the case, the sole purpose for renting the flat was in order to carry on his profession of an actor'. If that had been Mr Healy's sole purpose, the expenditure would be deductible, but if there was a dual purpose, the expenditure would not be deductible.

Why it matters
The Upper Tribunal held that the FTT had erred in law, and remitted the case for rehearing. Part of the Upper Tribunal decision appears to suggest that the actor's 'subjective purpose' should be conclusive, although this suggestion appears to be inconsistent with the House of Lords' decision in the well-known case of Mallalieu v Drummond [1983] STC 665, where the majority of the HL held that Miss Mallalieu's subjective purpose was not conclusive.

(HMRC v Healy, reported at The Tax Journal 9.08.13 p4)
5.2 Disincorporation Relief: HMRC Guidance

Disincorporation Relief was introduced from 1 April 2013 and is a form of roll-over or deferral relief. It allows a company to transfer certain assets to shareholders who continue the business in an unincorporated form, without the company incurring a Corporation Tax charge on the disposal of that asset.

This guide explains when Disincorporation Relief can be claimed and how to make a claim.

Who can claim Disincorporation Relief?
A company and its shareholders can make a claim for Disincorporation Relief if:

- the company transfers its business to some or all of its shareholders;
- the transfer is a 'qualifying transfer'; and
- the transfer occurs between 1 April 2013 and 31 March 2018.

The business transfer date is normally the date on which the business is transferred, but this can be different where the business is transferred under contract.

The business can be transferred to individuals who are in partnership but not to members of a limited liability partnership. They must continue to run the business after the transfer.

What is a ‘qualifying transfer’ for Disincorporation Relief?
The business transfer by the company will be a ‘qualifying transfer’ for the purposes of Disincorporation Relief if it meets all the following conditions:

- the business must be transferred as a going concern;
- the business must be transferred together with all the assets of the business or together with all the assets of the business apart from cash;
- the total market value of the qualifying assets at the time of the transfer must not be more than £100,000;
- the shareholders that the business is transferred to must be individuals; and
- those shareholders must have held shares in the company throughout the 12 months before the transfer.

Qualifying assets are interest in land (other than land held as trading stock) and goodwill.

If the company has goodwill in relation to a business that commenced on or after 1 April 2002, or you acquired goodwill from an unrelated party on or after 1 April 2002, please refer to the detailed guidance in the Corporate Intangibles Research & Development Manual.

How does Disincorporation Relief work?
Transfers of assets between a company and its shareholders are normally transfers between connected persons or related parties. Usually transfers between connected persons or related parties are on the market value basis - the transfer is taxed on the market value of the asset regardless of the amount paid. This could result in the company having to pay a Corporation Tax charge where the asset is worth more than its original cost or its tax written down value.

A claim to Disincorporation Relief allows qualifying assets to be transferred below market value, so that no Corporation Tax charge arises to the company. The shareholders accept the reduced transfer value for all future capital gains computations.

Please note: shareholders may still be liable to Income Tax or CGT on the transfer of assets to them by the company. Shareholders may also be liable to CGT, as usual, on a future sale of the assets.

Claiming Disincorporation Relief
A claim for Disincorporation Relief must be made jointly by the company and all the shareholders to whom the business is transferred. The claim must be made within 2 years of the business transfer date.

As claims are made jointly by the company and shareholders, a claim cannot be made if the company has already been closed down (struck off or wound up).

The claim must include:

- the name, address, Unique Taxpayer Reference and company registration number of the company;
- the name, address, Unique Taxpayer Reference (if available) and National Insurance number of each shareholder to whom the business has been transferred;
- the transfer value of each qualifying asset for each shareholder to whom the business has been transferred;
- the date of the business transfer; and
- a declaration that the business has been transferred with all its assets, or with all of its assets apart from cash.

Where the company is required to complete a Company Tax Return, claims should be made as part of the Company Tax Return for the period in which the business is transferred. Claims submitted as part of the online filing process should therefore be made by including the claim as a PDF document, attached to the Company Tax Return. Alternatively, if a notice to file has not been received or you wish to amend your Company Tax Return, you can write to the company's Corporation Tax office to claim the relief. The claim must contain all the required information.
Once a claim to Disincorporation Relief is made, it cannot be revoked.

The transfer values apply to transferor and transferee. Transferee shareholders must use the same transfer value in future Capital Gains Tax calculations.

(HMRC website What's New? 13.08.13)

5.3 Pensions: Asset-Backed Contributions Draft Guidance

Context
HMRC have issued a 25 page note, updating their guidance relating to employer asset-backed pension contributions (ABC arrangements).

Introduction
Employers are generally able to claim relief for contributions paid to a registered pension scheme subject to general taxation rules. Relief is available for monetary contributions that are paid to a scheme as opposed to a contribution made in asset form. As explained in the Registered Pension Scheme Manual at RPSM 05102035, it may be possible to structure a transaction so that a monetary contribution is achieved without the need for cash to pass between the employer and the pension scheme.

With effect from 29 November 2011, employers are not able to claim relief at the time of payment if they make contributions using certain asset-backed contribution arrangements. This guidance explains how to identify such asset-backed contribution arrangements and how to determine whether upfront relief is available. This guidance also covers the special rules that affect asset-backed arrangements that existed at 29 November 2011 and the tax consequences of changes that are made to asset-backed arrangements.

What is an asset-backed contribution (ABC) arrangement?
These are arrangements that allow an employer to use non-cash assets to underpin and/or act as a guarantee for regular income stream payments to the pension scheme. These arrangements do not usually result in the outright disposal of an asset to the scheme.

In a simple example, an employer makes a contribution to a pension scheme. The pension scheme immediately uses the contribution to acquire from the employer a property with a predicted rental stream. The terms of the disposal contain an option by which the property reverts to the employer after, say, 15 years.

The amount of the pension contribution is equal to the value of the property interest disposed of. This will be equal to the net present value of the income stream the pension scheme expects to receive over the 15 year term. In effect, the pension scheme has immediately lent back the value of the pension contribution it received. This ‘loan’ will be repaid by the income stream payments over the term of the arrangement.

In a more complex arrangement, the property (or other income-producing asset) is transferred into a partnership. The employer or connected persons will be members of the partnership. The employer makes a contribution to the pension scheme which the pension scheme then invests in the partnership. The amount of the employer contribution and the capital invested will be determined by the net present value of the anticipated income stream attached to the partnership interest the pension scheme acquires. Typically, the majority of the income stream will flow through to the pension scheme’s interest.

This more complex structure is frequently used in pension funding arrangements due to other pensions legislation (non-tax) that governs the amount of investment into employer-related assets that can be made by pension schemes. Structures can also include two tier partnership structures where the income-producing asset is held in the lower tier whilst the pension scheme acquires an interest in the higher tier. The diagram below reflects this type of structure. Companies A, B and C will be within the employer group. The diagram reflects that the top tier partnership tends to be a Scottish Limited Partnership (SLP).

Asset-backed contribution arrangements can be attractive to the employer as they are able to address pension scheme funding issues immediately without having to commit cash. It also allows the employer to effectively retain the benefit of the capital growth of the asset. The pension scheme will have a guaranteed income return on their investment. If the employer defaults on payment, the scheme is usually able to take full ownership of the asset. This can make these arrangements more attractive to the pension scheme than a straightforward funding schedule with the employer which typically will agree the contributions to be paid over an 8 year period but will not have an underlying guarantee if the employer has financial difficulty.

Why are there special rules for ABCs?
There was a concern that some of the structures being used to provide ABCs could potentially result in the employer receiving tax relief on amounts in excess of the amount that was ultimately received by the pension scheme over the term of the arrangement. The object of the changes is to ensure that such advantages are eliminated.

(HMRC website What's New? 16.08.13)
6. EMPLOYMENT

6.1 Employment-Related Shares & Securities Bulletin No 9

Context
The August 2013 issue of the Bulletin contains articles on:

1. Employee shareholder
   [See Item 6.4 below]

2. Guidance on FA 2013 changes to tax advantaged share schemes
FA 2013 made a number of changes to the tax advantaged share schemes following the recommendations made by the Office of Tax Simplification. In summary these changes include:
   - Removal of the statutory £1,500 annual dividend reinvestment limit for the Share Incentive Plan (SIP).
   - Greater flexibility around the share price to be applied for shares awarded during SIP accumulation periods.
   - Changes to the rules concerning retirement and tax advantaged early exercise of Save As You Earn (SAYE) and Company Share Option Plan (CSOP) options, or the withdrawal of shares from SIP.
   - Broad alignment of the ‘good leaver’ rules for SIP, SAYE and CSOP.
   - New tax advantages for SIP, SAYE and CSOP participants on certain cash takeovers of a company.
   - Removal of the prohibition of the use of certain restricted shares in SIP, SAYE and CSOP.
   - Removal of the material interest rules for SIP and SAYE, and alignment of the material interest percentage for CSOP and Enterprise Management Incentives (EMI) at 30%.
   - EMI participants will now have 90 days following a disqualifying event to exercise EMI options with tax advantages.

