

CHALLENGES GALORE

- CHRIS SANGER LOOKS AT THE NEXT TWO YEARS

BRIEFINGS ON

- PAYE CODING – WHY DO THINGS GO WRONG?
- VAT CHALLENGE – REVOKING AN OPTION TO TAX ELECTION
- AT A LOSS? – TAX AND NIC RULES CONTRASTED



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Welcome to July 2009 *TAXline*.

The Tax Faculty's AGM took place on 16 June, and Paul Aplin handed over the reins to incoming chairman Chris Sanger. In this month's editorial Chris discusses the challenges which the Faculty will be facing over the next two years. There's no doubt that he is in for a busy and demanding time.

As well as welcoming Chris, we congratulate Paul Aplin on the OBE he has been awarded for services to the accountancy profession.

This month also brings some changes to the non-technical staff on the Tax Faculty's team. Zoë Jeakins and Pat Hollamby are moving to new roles within a reorganised ICAEW structure for support staff (see page 25). We wish them both well in their new roles. However, I am very pleased to say that Pat Hollamby's job has not changed in one respect – she will still be doing the typesetting and layout for *TAXline*.

Turning to technical matters, a frequent topic for members' comments and complaints about HMRC is PAYE coding notices. In her briefing this month Angela Williams answers many of your questions and explains what improvements HMRC is aiming to introduce. We also have briefings by Neil Warren about the new opportunity to revoke a VAT option to tax election, and by Peter Arrowsmith about tax and NIC rules for carrying losses forward.

Among the practical points, I would draw your attention to issues where we'd like feedback from members to help us put our case to HMRC. One is HMRC's change of guidance on 'Mansworth v Jelley losses' (Practical Point 147) and the other is the proposed withdrawal of equitable liability (Practical Point 153). Members' feedback is always hugely useful, so if you can spare a little time for this, please do contact us.

Finally, readers will spot an innovation this month – the events details have moved to page 26 and we have an advert on the back page. In these straitened times, the Faculty is exploring ways to use advertising and sponsorship to boost our funds, making use of our publications such as the newswire and *TAXline*.



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CHALLENGES GALORE

Chris Sanger looks at the challenges facing the Faculty over the next two years

Thank you Paul, from us and others ...

Last month's editorial by Paul Aplin looked at the great successes of the Faculty over the last two years under his chairmanship and this was echoed in the Annual General Meeting in June. A huge amount has been achieved through the hard work of Paul and those under his direction. Some of this is apparent to all, but even more is visible to those working on the Faculty's operations – as Paul mentioned in his editorial, he 'favours working behind the scenes', but making sure that the Faculty is 'getting results'.

I'm very pleased to say that Paul's dedication has been recognised beyond the Faculty and not just through the LexisNexis Tax Personality of the Year award for 2007. Paul has been included in the Queen's Birthday Honours list for an OBE, reflecting the contribution that he has given to all those affected by the tax system ... namely all of us.

Future challenges – the HMRC perspective

I'm also personally very pleased with the state of the Faculty as he stands down. The Faculty under his Chairmanship has grown in stature and now receives ever greater respect from parliamentarians and other commentators. This is a very strong foundation for the challenges that face us for the future.

Those at the AGM will have heard of some of the challenges, when Dave Hartnett, HMRC's Permanent Secretary for Tax, spoke to those attending. The primary focus of his talk was the 'Working with Tax Agents' consultation that was launched at the time of the Budget this year. You only have to read the article by Robert Maas in *Taxation* magazine (11 June 2009) to see how controversial this has become, driven by scepticism and distrust on both sides of the debate. Dave stated that HMRC has no interest in managing the behaviour of tax advisers, except where they have stepped over a statutory line. This is a difficult debate, but one which we need to engage in actively.



Chris Sanger

Those wanting to know more on this can see Dave and Simon Norris in action on the webcast that was recorded live two days after the AGM (available on www.webchats.tv/chat/dave_hartnett_review_of_tax_agents).