Most of these changes are effective from Royal Assent to the Finance Act 2013 on 17 July. Detailed guidance on these changes will be published shortly.

3. Revised SAYE prospectus

4. Valuation of shares on Long-term Incentive Plan (LTIP) vesting
ERSM 220060 sets out HMRC’s approach to the valuation of shares in cashless exercise situations involving options. It recognises that in some situations the sale of shares to cover the exercise price payable in respect of the option, and any tax and NIC due, may extend into the day following the exercise; and says that the actual sale price achieved may be taken as the market value of the shares at the time of exercise in this situation. It also says that, where there are a large number of sales extending over one or two days, the average sale price achieved may be taken as the market value of the shares acquired by each individual employee.

HMRC have recently been asked whether this approach may also be adopted in situations not involving options, for example where large numbers of shares vest at the same time under an LTIP. ESSU and Shares and Assets Valuation are happy to confirm that the treatment set out in ERSM 220060 may also be applied in such situations. The ERSM will be updated as soon as possible to reflect this.

ERSM 220060 also makes clear that where sales of shares extend beyond Day 2 the statutory valuation approach in section 272 TCGA 1992 needs to be followed. There is no change to HMRC’s position in this respect.

5. Employee ownership guidance

6. Quick Response to enquiries trial – summary review

7. Self-certification of employee share schemes
As part of HMRC’s work to develop self-certification and online filing arrangements for SIP, SAYE and CSOP, they are visiting a number of companies and scheme administrators who have kindly offered to show them how they process employee share scheme information. This is enabling HMRC to develop a better understanding of how share plans are administered by taxpayers, which is being reflected in their development of the proposed new arrangements.

HMRC’s aim is to move away from the current approach which requires taxpayers to provide detailed information about their employee share schemes on paper forms. HMRC’s proposed approach will allow customers, if they wish, to complete the online form as transactions take place, and will be focused on the collection of information that adds greatest value to HMRC’s compliance activity. Initial details on the proposed self-certification and online filing process were set out in Bulletin No.8, and further updates will follow in due course.

(HMRC website What’s New? 8.08.13)

6.2 Real Time Information - Reconciling PAYE Charges

HMRC have received feedback that some PAYE schemes have experienced difficulties in reconciling the difference between:
   - the tax HMRC say is due, and
   - the tax they think is due.

HMRC have set up a dedicated team to identify the cause of these discrepancies.
The team is working with a number of PAYE schemes to work through their examples to examine what is causing these discrepancies, and then to resolve them.

This will also enable HMRC to:

- understand the issue in greater depth, and
- take the steps necessary to prevent them arising in the first place

Each time HMRC identify a root cause, they will update their guidance, where appropriate, as soon as possible. HMRC have already updated the ‘View your current PAYE payment and submission position’ section of their guidance for employers using HMRC’s PAYE Online, to make it clearer when they update this information, and what information will be available at any given time.

(HMRC website What's New? 12.08.13)

6.3 Simplifying the Benefits System

The complex system for reporting and taxing employee benefits and expenses is ripe for a complete overhaul, an interim report from the Office of Tax Simplification (OTS) concluded.

The report identifies some issues for further study, such as payrolling of benefits, abolishing the £8,500 higher-paid threshold, and smoothing the differences between tax and National Insurance rules. The OTS will focus on four core areas in the coming months:

- HMRC’s administration of the system including the PHID form;
- travel and subsistence;
- accommodation; and
- termination payments

In addition, the report made 43 suggestions for quick simplifications. These include streamlining the cycle to work scheme, aligning tax and National Insurance treatment of mileage rates over 45p, changes to the HMRC forms and publishing a list of items that automatically qualify for a ‘dispensation’.

John Whiting, tax director of the OTS said: ‘It is clear that the current system for reporting expenses and benefits is simply not working well for employers or employees and also, in many cases, HMRC. Time and again - through our workshops and in submissions - people have told us that the rules around travel and subsistence, accommodation or HMRC administration, are causing them problems and costing them time.

‘We are now looking to develop workable ideas that will make things easier for everyone, with the aim of significantly reducing the 4.5m P11Ds completed annually. We will be putting those proposals forward in our final report to the chancellor before the next budget.’

This report marks the halfway stage of the OTS's review of employee benefits. Final details of the next stage will be agreed with Treasury ministers over the summer and final recommendations will be reported before the next budget.

Comments are invited and should be emailed to: ots-employee.benefits@ots.gsi.gov.uk.

(Taxation 29.08.13 p5)

6.4 Employee Shareholder Status Goes Live on 1 September

The employee shareholder, a new employment status, is available from 1 September 2013. Employee shareholders will give up certain employment rights and in return they will be awarded at least £2,000 of shares in their employer or parent company.

FA 2013 provides tax reliefs for employee shareholder shares. In summary:

- Income Tax and National Insurance will usually not be chargeable on the first £2,000 of share value received by an employee shareholder.
- There will normally be CGT exemption for £50,000 of shares received by an employee shareholder.
- When an employer funds the costs of the independent legal advice received by a person considering an employee shareholder offer, this will not usually be a taxable benefit.

Businesses awarding employee shareholder shares may propose a share valuation to HMRC's Shares and Assets Valuation team in advance of the award. Where possible, HMRC will agree this valuation for tax purposes, and this agreement will be effective for 60 days. There is no requirement for businesses wishing to offer an employee shareholder contract to obtain HMRC approval or agreement before doing so.

Employers that have awarded employee shareholder shares should provide details on HMRC form 42 (employment-related securities). The form will be amended to include a section relating to these share awards.

More detailed guidance on the tax treatment of employee shareholder status will be published on the HMRC website.

(Taxation 29.08.13 p5)
7. NATIONAL INSURANCE

7.1 Actors' Payments are Salary (ITV Services)

In April 2009, HMRC ruled that actors engaged by ITV, the taxpayer, under certain types of contract were to be treated as employed for National Insurance purposes and that ITV was liable to secondary class 1 NIC on their earnings under Social Security (Categorisation of Earners) Regulations 1978 (SI 1978/1689), Sch 1 para 5A(d), as amended by Social Security (Categorisation of Earners) Regulations 1998.

HMRC’s decision applied to ten different types of contract used by ITV. Six of those contained a term which entailed the actor to receive an attendance day payment to cover post-synchronisation sessions after filming had been completed. Three contracts included a right to production day payments at a fixed rate for each day worked beyond the first. The remaining ‘all rights contract’ required the actor to attend filming on specific dates, for which a fee was paid.

ITV appealed to the First-tier Tribunal which held that, apart from actors engaged under the ‘all rights contract’ who were not employed earners, payments made under the other contracts were salary, and therefore subject to employers’ NI, because they were calculated by reference to the total number of days the actors were ‘on call’, and being on call was work.

The Upper Tribunal upheld that decision, so ITV appealed to the Court of Appeal. The Court of Appeal said the condition in para 5A(d) would be satisfied if the payments due to the actor were made by reference to the time for which work was to be done. The court held that an actor was only working when performing, and that payments calculated by reference to the days on call were not therefore salary. However, it agreed with the previous tribunals that apart from the ‘all rights contracts’, the possibility of post-synchronisation payments constituted salary, and the wording of the contracts to be ‘inclusive’ of daily rates on performance days also made them salary. ITV was therefore liable to pay secondary class 1 National Insurance on them.

The taxpayer’s appeal was dismissed.

Taxation commented that it takes only one element of salary within the payment to ‘taint’ it all. However, the case indicates that minor changes, such as a further lump sum for post-synchronisation work if needed, and saying that the contract ‘replaced’ the daily rates otherwise payable, could well have taken the contracts outside the scope of National Insurance.

(‘ITV Services Ltd v CRC, Court of Appeal, 23 July 2013, reported in Taxation 1.08.13 p6)

7.2 Software, NICs and Pensions

Another fact every accountant should know is: a taxpayer is required to pay NICs only until he/she reaches State Pension Age (SPA).

The cut-off date for NICs Class 4 is actually the end of the tax year in which the taxpayer attains SPA, as Class 4 is assessed on an annual basis. Class 2 and Class 1 NICs are assessed weekly so the stop-date for those classes is the pay period or week in which you reach the SPA.

But what is the taxpayer’s personal SPA? This is no longer the same age for all men or all women. The SPA for women is gradually being moved up from 60 to 65. Once aligned, the SPA for both men and women will move to 66, and then onwards and upwards.

If you have self-employed clients who are aged over 60 you should check their SPA on the online state pension age calculator, before finalising their tax returns. Do not assume that your tax return software has used the right SPA date when calculating the class 4 NICs due for the tax year.

A separate software glitch concerning occupational pensions is causing some problems with RTI returns.

The full payment summary (FPS) includes a field to indicate the annual amount of occupational pension paid. When this field is completed with 0.00, HMRC assumes that an occupational pension is in payment for that individual, but no payment was made for that tax year so far. If the individual is not entitled to a pension payment at all the occupational pension field should be left blank.

The knock-on effect of including 0.00 in the pension field is that student loan deductions could cease. This could have a significant effect on younger employees. HMRC have said they have picked up all the incidences of incorrect completions of the pension field, but it is worth advising your payroll staff and clients to look out for this trap.

(Mark Lee 3 Topical Points 22.08.13)

8. VAT & CUSTOMS DUTIES

8.1 TOGC: Business or Mere Assets? (HQ Graphics)

In May 2011, the taxpayer, HQ, bought printing machinery and office equipment from Nowelle. The latter was about to go into liquidation and was majority owned by HQ Nowelle included VAT in the price of the assets sold to HQ which reclaimed the VAT as input tax.
HMRC refused the claim to recover input tax, saying the sale constituted a transfer of a going concern. HQ had many of the same customers as Nowelle, and operated from the same premises. Most of the employees had previously been employed by Nowelle and the director had also been a director of Nowelle.

HQ appealed, saying it had not purchased Nowelle's business, just assets.

The First-tier Tribunal found that printers and office equipment were transferred to HQ from Nowelle. In addition, 15 of Nowelle's 22 employees began work with the taxpayer, which operated from Nowelle's premises. Many clients moved across to the taxpayer.

The combination of these factors led the Tribunal to conclude that the transaction amounted to the transfer of Nowelle's business as a going concern and was outside the scope of VAT. On that basis, the supply of machinery and equipment from Nowelle to HQ should not be treated as a supply of goods or services. HQ’s appeal was dismissed.

HQ also argued that Nowelle had accounted for and paid output tax of £13,000 and therefore it would be incorrect for HMRC to disallow the input tax claimed by HQ, otherwise HMRC would be unjustly enriched. Neil Warren, independent VAT consultant, said: 'There is no statutory requirement for HMRC to adopt this approach and Nowelle owed over £9,000 of VAT. The transfer of a going concern rules can be a very grey area of the VAT legislation and a key approach is to remember that substance over form is the relevant consideration.'

(HQ Graphics Ltd v HMRC (2013) TC 2640, reported at Taxation 1.08.13 p6)

8.2 Avoidance Scheme: No ‘Abuse’ Rules CA (Pendragon)

The facts
An accountancy firm advised a group of companies to enter into a complex scheme with the intention of accounting for VAT only on its profit on ‘demonstrator cars’, rather than on their full sale price. Four associated ‘dealership’ companies sold various ‘demonstrator cars’ to three associated ‘captive leasing companies’ under leaseback arrangements. The ‘captive leasing companies’ assigned the benefit of the lease agreements and the underlying cars to a Jersey bank (S), in return for a substantial 45-day loan facility. A month after these transactions, another associated company (PD) entered into an agreement with S to acquire its car hire business. This was treated as a transfer of part of S’s business as a going concern, and therefore as outside the scope of VAT. PD then sold the cars to arm’s length customers under the second-hand margin scheme, only accounting for VAT on its profit margin. HMRC issued assessments on the basis that the scheme was an abuse, applying the principles in Halifax PLC v C&E Comms. They also imposed misdeclaration penalties. The companies appealed.

The First-tier Tribunal reviewed the evidence in detail and allowed the appeals. Judge Shipwright observed that the accountancy firm ‘seemed to think it was selling a means of reducing VAT on demonstrator cars which also involved the provision of third party finance’. However, the subjective aim of the accountancy firm was not conclusive. The main aim of the holding company’s finance director was to ensure that its ‘continued funding needs were met’. Viewed objectively, the principal aim of the transactions was ‘the obtaining of finance’, rather than ‘an abusive VAT advantage’.

The Upper Tribunal reversed this decision but the CA unanimously restored it. Lloyd LJ held that Judge Shipwright had been entitled ‘to come to the conclusion that no element of the arrangement was inserted artificially, and that the arrangements were not abusive or artificial’.

Why it matters
The CA restored the FTT decision in favour of the company, holding that the FTT had been entitled to find that the appellant company had a legitimate commercial aim in entering the relevant transactions, notwithstanding that the accountancy firm which devised the scheme had ‘seemed to think it was selling a means of reducing VAT on demonstrator cars which also involved the provision of third party finance’. As Stephen Herring has observed, the case appears to illustrate the distinction between ‘understandable tax planning undertaken as part of a commercially driven transaction and blatant ‘standalone’ planning approaches which are not derived from the commercial transaction itself’.

(Pendragon PLC v HMRC (and related appeals) reported at The Tax Journal 2.08.13 p4)

8.3 DIY Scheme: Time Limits (Hunt)

Taxpayer Mr Hunt built a new house on a piece of land next to his garage business. He could not afford to engage a builder to carry out all the work so he did most of it himself, but with some help, for example in fitting windows and doors. On completion of the house, he claimed the VAT on materials under the DIY builders’ scheme.

HMRC wrote to Mr Hunt saying that £1,411 of his claim in respect of doors and windows was not allowable. Under the DIY scheme, the service of supplying windows for the new house should have been zero rated. In this instance, the supplier had incorrectly added VAT to its invoice. Mr Hunt appealed.

The First-tier Tribunal ruled that, because no VAT should have been charged on the supply of windows, no VAT could be recovered. This was
‘harsh’ on Mr Hunt, but the Tribunal could ‘do nothing to alleviate this burden’.

Unfortunately, it was too late to approach the supplier for a VAT credit because the original invoice was more than six years old, and it would resist the claim because of the four-year cap.

Mr Hunt’s appeal was dismissed.

Builders who use the flat rate scheme sometimes incorrectly charge VAT on zero-rated jobs and encourage their customers to reclaim the VAT as input tax on their VAT return or through the DIY scheme, said Neil Warren, independent VAT consultant. He explained that under the flat rate scheme ‘tax must be accounted for on zero-rated and exempt sales made by a business, even though no VAT is being charged to customers’. He confirmed that an ‘important principle of both input tax recovery and DIY claims is that HMRC will only repay VAT that has been correctly charged by a supplier in the first place’.

(Paul Charles Hunt v HMRC (2013) TC 2676, reported in Taxation 8.08.13 p6)

9. COMPLIANCE

9.1 Penalty for Late Trust Return Remitted (Rosenbaum)

Teresa Rosenbaum’s executor appealed against a penalty imposed for the late submission of a trust tax return for the year ended 5 April 2012. The return was submitted on paper on 14 January 2013. HMRC imposed a penalty on the basis that paper returns for the year should have been submitted by 31 October 2012. The executor filed an electronic version of the return ten days later on 24 January. He explained that the reason for the paper form had been to submit with it a covering letter confirming that it would be the final return.

HMRC said their guidance stated that ‘if a paper return is filed late, it is not possible to avoid a penalty by filing a further tax return online before 31 January’. The taxpayer appealed.

The First-tier Tribunal said the issue was whether the paper document was a valid return.

In essence, according to HMRC’s practice, this meant the return had to be signed by the taxpayer. The department did not produce the paper return as evidence to the Tribunal and, although the covering letter which referred to a return was provided, this was not sufficient to show that the return was a valid one for the purposes of TMA 1970 s8A.

The taxpayer’s appeal was allowed.

(Executor of the estate of Teresa Rosenbaum (deceased) v HMRC TC2804, reported at Taxation 22.08.13 p7)

9.2 Starting a Trust: When you Need to Tell HMRC About a Trust

HMRC Trusts & Estates are receiving a number 41G forms where the trust is not expected to receive income or make chargeable capital gains. This can lead to the unnecessary issue of the SA900 Trust and Estate Tax Return.

You should tell HMRC as soon as the trust is created if you expect a new trust to:

• receive income
• make chargeable capital gains (profits) from the sale of assets - such as shares, buildings or land - within the next tax year

If an existing trust starts receiving income or making chargeable gains, you need to notify HMRC by 5 October following the end of the tax year (5 April).

There is no need to tell HMRC if a trust is not going to receive any income or make any chargeable gains.

(HMRC Trusts & Estates Newsletter 21.08.13)

10. ADMINISTRATION

10.1 Single Compliance Process (SCP) Briefing Paper for Tax Agents

Purpose

This note explains the outcome of the evaluation of the SCP which has been tested by HMRC.

Introduction

One of HMRC’s top priorities as part of the Spending Review is to relieve the compliance burden on businesses and their agents and increase the efficiency of their activities.