Of more concern were Dave's remarks on the threats facing the tax system as a whole. He said HMRC had become aware of some organised attacks on the system, where tax returns were submitted and then immediate reclaims requested for huge amounts. Such organised fraudulent activities led to a tightening of controls, delaying repayments and therefore affecting all of us. Following the missing trader frauds, we have to face the fact that our tax system needs to be robust against abuse yet still able to deliver what it needs to for genuine taxpayers. This is a greater challenge than we might otherwise have expected to face.

A positive challenge is the new internal process adopted by HMRC in relation to appeals. The new 'challenge panel' (within HMRC) is designed to ensure that appeals have been reviewed by an independent HMRC panel to minimise the risk that disputes will be taken to appeal where they are not justified. Again the sceptics will note that this is only internal and we will have to measure the output before we know whether any of this will make a difference.

The wider challenges

Paul Aplin noted that his predecessor had told him that, however good your plans are, the thing about running the Faculty was that 'as soon as you take over, something totally unexpected will come up and wreck your plan'. This may well be true and I'm pleased that the Faculty has shown itself able to tackle and even prosper in the light of the challenges of the last two years.

Looking forward, we now face a very different environment from that of two years ago. With debt having doubled to 80% of Gross Domestic Product, the long established role of the tax system, in bringing in a fairly constant level of taxation, is being challenged. In this new world, the tax system will be called on to raise much more revenue than before, to allow repayment of this debt before we lose the benefit of low rates of interest which are helping to make those debt levels affordable. This is clearly a race against time and one that will put pressure on areas that have recently benefited from a benign environment.

But tax is also being used as a tool to help in the short term. The *OECD Economic Outlook – Interim Report* (31 March 2009) identified that, on average among OECD countries, 56% of the fiscal stimulus to tackle the global downturn was being delivered by the tax system. This is a far greater proportion than previous recessions and shows that governments are adopting the mantra that 'tax is a tool of social and economic policy' and that 'tax can send clear signals as to the behaviour that governments wish to encourage'. In this environment, the tax adviser plays an even more important role.

Have your say

Given this perspective, policy makers are expected to face the challenge of where to raise taxes rather than whether to raise taxes. The overall amount can be mitigated, not least by ensuring that the UK continues to be a good place for people to invest in, but that the underlying environment is difficult is hard to dispute.

With this in mind, this year's Wyman Debate on 16 July will focus on the challenge. Entitled 'If taxes have to rise, which goose should be plucked first?' it draws from the observation of Jean-Baptiste Colbert, Finance Minister to Louis XIV that 'the art of taxation is to pluck the maximum number of feathers from the goose with the minimum amount of hissing'. The debate will consider what, in the 21st century, is the right measure to use to evaluate where to raise taxes.

Rather than having a debate against tax rises in all areas, our participants will put forward reasons why their allocated area might be able to shoulder the burden of greater taxes in the future. Through this unusual and contrary approach, we hope to stimulate a vibrant debate that can inform us all of the dangers in each area and help minimise the risks for the future.

The future

With all this happening, I can expect a busy two years as I take over as Chairman and I'm very pleased that David Heaton and Francesca Lagerberg, and Frank Haskew and the rest of the Faculty team, are with me on this journey. I am even more grateful that Paul, having survived his six years on the journey from Vice Chairman through to Chairman, seems to be showing the same enthusiasm that was demonstrated by Francesca in wanting to stay part of the team. This dedication is what makes the Faculty the success that it is. Whatever the future, I'm sure that together, and with your support, we'll overcome the challenges.

Chris Sanger is the Chairman of the Tax Faculty and Head of Tax Policy for Ernst & Young LLP

PRACTICAL POINTS

The Practical Points section includes tips and reminders, short technical notes, and news of recent developments in tax. Contributions from readers are always welcome – email taxline@icaew.com.

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General

133. Tell HMRC online about name and address changes

HMRC has provided a new online form which taxpayers and agents can use to notify HMRC about changes of name and address for tax purposes.

The form can be found at www.hmrc.gov.uk/individuals/change-of-circs.htm, together with information about what security information must be supplied and which HMRC systems will be updated.

This notification method should not be used by taxpayers who are registered for Self Assessment Online, are leaving the UK or have previously been given specific instructions about contacting HMRC.

E-filing

134. E-filing trust returns

We have had reports from members who are experiencing trouble when trying to e-file trust tax returns. We noted this problem in Practical Point 118 last month.

We now understand that there are problems at the Government Gateway and it is not possible to file a trust tax return by internet if it has:

- a beneficiary who has become absolutely entitled; or
- any tax pool brought forward; or
- any management charges or costs.

Clearly this is going to affect a large proportion of returns. HMRC has said that the affected types of return will be placed on its 'Exclusions' list (available on the Software Developers pages on the HMRC website), although workarounds will still be available for those who prefer to use them. Returns covered by the 'Exclusions' will have an extended paper return filing date of 31 January 2010.

As members will recall, the trust return e-filing process is not end-to-end, in that HMRC has to print out and rekey manually into its back end system. This means that many of the benefits to the user of e-filing do not apply to trust returns.

Contributed by Anita Monteith

Personal tax

135. HMRC's National Claims Office

In the continuing saga of how to get repayments on HMRC, the latest *Working Together* bulletin contains some useful information about the National Claims Office which deals with repayment claims for individuals who do not have a PAYE or self assessment source of income.

1. Forms R40 can be sent in by an agent when no 64-8 is in place. HMRC's guidance says repayment should be made as requested and any paperwork will be sent directly to the taxpayer.
2. If you need to send in a 64-8 for your client, send those for claims cases directly to the National Claims Office, Saxon House, 1 Causeway Lane, Leicester LE1 4AA.

This is a different process from the main agent authorisation route where requests should continue to be sent to the Central Agent Authorisation Team (CAAT) in Longbenton. If they are sent to the CAAT office it will cause delay and has led to self assessment records being set up in error.

3. If you are sending in a payment for a claims case, eg for a one-off capital gains tax liability, put the full claims reference on the back of the cheque as well as the National Insurance number. This will ensure the payment is correctly allocated.
4. Quote the full claims reference in all communications. Since Leicester has taken in all the claims cases from around the country certain parts of the reference have been duplicated. It is only the full reference (three digit prefix followed by up to two alpha characters followed by up to five digits) that clearly identifies each individual claimant.
5. Box 1.5 on the R40, which indicates if a capital gain has been made in the year, is often ticked automatically by some software packages where no capital gain has actually been made. This can cause lengthy delays in dealing with the repayment as HMRC has to issue supplementary forms for details of this apparent gain. If you are aware that your software package does this, tell HMRC to disregard the entry in a covering letter.

136. Sherburn Aero Club wins status case

Following on from the *Castle Construction* case (see Practical Point 79 in April 2009), another status case that doesn't involve IR35 has rightly been lost by HMRC.

In one of the first cases to be reported under the First-tier Tax Tribunal reference (although it was heard on 30 March 2009), namely *Sherburn Aero Club Ltd v HMRC Commissioners* (TC6), the flying club engaged flying instructors to provide tuition to its members at its own premises using its own aircraft. The instructors notified the club as to when they were available to take lessons – though this could be changed at very short notice – and they were free to work elsewhere. They had, however, to follow a syllabus laid down by the Civil Aviation authority (CAA) and were subject to the flying orders set out in the Flying Order Book.

The Club treated the instructors as self-employed, but HMRC issued tax determinations and NIC Notices of Decision that they were employees for 2005/06 and 2006/07.

The Club's contentions were broadly upheld in that it was found that there was no mutuality of obligations and that the control test for employment was not met.

Both this case and the *Castle* case seem to reflect both increasing aggression and desperation on the part of the authorities, together with – it seems to me – an increasing lack of understanding of the law, especially in the area of mutual obligations.

Contributed by Peter Arrowsmith

137. 'Arctic Systems' cases not caught by Sch 25 Finance Bill 2009

As readers will recall, the Government wisely decided in 2008 that the proposed income shifting legislation would be deferred. There have, however, been concerns that the draft legislation on the transfer of income streams included in Sch 25, Finance Bill 2009 could be applied in Arctic Systems-type cases.