A specially convened sub-group of the Compliance Reform Forum has been working closely with HMRC to develop and trial a new enquiry process. During the design/trial stages, feedback and concerns were considered and agreement was reached on a revised opening approach under which the agent will be contacted in the first instance.

What is the SCP?

HMRC see the SCP as a single framework within which the majority of future small and medium enterprise business compliance checks will be undertaken, catering for both single tax and cross-tax enquiries. It does not apply to Local Compliance Fraud cases (worked under Code of Practice 9 or the Contractual Disclosure Facility), certain types of Avoidance work and work carried out by specialist ‘Alcohol’ teams. The Hidden Economy Group was not part of the SCP trial, but they have subsequently adopted those parts of the process that are appropriate to their line of work.
The framework is designed to concentrate solely on the risks or behaviours identified, using 3 different approaches:

- **desk-based** - for cases that can be worked either by correspondence or over the telephone, as HMRC currently do with Income Tax and Corporation Tax aspect cases and VAT pre-repayment credibility queries;
- **visits** - to provide a simplified and faster route for those cases where a face to face visit is required (visits are distinguished between cases requiring either a 1 or 2 day visit); and
- **evasion** - to address those cases showing evasion characteristics requiring evasion approaches from the outset such as surveillance or unannounced visits.

**Evaluation findings**
The trial concluded on 31 March 2013 and the key findings were:
- direct tax enquiries were concluded more quickly;
- the new process did not slow down the current process of conducting VAT visits and there is scope for further improvements by working some cases via telephone and/or written correspondence;
- 86% of taxpayers responding to the customer satisfaction questionnaire were extremely positive about their experience; and
- agents were complimentary about the new process with 63% of respondents reporting a more positive experience under SCP.

**What happens now?**
The key elements which contributed to improved process times and increased taxpayer satisfaction will be applied in small and medium enterprise cases. These are:
- emphasising the principles of openness and early dialogue - through early discussions around the risks identified and the information/documents required;
- promoting collaborative working by developing a working relationship with the agent or taxpayer at every stage of the enquiry; and
- conducting on-site review of business records, including use of sampling techniques.

HMRC will monitor taxpayer and agent response to the SCP once it is fully implemented to enable them to make further improvements.

SME have already started to use collaborative working as their preferred approach, and will be seeking to speak to the taxpayer (or agent when acting) at the start of the compliance check. There will also be an increase in requests for early meetings, and a drive to undertake records reviews at the same time for Income Tax and Corporation Tax taxpayers. This is already the established practice for VAT and employer compliance.

**What will the SCP achieve?**
HMRC believes that by focussing on the risks or behaviours identified and streamlining the process, the SCP will:
- reduce taxpayer burden by reducing the time taken to complete enquiries;
- focus the intensity of the enquiry so that it is proportionate to the risks identified – concentrating on the rule breakers and potential rule breakers; and
- improve the quality and consistency of enquiry work across SME.

*(HMRC website What's New? 7.08.13)*

**10.2 Non-statutory Clearances**

**Context**
From 8 August 2013, the non-statutory business and non-business clearance regimes have merged to become the Other Non-Statutory Clearance Guidance.

This guidance tells you about the non-statutory clearance service offered by HMRC for all taxpayers and their advisers who need clarification on guidance or legislation for other circumstances.

**HMRC’s clearance service - an introduction**
Before using HMRC’s clearance service you should have first:
- checked that your transaction is not covered by a more appropriate clearance or approval route; and
- considered HMRC’s guidance to see if this answers your question.

**When HMRC will provide advice under this service**
If you have done the following you can ask HMRC for further guidance or advice:
- fully considered the relevant guidance and/or contacted the relevant helpline, and
- not been able to find the information you need, or
- remain uncertain about HMRC’s interpretation of recent tax legislation.

HMRC will then set out their advice in writing.

**When HMRC will not provide advice under this service**
If you ask for advice and HMRC do not provide it, they will tell you why. For example:
- you have not provided all the necessary information - see the checklists at Annex A, B or C for details of what you need to provide;
- HMRC do not think that there are genuine points of uncertainty - they will explain why...
they think this and direct you to the relevant online guidance;
- You are asking HMRC to give tax planning advice, or to ‘approve’ tax planning products or arrangements;
- your application is about treatment of transactions which, in HMRC’s view, are for the purposes of avoiding tax;
- HMRC are checking your tax position for the period in question, in which case you will need to contact the officer dealing with the check;
- any related return for the period in question is final; or
- there is a statutory clearance applicable to your transaction.

What information you need to provide
To help you decide what information is relevant to your application when you write to HMRC, you should use the checklist at:
- Annex A for all transactions other than Business Investment Relief and Business Property Relief (see below) - please head your letter ‘Clearance service’;
- Annex B for advance assurance on Business Investment Relief for non-domiciled persons taxed on the remittance basis - please head your letter ‘Advance Assurance for Business Investment Relief’; and
- Annex C for Inheritance Tax Business Property Relief clearances.

HMRC ask for this information to make sure that they understand the background to your request and where your uncertainty lies. This helps to process your application more quickly.

When you write to HMRC you must be satisfied that the information you give is, to the best of your knowledge and belief, accurate and correct.

Where you should send your application
If you have a Customer Relationship Manager or are already in contact with an HMRC clearance team, please send your application directly to them.

In all other cases, you should send your application to the appropriate address in Annex A, B or C.

When HMRC will reply
HMRC will usually reply within 28 days. But where difficult or complicated issues are involved it may take longer to reply. If this is the case, HMRC will acknowledge your request and tell you when you can expect a full reply.

Sometimes HMRC may need to ask you to provide more information before they can send you a full reply. If so, they will suspend the handling time for your application until you are able to provide them with the additional information that they have requested. HMRC may wish to contact you by telephone for clarification, so it helps if you can provide a day time contact number.

How HMRC’s advice affects time limits, interest and penalties
HMRC’s advice does not affect the date by which you have to pay your tax or send in returns. You may have to pay interest and late payment penalties on any tax that you pay late, for whatever reason.

If you have asked for advice after a transaction has taken place, but not received this by the time your return (or for Business Property Relief clearances - an Inheritance Tax Account) is due to be submitted, then you should still send your completed return in on time. If you send HMRC your return on time, you will not be liable to penalties for failing to make a return. When you receive HMRC’s response, you can, if necessary, amend your tax return as long as you are within the normal time limits to do so.

If you are seeking advance assurance that a proposed investment will meet the requirements of Business Investment Relief, the time limit within which qualifying investment needs to be made remains unaffected.

If you disagree with HMRC’s view of your transaction and complete your return and pay tax in accordance with your own view of the proper tax treatment, then you may not have paid the right amount of tax at the right time. In such circumstances, if your return contains a careless or deliberate error which results in a loss of tax or an inflated claim to repayment of tax, then you may be liable to interest and penalties.

When you can rely on information or advice provided by HMRC
Provided the information you have supplied is accurate and complete, and you carry out the proposed transactions exactly as you describe them, you will generally be able to rely on HMRC’s advice.

What you can do if you disagree
HMRC aim to give you a clear reply to your questions; they recognise that sometimes you may not agree with what they say, or you may not be happy with the service they have provided.

If you disagree with HMRC’s advice, you may complete your return in accordance with your own view of the proper tax treatment, but you should draw HMRC’s attention to the particular entry in your return and explain what you have done.

If you believe that HMRC have failed to take account of some of the material facts set out in your request, please contact the officer who dealt with your application (their details will be on the letter HMRC sent you), explain what facts you feel were overlooked and ask them to look at your request again. If you remain unhappy you can ask for the request to be referred to another officer.
If you are unhappy with the way HMRC have handled your request, please tell the person or office you have been dealing with. If they are unable to resolve the issue, ask for your case to be referred to the complaints manager. For more information, see the link below.

Whether you can appeal
There is no general right of appeal against advice expressed by HMRC, except where rights to appeal are set out in statute. Rather, appeal rights are usually against decisions HMRC take, such as issuing an assessment for underpaid tax or a penalty.

However, some VAT related decisions are classed as ‘appealable decisions’ by statute. The letter HMRC send you will explain whether you are able to appeal and tell you what to do if you disagree with a VAT decision.

( HMRC website What's New? 8.08.13)

10.3 Tempted by Tax Avoidance?

HMRC have issued a five page document with the following introduction and content.

A warning for people thinking about avoidance schemes
The vast majority of people in the UK do not try to avoid tax: they pay the tax they owe when it is due and do not try to bend or break the rules. A small minority of people are lured into tax avoidance schemes by the promise of big tax savings for little cost or effort. But trying to dodge tax carries risks.

HMRC are very successful at tackling tax avoidance and employ teams of tax, legal and accountancy experts to challenge those who try to get out of paying their tax. Anyone tempted to use a tax avoidance scheme should think very carefully about the costs, the disruption caused by having to deal with HMRC enquiries and potentially lengthy litigation, and uncertainty over the outcome they may face as a result.