In the course of the Finance Bill debate on this schedule the Minister, Stephen Timms, said that although individuals do come within Sch 25, 'the provisions will not be applied in situations such as the Arctic Systems case'. He said he thought the legislation puts this beyond doubt but will look at it again.

138. Furnished holiday lettings in the EEA – 31 July deadline

Members are reminded that there is currently an opportunity to make claims for furnished holiday lettings (FHL) status to apply to properties within the European Economic Area (EEA) and there is the scope to go back and amend previously submitted computations.

Landlords with income from furnished holiday accommodation in the UK are currently treated as if they are trading for certain tax purposes, as long as they satisfy the FHL rules. Landlords with income from furnished holiday accommodation elsewhere in the EEA have not previously qualified for this treatment and were treated instead in the same way as landlords of other types of overseas property, under the property income rules.

It was announced in Budget 2009 that this difference may not be compliant with European law and that the Government has decided to repeal the FHL rules from 2010/11. However, until the FHL rules are repealed, HMRC will regard the FHL rules as applying to furnished holiday accommodation elsewhere in the EEA.

For 2007 returns, HMRC has extended the amendment deadline to 31 July 2009 and full details are included in the Technical Note published with the Budget 2009 (www.hmrc.gov.uk/budget2009/furnished-hol-lets-1015.pdf).

Advisers need to reconsider previously submitted computations where appropriate, especially in respect of capital gains, although foreign tax liabilities may make any reduction in the UK capital gains tax liability academic.

Savings and investment

139. ISA changes

HMRC's *ISA Bulletin* 12 covers the new subscription limit for Individual Savings Accounts (ISAs) and some other issues.

The subscription limit increases to £10,200 from 6 October 2009 for people age 50 or over. The *Bulletin* clarifies that subscribers who reach the age of 50 between 6 October 2009 and 5 April 2010 can use the new subscription levels from 6 October 2009 onwards: they do not have to wait until their actual birthday.

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There is also advice about how it is not necessary to reject transfers between ISA managers when there is a minor error in some of the personal information about the investor, but it should be clear that the right ISA is being transferred. One example given is where figures in an NIC number are transposed: the issue can be sorted out between the two managers rather than the new manager rejecting the transfer outright.

Business tax

140. Extension of trading loss carry-back – how to claim

Peter Arrowsmith's briefing on pages 20–21 discusses the extension to the trading loss carry-back provisions in Clause 23, Finance Bill 2009. Members have asked us how they should go about submitting claims. HMRC has advised as follows.

Companies

The new relief applies to losses of accounting periods ending between 24 November 2008 and 23 November 2010 and permits carry-back against total profits of the three years preceding the year of the loss, latest year first.

The claim is in respect of the year of loss and must be made in the tax return for that year. It cannot be made by just amending the return for the earlier year in which relief is to be given before the return for the year of loss has been delivered.

That said, the claim must be made in the return for the year of loss by putting it in a covering letter or on the face of the tax computations, as it is not catered for on the face of the CT600. It would be helpful if the company also sends in a computation showing the utilisation of the loss in the earlier years and the effects on the tax computations for those years, although it is not obligatory to do so.

Unincorporated businesses

For unincorporated businesses the relief applies to unrelieved trading losses of the tax years 2008/09 and 2009/10, which can be carried back and set against profits of the same trade, profession or vocation for three years before the tax year of loss, latest year first.

Guidance is available for SA taxpayers in 2008/09 Help Sheet 227 for losses made in 2008/09 and includes (on page 1, under 'Claims not made in a Tax Return') guidance about early claims for losses made or anticipated in 2009/10:

Please write a letter telling us the name of your trade, how much the loss is and for what period, and say how you want the relief to be given.

Otherwise, claims can be made on the tax return itself.

Contributed by Anita Monteith

Company tax

141. Companies Act 2006

Tax and National Insurance legislation is to be amended so that, from 1 October 2009, it will refer to Companies Act 2006 provisions in place of the corresponding former provisions, which will by then have been repealed.