Contents
• How can I tell if it is tax avoidance?
• If something sounds too good to be true, it probably is
• Look out for the warning signs
• Do not fall for the sales pitch
• HMRC never approve tax avoidance schemes
• Contacting HMRC
• More useful links.

( HMRC website What's New? 8.08.13)

10.4 Publishing Details of Deliberate Tax Defaulters (PDDD)

Context
Subject to certain stringent conditions, anyone who has deliberately defaulted on their tax responsibilities will have their details published by HMRC. HMRC have published their third list of deliberate defaulters who meet those conditions.

HMRC publish details of deliberate tax defaulters - people who have received penalties either for:
• deliberate errors in their tax returns or
• deliberately failing to comply with their tax obligations

The law that allows this is FA 2009 s94.

HMRC may publish information about a deliberate tax defaulter where:
• HMRC have carried out an investigation and the person has been charged one or more penalties for deliberate defaults; and
• those penalties involve tax of more than £25,000.

However, their information will not be published if the person earns the maximum reduction of the penalties by fully disclosing details of the defaults.

HMRC will publish sufficient information to identify the deliberate tax defaulter, the penalties imposed for their deliberate defaults and the amount of tax on which those penalties are based.

HMRC publish this information once these penalties are final. A penalty becomes final on:
• the day after the end of the appeal period if the person does not make an appeal;
• the date when an appeal is finally determined; or
• the date when a contract settlement is made.

The law requires that HMRC do not publish any information about the person for more than 12 months from the date HMRC first publish it.

Please note that each entry relates specifically to the dates listed. The address is the one associated with the published person at the time of the default. It should not be assumed that tax defaults are currently taking place at the published address or by the published person because, for example:
• the published person may have changed their behaviour;
• the published person may no longer be at the published address;
• the business currently at the published address may have no connection with published business; and
• the business currently at the published address may have the same name as the
published business but could be under completely new management.

In order to comply with the obligation in FA 2009 s94(9) that no information may be published for longer than 12 months the lists of deliberate tax defaulters will not be captured for the National Archives.

If you want more information about publishing details of deliberate tax defaulters, you can look at the technical guidance HMRC provide to their officers on this issue.

(HMRC website What's New? 14.08.13)

10.5 HMRC Visits – What to Expect

Context
HMRC have published separate leaflets FFC1 (for England, N Ireland and Wales) and FFC1(S) (Scotland) ‘What to expect when we visit you’, which read as follows:

‘HMRC are visiting you today because you have not paid your debt. This leaflet explains what will happen during the visit, what your rights are and how we will work with you to make sure that the amount you owe is settled.

Why are you visiting me?
We are visiting you because we have already attempted to contact you by post and/or by phone, to advise you that you owe us some money. As we have not received the amount that you owe we are now visiting you to collect payment.

Who am I being visited by?
Only direct employees of HMRC, known as Field Force Collectors, visit our customers. We do not employ debt collection agencies to visit the homes or businesses of customers. All our Collectors carry HMRC ID and will show this to you if you ask to see it.

If you are concerned about whether the person on your doorstep is really one of our Collectors, you can check by phoning the HMRC Verification Helpline on 0300 200 3862 or go to hmrc.gov.uk/contactus/debtcollection

What if I do not agree that I owe you any money?
If you do not agree that an amount is owed, we will check what you tell us. If you believe that you have already paid an amount you will need to provide evidence to support this, for example, proof of payment.

What to expect during our visit
Our Collectors have the right to seize your goods in order to settle your debt. If this happens, they will select the goods from your home or business, list them on an inventory, and then arrange for an auctioneer to take them away. These items will then be impounded until they can be sold at auction. The funds raised, minus any costs, will be used towards settling your debt.

What legal action can the Collector take?
The purpose of every visit is to collect payment in full. If you cannot pay in full, the Collector will ask about assets you own that could be listed to secure the debt. Once any assets have been identified and viewed by the Collector, they will enter the details of these on form C204 Distraint notice and inventory, which includes a Walking Possession Agreement.

The C204 lists:
- the type of tax due
- the amount outstanding
- any costs incurred, and
- the inventory of goods listed.

It should be signed by you and the Collector.

The goods listed remain with you for the period of the Walking Possession Agreement. If you do not pay the debt by the time that the Walking Possession Agreement expires, your case will be passed to an auctioneer, who will remove your goods and sell them at auction.

If you refuse to sign the Walking Possession Agreement the Collector can instantly remove the identified assets. The Collector will arrange for the auctioneers to attend immediately to remove the goods.

What must the Collector legally do?
They must:
- see the goods that are being seized
- leave a copy of the C204 inventory with the taxpayer – this gives the date that the Walking Possession Agreement expires and the address where payment can be made in order to stop the listed goods being removed.

What must I legally do?
You must:
- pay the amount of the debt plus the costs detailed on the C204 to avoid removal of the goods
- allow access to an auctioneer if goods are to be removed.

Future changes From April 2014, under the Tribunals, Courts and Enforcement Act (TCEA) 2007, HMRC will be required to charge taxpayers in England and Wales fees if we have to take enforcement action to collect a debt.

For more information about Distraint and what it means for you, please refer to our factsheet EF1 Distraint, go to hmrc.gov.uk/factsheets/ef1.pdf

For information about bailiffs, please go to www.gov.uk/your-rights-bailiffs.‘

(HMRC website What's New? 12.08.13)
10.6 New Safeguards for Debt Collection Visits

Every year, HMRC have to visit a small number of taxpayers who have not paid their tax or arranged to repay overpayments of tax credits, in order to collect the debt. Visits are undertaken by Debt Management and Banking’s Field Force Collectors and can take place at a taxpayer's home or business premises. Advance warning is always provided to a taxpayer that a visit may take place if a debt is not paid.

However, when faced with an unknown caller on the doorstep, taxpayers may still be concerned. To provide a safeguard against bogus callers in these situations, HMRC have introduced a new Field Force Verification Helpline, so that a taxpayer can easily check whether or not a caller on their doorstep claiming to be from HMRC is, in fact, genuine.

To access the helpline, taxpayers should follow these simple steps:

- Ask to see the Collector's photo ID.
- Make a note of the ID number on the photo ID.
- Call 0300 200 3862.
- Provide HMRC with the ID number you have noted.

HMRC’s operators will then be able to confirm to you whether or not your caller is genuinely an HMRC Collector.

To help to explain the purpose of the visit and the rights and responsibilities of taxpayers, HMRC have also produced a new leaflet. Every taxpayer visited, from 13 August onwards, will be given a copy of this by the Collector on arrival at the customer's premises. This also includes the Field Force Verification Helpline number. The number is also listed at HMRC website.

(HMRC website What's New? 12.08.13)

10.7 HMRC’s Relationship with Tax Agents

HMRC have updated their guidance on the Tax Agent Strategy.

About the Tax Agent Strategy

The Tax Agent Strategy aims to transform the relationship between HMRC and agents by:

- gaining a better understanding of agents and their clients to help HMRC target the right services and communications;
- aligning HMRC and agent processes where possible and enabling agents to carry out more transactions for themselves with minimal HMRC involvement;
- eliminating duplication and reworking - making it easier for agents to do business with HMRC and reducing costs;
- supporting agents in improving services for their clients including tackling the small minority of agents with poor performance more effectively;
- working closely with the agent representative bodies on the development of ‘Agent and Client Statistics’ - previously referred to as ‘agent view' - and through further consultation; and
- making sure that any new systems are joined up, user tested and will benefit agents and HMRC.

In 2011 HMRC published a consultation document seeking views on their proposals - and a second consultation (in late summer 2013) will ask for views on:

- how HMRC can make the most of new digital services to recognise agents’ skills and capabilities;
- what else HMRC can ask agents to do on behalf of their clients; and
- what standards and governance are needed to enable agents to do more

The Agent Strategy Programme

The Tax Agent Strategy sets the direction for the future HMRC and agent relationship. The Agent Strategy Programme has been set up to take this work forward.

New online services for agents

As part of the programme, HMRC will introduce new online services by March 2015 to help you take more control of your clients’ tax affairs. These services will include the introduction of a single, secure process for agents to register with HMRC and obtain a Unique Agent Reference, and a new streamlined agent authorisation process.

HMRC’s ‘Agent and Client Statistics’

HMRC’s ‘Agent and Client Statistics’ will bring together and analyse information held on the department's systems about agents and their clients’ filling, payment and compliance history. The aim is for HMRC to work with agents to help them improve their clients’ compliance and to identify what good agent practice looks like and how it can be shared.

Joint Tax Agent Strategy Steering Group

The Joint Tax Agent Strategy Steering Group (JTASSG) has been set up to steer development of the strategy and make decisions. The group is made up of representatives from the main agent professional bodies and senior HMRC managers.