The relevant instrument – the draft Companies Act 2006 (Consequential Amendments) (Taxes and National Insurance) Order 2009 – and an Explanatory Memorandum were published in June 2009.

142. Qualifying bodies for R&D purposes

A company can obtain tax relief in respect of qualifying expenditure incurred on research and development (R&D) (Part 13 of the Corporation Tax Act 2009). Qualifying expenditure includes expenditure on research and development undertaken on the company's behalf by 'qualifying bodies' as defined in s 1142, CTA 2009. In addition to the categories of qualifying body listed in s 1142, specific bodies can be prescribed as qualifying by Treasury Order.

A recent Order (the Research and Development (Qualifying Bodies) (Tax) Order 2009, SI 2009/1343) lists a range of institutions located outside the UK which are qualifying bodies. It has effect in respect of expenditure incurred on or after 1 April 2002.

143. CFCs – the *Vodafone 2* decision

The *Vodafone 2* case has been decided in favour of HMRC in the Court of Appeal, which reverses the High Court decision in favour of the company (*Vodafone 2 v HMRC* [2009] EWCA 446). As there are several billion pounds 'riding' on the decision, Vodafone is certain to apply for leave to appeal to the House of Lords.

The Court of Appeal decision is that in the light of the judgment of the ECJ in the *Cadbury Schweppes* case, the UK controlled foreign company (CFC) legislation can be considered to be compliant with the EC Treaty. This is on the grounds that it is permissible to 'read across' into the existing CFC domestic legislation an

additional rule to the effect that the CFC legislation will not apply if a CFC 'is actually established in another member state of the EEA and carries on genuine economic activities there'.

There are always a number of twists and turns to these UK/ECJ cases and *Vodafone* is no exception. The case centres around the takeover of Mannesmann in Germany by Vodafone in 1999 and, in particular, the establishment of a subsidiary in Luxembourg which owned the European sub-subsidiary companies in Europe and lent money to those sub-subsidiaries and, in return, earned interest on the loans. The case involves the Vodafone accounting period to 31 March 2001.

HMRC argued that the interest income of the Luxembourg subsidiary should be treated as if it had been received by the UK parent company under the then CFC legislation.

Even if the House of Lords decides in favour of HMRC, that is not the end of the matter, because there will have to be agreement as to whether Vodafone's Luxembourg subsidiary was carrying on 'genuine economic activities there'. HMRC has said (see Simon Davies's article in the 22 June 2009 edition of *Tax Journal*) that it will use the capital/labour tests now contained in ss 751A and 751B, ICTA 1988 to determine whether that is the case, even though that legislation strictly only applies to post-December 2006 profits.

Any UK company with overseas subsidiaries that has been subject to a CFC apportionment needs to make sure that it has kept its options open and made the necessary claims. Either the CFC regime will be deemed to be non-compliant with the EC Treaty or, even if the Court of Appeal decision is upheld, companies will still be able to resist CFC apportionments if they can convince HMRC that the subsidiaries are carrying on 'genuine economic activities'.

Contributed by Ian Young

PAYE and employers

144. P11D dispensations

During a recent meeting, HMRC re-emphasised its commitment to granting P11D dispensations whenever it can. It appears that the message is not getting out and many employers still do not apply for dispensations

when it would save them, their employees and HMRC time and costs if one was granted.

Some employers do not apply for a dispensation because they fear that such an application will trigger an HMRC compliance visit. HMRC assures us that this is not the case. Should an employer receive a compliance visit after submitting an application for a dispensation, please let us know. HMRC has promised to investigate these cases, which should not happen.

HMRC is also keen to allow one-man and very small companies to obtain dispensations wherever possible. It is not HMRC's policy to refuse a dispensation simply because the company has only one or two employees. There may be an accountant who is reviewing all the expense reimbursements when doing the book-keeping or preparing the VAT returns. HMRC has indicated that, if the accountant does review the expense claims claimed and advise where corrections are needed, this would be considered to be an independent check so that a dispensation could be granted. Again, we should like to hear instances of dispensations being refused in these circumstances so that HMRC can investigate.

Contributed by Angela Williams

145. Advisory fuel rates from 1 July 2009

HMRC has published revised Advisory Fuel Rates which take effect from 1 July 2009 (ie they apply to all journeys on or after that date). The new rates are (old rates in brackets):

Engine size	Petrol	Diesel	LPG
1400cc or less	10p (10p)	10p (11p)	7p (7p)
1401 to 2000cc	12p (12p)	10p (11p)	8p (7p)
Over 2000cc	18p (17p)	13p (14p)	12p (12p)

These rates only apply where employers:

- reimburse employees for business travel in their company cars; or
- require employees to repay the cost of fuel used for private travel.

If the rate paid per mile of business travel is no higher than the advisory rate for the particular engine size and fuel type of the car, HMRC will accept that there is no taxable profit and no Class 1 NICs liability. This reflects the fact that they are intended to reflect actual average fuel costs.

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The rates do not apply in any other circumstances. In particular, employees driving company cars are not entitled to use them to calculate a deduction if employers reimburse them at lower rates. Such calculations should continue to be based on actual costs incurred.

146. Tips can no longer subsidise the NMW

The Court of Appeal heard the National Minimum Wage (NMW) case of *Annabel's (Berkeley Square) Ltd* in January 2009 and the decision was handed down in May, in favour of HMRC ([2009] WLR(D) 149). This means that employers should be paying the NMW regardless of any tips, gratuities, service charges or cover charges that are not paid by the employer through the employer's payroll.

In the meantime the new Department for Business, Innovation and Skills (the successor to the Department for Business, Enterprise and Regulatory Reform) has confirmed that the NMW regulations will be amended as planned with effect from 1 October 2009 to make clear that employers may no longer include tips as part of the NMW.

Contributed by Peter Arrowsmith

CGT

147. 'Mansworth v Jelley losses' and HMRC's change of view

HMRC has overturned its guidance in respect of certain share disposals. These disposals had in the past created losses, sometimes referred to as 'Mansworth v Jelley losses'.

This issue affects the disposal of shares acquired before 10 April 2003 by exercising unapproved employee share options. Following the 2002 decision in *Mansworth v Jelley* [2002] EWCA Civ 1829, HMRC originally said that to calculate the gain or loss you should deduct both the market value of the shares at the time the option was exercised and any amount chargeable to income tax on the exercise – a view which many people found surprising at the time. The new guidance (in *Revenue & Customs Brief 30/09*, published on 12 May 2009) says that you should only deduct the market value. The change of view will affect capital loss claims and HMRC has indicated that those affected by the change 'may' need to make or amend a self assessment return or loss claim, without giving more guidance on what this might mean in practical terms.

The Tax Faculty has put some questions to HMRC about the implications of this (published as TAXREP 34/09), and will publish guidance for members on our website as soon as we can. We are also seeking input from members about how many clients are potentially affected by the change.

For more details and a list of the information we require, see our 22 June 2009 news item at www.ion.icaew.com/TaxFaculty/17854. Feedback should be sent to Angela.Williams@icaew.com.

IHT

148. Post-death variations

When an individual dies the distribution of the assets from the estate may be varied from that which was set out in the deceased's will, or even under the intestacy laws where there was no will. The variation is made effective by a deed or deeds disclaiming the gifts or legacies, which is signed by the beneficiaries of the estate. The variation can apply for both IHT and CGT, and is normally treated as if the will had actually been changed (s 142, IHTA 1984 and s 62(6), TCGA 1992).

Such a variation may be used to ensure the IHT nil rate band is fully used, or the surviving spouse receives the bulk of the estate making it free of IHT. There are two conditions for the deed of variation to be effective:

- it must be undertaken within two years of the date of death; and
- it must not be entered into for any consideration in money or money's worth, except where the variation is for beneficiaries to swap assets (s 142(3), IHTA 1984).