A separate Agent Strategy Group has also been set up to discuss the views of agents who are not represented on the JTASSG.

(HMRC website What's New? 6.08.13)
11. EUROPEAN AND INTERNATIONAL

11.1 Panama: Double Taxation Convention Signed with Panama

A first-time comprehensive Double Taxation Convention between the UK and Panama was signed in London on 29 July 2013 by The Rt Hon William Hague MP, Secretary of State for Foreign and Commonwealth Affairs and H.E. Mr Fernando Núñez Fábrega, Foreign Minister of Panama.

The Convention generally follows the OECD Model Double Taxation Convention. Important features include exemption from withholding tax on certain dividends and low withholding rates on interest and royalties. The Convention also includes the latest OECD exchange of information article.

The text of the new Convention is available on the HMRC website, and will be published by the Stationery Office as soon as it is presented to Parliament for approval.

The Convention will enter into force once both countries have completed their legislative procedures.

(HMRC website What's New? 29.07.13)

11.2 UK/Switzerland Withholding Tax Agreement: Impact of Reduced UK Income Tax Rates for 2013/14

Item 12 of my Points Arising Note for MTR August stated the following:

For those taking advantage of the Agreement who had settled their past misdemeanours on the basis of the lump sum payment by the relevant financial institution, we were told last year that a rate of 48% for non-dividend income and 40% for dividend income, plus 27% for capital gains would be applied to future income and gains derived from Switzerland. These rates were of course set against the background of marginal Income Tax and CGT rates in the UK for 2012/13, ie just below the UK rates. Since then, the marginal rates of Income Tax have fallen to 45% and 37.5% for non-dividend and dividend income respectively. However, I cannot see that any changes have been made to the rates payable under the Withholding Tax Agreement.

Those to whom I have put the point have agreed that it seemed strange but were not aware of anything in particular. One of my MTR delegates, Carol Haworth of Practical Law Company, has sent me the following:

‘Article 20 of the Agreement provides that:

- HMRC will inform the Swiss Federal Department of Finance (FDF) without delay of any change to the tax rates applicable to income and gains.
- If the UK highest rates of tax on income or gains are amended after the date of signature of the Agreement (6 October 2011), the rates of the withholding tax will automatically be amended by the same number of percentage points unless the FDF informs HMRC in writing, within 30 days of receiving the information above, that it will not do so. Subject to this, the FDF must publish the amended rates and inform Swiss paying agents.

Article 44(4) of the Agreement provides that refusal by the FDF to amend the rates under Article 20 would be a ground for the UK to terminate the Agreement under Article 44(3), which allows either party to terminate at six months’ notice if the other party is deliberately undermining the effectiveness of the Agreement.

The text of the Agreement is available here: http://www.hmrc.gov.uk/taxtreaties/swiss.pdf.

My understanding, therefore, is that HMRC should have informed the FDF of the reduction in the additional rates of income tax from 6 April 2013 (which was announced in the 2012 Budget and enacted in the Finance Act 2012) and that, unless the Swiss objected, the rates of withholding tax on income under the Agreement should be reduced accordingly (by 5 percentage points) from 6 April 2013. I am not aware of any announcement about this, and I cannot find anything about it on http://www.hmrc.gov.uk/taxtreaties/ukswiss.htm or the FAQs at http://www.hmrc.gov.uk/taxtreaties/ukswiss-faqs.htm, which state that they were last updated on 6 December 2011.

I will try to obtain confirmation from HMRC, and let you know if I do. I do not read anything into the lack of an announcement; I remember that it took some time for HMRC to confirm that the agreement had come into force on 1 January 2013 as expected. If you hear anything in the meantime, I would be grateful if you could also let me know. The people most likely to know are probably the Swiss paying agents, but as I am not in practice I do not have these contacts.’

An update from Carol Haworth

‘I have received a reply to my query from Elyot Godfrey, Specialist Investigations, Offshore Coordination Unit at HMRC. He says that the Swiss were informed about the changes to UK tax rates from 6 April 2013. In reply to my follow-up query saying that I assumed that this meant that the Swiss had not objected under Article 20 and so had implemented reduced rates from that date, he said he understood that my assumption was correct!”
He also said that if this appeared not to be the position, either in general or in respect of any particular financial intermediary, he would be happy to receive details so that HMRC could address any concerns in this area.

So it looks as if the rates of withholding tax on income should have reduced by 5 percentage points from 6 April, but it would be useful to confirm that this has happened in practice. I will also pass on to the private client PSL forum.’

(Email to me from Carol Haworth of 14.08.13)

11.3 International Agreements to Improve Tax Compliance

HMRC have published updated guidance notes to accompany The International Tax Compliance (United States of America) Regulations 2013. These reflect the 6 month deferral of the commencement of FATCA until 30 June 2014 and other changes made following informal consultation.

(HMRC website What's New? 14.08.13)

12. RESIDUE

12.1 HMRC Review of Tax Avoidance Disclosure Regimes

HMRC are conducting a full review of the UK’s disclosure regimes - the Disclosure of Tax Avoidance Schemes (DOTAS) regime and the VAT Disclosure Regime.

This review will consider the success of the regimes since their introduction in 2004, how they are operating against policy objectives, levels of compliance with the regimes and the burden they place both on taxpayers and HMRC.

HMRC are due to complete the review by 31 March 2014.

How you can help
HMRC are asking anyone with experience of either DOTAS or the VAT Disclosure Regime to help them by answering a short questionnaire on the regimes. Your experiences are important in helping HMRC form a more complete, objective view of the disclosure regimes.

All responses to questionnaires will be anonymised and held confidentially. Questions do not relate to specific discloseable schemes or arrangements. Responses will be analysed collectively and information provided will not be used by HMRC beyond the scope of this review, or to identify individual promoters or users.

How to share your views
Please follow the link to access the questionnaire.

Review of tax avoidance disclosure regimes questionnaire

In order to guarantee that your feedback is included in the review, HMRC asks that you complete the questionnaire by Friday 20 September 2013.

(HMRC website What's New? 8.08.13)

12.2 Disclosure Regime: Scheme Reference Numbers Withdrawn

Changes to the disclosure rules announced in Finance Act 2008 provided HMRC with the power to give notice of the withdrawal of a SRN issued under FA 2004 s311. This power will be used at the discretion of HMRC.

From 28 June 2013 29540238, 83881673, from 8 July 2013, 94248822, 38100507, from 30 July 2013, 08362748 have been withdrawn.

(HMRC website What's New? 31.07.13)

12.3 DOTAS Confidentiality Hallmark: Draft Guidance

Draft guidance is published to accompany the current consultation on the confidentiality hallmark. The guidance will be revised once the hallmark is final.

(HMRC website What's New? 21.08.13)

12.4 Consultation: Raising the Stakes on Tax Avoidance

HMRC launched a consultation on 12 August with proposals to tackle tax avoidance, including proposals for information powers and penalties for high risk promoters and for follower penalties (viz, I imagine, for those who would be ‘a follower case in avoidance litigation’). The consultation runs until 4 October (12.08.13).

Comment from STEP
The Government is proposing to force 'high-risk' tax planning promoters to report their schemes to HMRC before launching them, and to disclose names of all users and intermediaries. The minimum penalty for non-compliance will be £1 million.

Resources
Legislation outlined in a consultation document published today aims to ‘make it significantly harder to market avoidance’. It seeks to ‘publicly identify high-risk promoters of avoidance schemes and isolate them from reputable mainstream advisers’, who, say HMRC, are increasingly unwilling to advise clients to undertake tax avoidance. Those who continue to promote avoidance will be expected to be ‘transparent with HMRC about what they are
doing and transparent with their clients about the risks involved in undertaking tax avoidance’.

The principal measures to be introduced are two new information reporting requirements on so-called high-risk promoters. These powers will operate separately from any obligation to provide information under the existing DOTAS (Disclosure of Tax Avoidance Schemes) rules.

The first new power would enable HMRC to make a specific request requiring the promoter to provide information about a particular tax-planning product and its intermediaries and users, or perhaps about a particular type of user.

Under the second new power, HMRC would be able to impose a continuous duty on the promoter to provide details of all of its products, intermediaries and users to HMRC within five days of being asked to do so. An example specifically cited in the HMRC paper is that a promoter could be placed under a duty to inform HMRC about any product it plans to launch, five days before it is launched.

Both types of notice would force scheme promoters to provide a product description, all marketing material, and any agreements that a user must sign when adopting the scheme. They would also require the promoter to reveal the name, address, national insurance number and unique tax reference number of each user, the amount they have invested in the product, full details of any intermediaries, and any fees paid. The minimum penalty for non-compliance will be £1 million.

The consultation paper stresses that the reporting requirements apply only to ‘high-risk promoters’, which it defines as ‘advisers who promote tax avoidance schemes and are not or do not want to be transparent with HMRC’. However, legislation to introduce the proposed new powers would also set out objective criteria to define a high-risk promoter, possibly allowing HMRC some discretion to adjust a particular promoter’s status as high-risk or not. Criteria being considered include that the promoter has previously been late in notifying a scheme under the DOTAS rules; that the promoter has marketed an avoidance scheme that appears to be caught by the general anti-abuse rule; or that the promoter is based overseas.

Being classed as a high-risk promoter will bring several other problems for marketers of tax-planning schemes. For one thing, HMRC will publish the names of promoters which they designate as high risk, along with publicity material designed to warn consumers against their products. Moreover, such promoters will be required to inform all their intermediaries and users that they are designated as high risk. They will have to use a special form of words, prescribed by HMRC, to describe the possible consequences of their high-risk status for the promoter, intermediary and user.

‘Never before have the stakes been raised so high and the disincentives to market and participate in avoidance so strong’, said Treasury Secretary David Gauke.

A second strand to the same consultation concerns new ‘follower penalties’ – measures to encourage users of avoidance schemes to settle with HMRC after the schemes have been defeated in court or tribunal. The consultation is open until 4 October.

(STEP Release, reported in STEP UK News Digest 12.08.13)

Encouraging settlement in follower cases

The second proposal in the consultation document is described as ‘a new way of encouraging faster settlement among users of avoidance schemes that have failed in the courts’. This proposal will (broadly) work as follows:

1. HMRC would first need to obtain what they consider to be an authority, that is, they have been successful in litigation which is not the subject of further appeal, for example, a final judicial decision in relation to a particular avoidance scheme;
2. HMRC would then be able to issue a notice to other taxpayers who have an open enquiry, to the effect that HMRC believes the judgment also applies to them;
3. the taxpayer concerned would then be required, within a set period, to either amend their return, or inform HMRC that they do not think the authority was relevant to their case;
4. the taxpayer would then be subject to a penalty (linked to the amount of tax in dispute) if they did not have a reasonable basis for such a conclusion;
5. if the taxpayer subsequently settles with HMRC, the penalty would be reduced;
6. the imposition of the penalty could be challenged by appeal to the tax tribunal.
7. Although the consultation document is generally couched in terms of members of the same scheme, HMRC have acknowledged that the proposed power to issue a notice does not necessarily need to be so limited provided the facts were sufficiently similar between lead and follower cases.

Comment

The proposals contained in this consultation document are the latest attempt by HMRC to influence behaviours and reduce tax avoidance. The proposed HRP regime appears to be intended to disrupt the business of certain tax advisers whose activities HMRC take exception to. Tackling tax evasion and dishonest tax advisers is unobjectionable. In their current form these proposals are intentionally aimed at tax avoidance, which is of course lawful. The proposals will impact upon tax advisers who are conducting their businesses in an entirely lawful manner, their only
'crime' being that their activities do not meet with the approval of HMRC. If introduced in their current form, one can envisage the HRP regime being challenged in the courts, especially if all the consequences of HRP designation apply immediately, notwithstanding that the promoter is in the process of appealing the designation. In practice, being designated a HRP is likely to have an adverse commercial effect on the business concerned and it will be of little consolation to the promoter that its appeal is ultimately successful as by then the damage to its reputation and business is likely to have already been done.

Responses to the consultation can be sent to aag.consultation@hmrc.gsi.gov.uk

(Release by RPC carried at STEP UK News Digest 27.08.13)

12.5 ATED – HMRC Technical Guidance

HMRC have published a 90 page Technical Guide about ATED, which covers the primary legislation, including the obligations to make ATED returns and the reliefs available.

(HMRC website What's New? 14.08.13)

12.6 Import Duties: Application for Repayment /Remission

HMRC have published a simplified C285 form for use by private individuals when applying for repayment/remission of import duties.

(HMRC website What's New? 22.08.13)

12.7 Succession Law: Inheritance and Trustees' Powers Bill Introduced

Context
The Government-sponsored Inheritance and Trustees' Powers Bill was introduced into the House of Lords in the last week of July. As well as reform of the intestacy provisions, it seeks to extend the jurisdiction of family provision claims.

The Bill is based on recommendations issued by the Law Commission after a long consultation that began in October 2009. In December 2011 it published two draft Bills intended to implement its recommendations. Ultimately, in March this year, the Ministry of Justice published a draft Bill largely following the Commission's recommendations, with some exceptions. Comments were solicited from interested parties.

The principal purpose of the Bill is to reform and simplify the distribution of an estate in England and Wales on intestacy. In particular, a surviving spouse will automatically inherit the estate of an intestate person who dies childless. Where the deceased did have children, the estate is split between surviving spouse and children in definite legacies, doing away with the awkward life interest trust that the existing law of England and Wales (the Administration of Estates Act 1925) currently creates under such circumstances.

This, and related parts of the Bill regarding illegitimate or adopted children, are fairly uncontroversial. So is its alteration of the default powers of trustees to apply the whole of a minor beneficiary's share of trust assets before adulthood, instead of only half as set out in Trustee Act 1925 s32. However, the Bill also includes measures to extend the jurisdiction of family provision claims under the Inheritance (Provision for Family and Dependants) Act 1975 to cases in which the deceased was domiciled abroad. The 1975 Act as it stands does not allow such claims, applying only to deceased persons domiciled in England and Wales.

There was much less consensus regarding this section, and the government had to choose between four options set out in its original consultation paper.

The options are too technical to summarise easily, but essentially the Government has come down in favour of Option 4, under which claims may be made by any dependant who was 'habitually resident' in England or Wales. This, says the Ministry, is at least likely to be relatively simple to apply as a test in most cases, although it creates the problem that the English judiciary will be required to make orders affecting overseas property. This is bound to create difficulties in getting foreign enforcement, as well as the risk of conflict through dual consideration.

'Differing views were expressed over the proposed additional ground of jurisdiction,' said Lord McNally, the Liberal Democrat Justice Minister responsible for the Bill. He said the government had 'robust' reasons for choosing the option it did, even though it was not the most popular choice amongst consultees. [The ministerial statement does not make clear what was the most popular choice. The option favoured by STEP and several others was to use the presence of property in England and Wales as the extra ground of jurisdiction, and to limit 1975 Act claims under this rule to the property within the jurisdiction.]

The Government has decided not to proceed with another of the Law Commission's recommendations, namely that an intestate person's long-term cohabitant should be able to bring a 1975 Act claim on the estate.

(STEP Release, reported in STEP UK News Digest 1.08.13)
Valuation of Goodwill with Trade-Related Property (Hotels, Pubs, Restaurants, Care Homes, Theme Parks etc): Some Practical Suggestions

The Problem
Since FA 2002 we have seen an increasing level of interest by HMRC in the acquisition of trade-related property which is generally valued by reference to its trading potential. This interest has concentrated on two areas, initially that of goodwill, particularly that identified on incorporation and SDLT.

The interest is valuer-led, which is in itself interesting as there is no property based definition of goodwill as it is an intangible asset. The basic premise is that, because this type of property is valued with regard to its trading potential, all goodwill, generated by the activity of the people in the property, is inherent in that property and not capable of separation from it.

This originally came from a Valuation Office Agency [VOA] interpretation of a Royal Institution of Chartered Surveyors [RICS] Guidance Note. In the period 2002/3 to 2008 the VOA contended that for SDLT tax was payable of the acquisition cost of a trade-related property less the value of the chattels [moveables in Scotland]. It further contended that for allocations of fair value under GAAP the acquisition cost comprised the tangible asset and no separable goodwill was available to the acquirer of the entity.

In 2006 the Balloon case was heard and the HMRC applecart overturned. After a couple of years of internal haggling and supposedly four Counsel's opinions HMRC issued a new approach to goodwill in their CGT Manuals in late 2008. The VOA was unwilling to change its view, which had become almost a tenet of faith; and devised a method which effectively allows for a little goodwill in an acquisition for SDLT purposes, in practice not more than 7.5% of acquisition cost to include chattels and no separable goodwill for the purposes of allocations for GAAP. To support this view they cherry picked various parts of the Financial Reporting Standards [FRSJ which go to make up GAAP. After a consultation with the RICS, who rejected their views as being based on misunderstanding and misconception the VOA published their Guidance Note in January 2009.

Taxpayers find themselves under enquiry for SDLT purposes if they correctly include goodwill in their returns on an SDLT 4 accompanying the SDLT 1, as HMRC Compliance are dealing with many of these enquiries. Due to lack of staff at ECSM [Stamp Taxes] taxpayers often find further enquiries opened because of allegedly incorrectly applying the GAAP requirements on other acquisitions which have not been identified and challenged by Stamp Taxes. A further development is that HMRC Compliance is now originating enquiries themselves without an SDLT trigger.

Under a proper reading of the legislation HMRC have no right to open enquiries where the proper procedures of allocating fair value have been followed under GAAP. HMRC have no right to impose a valuation requirement on allocations under FRS 7 and certainly have no right to impose the revaluation approach using existing use value under FRS 15 (which actually specifically says so in a footnote to the valuation section). The SDLT approach is also highly suspect as HMRC and the VOA have never tested their invented approach in litigation. A further development has been to attempt to attack taxpayers where they have split an acquisition into the ownership of property in either an individual's hands or a company's and the acquisition of the business into a trading company. Whilst there is no justification for this in acquisition accounting terms SDLT does have linked transaction provisions and an attack under Schedule 4 to the FA 2003 may be made.

What is even more irritating is that little or no progress can be made in discussions with HMRC or the VOA who vigorously pass the 'technical buck' between themselves and other branches of HMRC and are not allowed to vary from their instructions. There are answers to these problems and responses that can be made to HMRC enquiries that cause them concern, the basic premise of course being wrong in law according to the Court of Appeal.

The Solution?
The HMRC/VOA position originates in the FA 2002 and the introduction of the intangibles regime and the same guidance was then applied to the FA 2003 and SDLT. It is unlikely that the HMRC position will be varied without either litigation or the prospects of litigation.

However, there is a number of steps a taxpayer or his agent can take to safeguard their position. The first question is how does the enquiry emanate, is it SDLT based or CT based? Please remember these are separate taxes and what is agreed or accepted for one does not apply to the other, whatever HMRC may say they have accepted this in other cases, and indeed argued for it when it suits them.

For SDLT there is an initial nine month period from the filing date [30 days after completion] in which HMRC can open an enquiry into any aspect of the return. Thereafter they have a four year period, taken from the date of completion to serve a Discovery Assessment, or longer periods out to 6 and then 20 years for fraud, schemes or negligence on the part of the taxpayer.

An enquiry is usually accompanied by a request for information or an information notice. One should always appeal an information notice with 30 days otherwise there is an open ended requirement to
provide all and any information HMRC require. This information may not exist and this should be brought to HMRC’s attention as soon as possible.

When HMRC produce a valuation figure based on their guidance note one may make an objective judgement as to its impact. It will be very close to the purchase price net of chattels; although there may be an increased SDLT liability, if it is small it may not be worth contesting on the basis of a risk/reward assessment. Do not agree the basis of approach; only make a without prejudice acceptance of the assessment.

If the matter is worth contesting, take expert advice and sit back to wait for a case to be resolved in litigation. However, there are perfectly legal and sensible ways of structuring an acquisition to avoid this problem which should be considered prior to the initial acquisition of the asset and which are not necessarily affected by the linked transaction provisions of SDLT.

If the enquiry is opened by a discovery/assessment, then look carefully at the grounds and again appeal it within 30 days. Chris Hart has had seven out of seven Discovery Assessments withdrawn or overturned to date because they were incorrectly served or formulated.

Where the enquiry is launched by Compliance because either they are dealing with an SDLT based enquiry or they have been trawling for transactions to pursue; the first stage is to ask on what basis the enquiry has been opened. Whilst they will argue a general statutory right the underlying grounds will relate to either FA 2002 Sch 29 or CTA 2009. CTA 2009 s856(3) states;

‘If assets are acquired together, any values allocated to particular assets by the company in accordance with generally accepted accounting practice must be accepted for the purposes of this Part’

This is a change from para105(3) of Sch 29 which used the term ‘shall’ rather than ‘must’. The first stage is to state that as the allocations of fair value adopted for the purposes of the acquiring company’s financial statements are wholly GAAP compliant and not capable of challenge. When this is disputed ask for the specific basis of the HMRC approach and as this is basically wrong it is capable of rejection. HMRC often try to argue that para 105 of Sch 29 or s716(4) which states;

‘In this Part ‘GAAP-compliant accounts’ means accounts drawn up in accordance with generally accepted accounting practice’

gives them a general right of challenge if the fair values allocated for GAAP purposes are not to their liking. This is not the case as a matter of statutory construction the specifics of para 105 and s856 overrule the general content of the earlier sections/paragraphs.

This is a major weakness in the HMRC approach and there is absolutely no right for HMRC to seek to impose a valuation requirement on FRS 7 all actions or to import the specifically excluded revaluation provisions of FRS 15. However, some cases have been opened, on the basis that a principle is involved, although there is effectively no tax at stake because the taxpayer cannot write down the goodwill element. Here again a risk/reward assessment should be made to see if the matter is worth contesting.

In short, whilst you are on strong ground regarding the allocation issues under GAAP requirements the jury is still out on the valuation issues of an SDLT apportionment. Properly argued it is probable that a just and reasonable apportionment approach (as required by FA 2003 Sch 4) could be sustained against the VOA Guidance Note approach. Chris would think the odds currently favour the taxpayer in the ratio of about 60/40.

As far as the GAAP argument is concerned, it is hard to see what credibility it has at all and litigation probably favours the taxpayer in the ratio of 80/20. If litigation against the HMRC interpretation of the GAAP provisions is successful, this probably increases the odds in favour of the taxpayer in an SDLT valuation case to 70/30 as the misquotations from GAAP form a major prop to the VOA valuation approach.

HMRC are allegedly taking Counsel’s opinion on the GAAP issues but this appears to be taking many months to achieve. This possibly means that the advice is not yet HMRC acceptable, and may never be.

(Contribution by Chris Hart of Hart Consulting Ltd, Property Taxation Specialists, chrishart@hartconsulting.co.uk)
APPENDIX

HMRC press releases, notes, notices and statements

1. Double Taxation Convention signed with Panama (29.07.13)
2. New annual premium limit of £3,600 for qualifying life insurance policies – FAQs (30.07.13)
3. Time apportioned reduction for life assurance policies – FAQs (30.07.13)
4. Avoidance: SRN withdrawn (31.07.13)
5. HMRC’s relationship with tax agents (6.08.13)
6. Agent Update 37 (6.08.13)
7. SDLT Group Relief Finance Act 2003 Sch 7 Part 1 (7.08.13)
8. Single Compliance Process (SCP) updated briefing paper for tax agents (7.08.13)
9. Revised Notice 12A: What you can do if things are seized by HMRC (7.08.13)
10. Employment-Related Shares & Securities Bulletin (8.08.13)
11. Other Non-Statutory Clearance Guidance (8.08.13)
12. Tempted by Tax Avoidance? (8.08.13)
13. HMRC review of tax avoidance disclosure regimes (8.08.13)
14. Raising the Stakes on Tax Avoidance (12.08.13)
15. Fixed protection 2014 (12.08.13)
16. New QROPS forms APSS 262 and APSS 263 (12.08.13)
17. New Inheritance Tax forms for Scottish Estates (12.08.13)
18. Real Time Information – reconciling PAYE charges (12.08.13)
19. What to expect when we visit you (version for England, N Ireland and Wales) – (12.08.13)
20. What to expect when we visit you (version for Scotland) – (12.08.13)
21. New safeguards for debt collection visits (12.08.13)
22. Disincorporation Relief (13.08.013)
23. Publishing details of deliberate defaulters (14.08.13)
24. Annual Tax on Enveloped Dwellings (ATED) – technical guidance (14.08.13)
25. Form EMI1 is now available in Word format (14.08.13)
26. SEIS1 – Seed Enterprise Investment Scheme Compliance Statement (14.08.13)
27. International agreements to improve tax compliance – updated guidance notes (14.08.13)
28. Pensions: Asset-backed contributions draft guidance (16.08.13)
29. SDLT: Court of Appal decision (19.08.13)
30. Sign up for Charities Online by 30 September (19.08.13)  
31. Corporation Tax on chargeable gains – Indexation Allowance – May 2013 (19.08.13)
32. Stamp Taxes Bulletin 2/2013 (20.08.13)
33. Draft Guidance on DOTAS confidentiality hallmark (21.08.13)
34. Trusts & Estates Newsletter (21.08.13)
35. Simplified C285 application form for private individuals (22.08.13)
36. Guidance Note: statutory residence test (28.08.13)
37. PAYE for employers: Advisory Fuel Rates updated (29.08.13)

Revenue & Customs Briefs

1. Senior Accounting Office Guidance Updates (19/13 5.08.13)
2. VAT: Withdrawal of the VAT exemption for supplies of research between eligible bodies – announcement on transitional arrangements (21/13 30.07.13)
3. Discounted Gift Schemes: Ten Year Anniversary values for Inheritance Tax and updated guidance on the calculation of transfer values when Discounted gift Schemes are effected (22/13 6.08.13)
4. Guidance on the provision of storage facilities (23/13 9.08.13)
5. European Commission investigation into certain exemptions and reliefs contained within the aggregates levy (24/13 16.08.13)

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