In the recent case of *Lau v HMRC* SpC 740, the children of Lau deceased disclaimed their inheritance from the estate of their father in favour of the widow, Mrs Lau. However, the advice letters released by the family's solicitor clearly demonstrated that the legacies would be disclaimed in return for large cash gifts from Mrs Lau to each of the children once the estate was finalised. HMRC successfully argued that the gifts to the children were consideration for the deed of variation, and hence the deed of variation failed for IHT purposes.

It appears that the solicitors advising the Lau family had not fully appreciated the need to keep any subsequent gifts completely separate from the arrangements to make the deed of variation.

From the *Practical Tax* newsletter published by the Tax Advice Network, founded by Mark Lee (www.taxadvicenetwork.co.uk)

VAT

149. Guidance for businesses affected by the Newnham decision

In *Revenue & Customs Brief 33/09* HMRC gives clarification of its policy following the House of Lords' judgment in the case of *The Principal and Fellows of Newnham College in the University of Cambridge* [2008] UKHL 23. It also provides guidance for those businesses affected by the judgment.

The case concerned whether Newnham was 'in occupation' of the college library. If they were, their occupation would be for the purpose of making supplies of exempt education. Consequently, the VAT incurred on the rebuilding and refurbishment of the library would be irrecoverable. The House of Lords upheld the judgment of the Court of Appeal and found in Newnham's favour. They concluded that Newnham was not in occupation and, as a result, that their option to tax was not disapplied.

Businesses that were wrongly denied input tax recovery may submit claims to their local Business Advice Centre. These will be subject to a three-year limitation period (four years from 1 April 2009, subject to a transitional period). All such adjustments or claims must take account of any underdeclared output tax as a result of incorrectly treating the option to tax as disapplied.

Further information about claims can be found in Notice 700/45 *How to correct VAT errors or make adjustments or claims*.

150. Reverse charge accounting – renewal of EU derogation

The reverse charge for mobile phones and computer chips was implemented with effect from 1 June 2007 to remove the opportunity for fraudsters to use these goods to perpetrate missing trader intra-community (MTIC) carousel fraud. As an exception to the normal accounting rules for VAT the UK had a derogation from

EU law to apply this anti-fraud measure, which ran until 30 April 2009. The Government announced in the 2008 Pre-Budget Report that it had applied for a renewal of the derogation.

On 10 March 2009 the European Council of Finance Ministers (ECOFIN) agreed, in principle, to renew the UK's derogation until April 2011. HMRC has now confirmed in *Revenue & Customs Brief 34/09* that the Government's application to renew the derogation was formally agreed by the ECOFIN on 5 May 2009. This decision has been published under Official Journal reference 2009/439/EC.

The agreement has retroactive effect from 1 May 2009 meaning that legal vices for the reverse charge is unbroken.

Enquiries and investigations

151. New Disclosure Opportunity

In the 2009 Budget the Government announced that there is going to be a 'New Disclosure Opportunity' (NDO) which will give the holders of offshore accounts an opportunity to disclose if they have unpaid tax or duties, and to settle arrears with a favourable level of penalty.

HMRC is consulting with representative bodies, including the ICAEW, on the details of the NDO. As yet few details have been officially published, although there has been a lot of press comment. We will issue detailed guidance for members as soon as we can.

In the meantime we are able to tell you the following:

The NDO is for people with unpaid tax connected to an offshore account and will run from 1 September 2009 until 12 March 2010. It will give offshore account holders one final opportunity to disclose and put their affairs in order. Once the scheme starts, taxpayers will have until 31 October 2009 to register and notify their intention to disclose.

The penalty will be 10% if the taxpayer makes full disclosure. However, it will be higher for a person who had the chance to disclose under previous Offshore Disclosure Facility but did not.

The NDO is a final opportunity to disclose in advantageous circumstances – there will not be another one.

PRACTICAL POINTS

www.icaew.com/taxfac

HMRC is currently seeking to obtain details of offshore accounts and assets from hundreds of financial institutions.

Although offshore account structures can be complex, HMRC will make it as simple and straightforward as possible for people to disclose. In addition HMRC want to work with the financial institutions and representative bodies to further simplify the disclosure process.

Those who do not come forward face the likelihood of HMRC contacting them after the disclosure window has closed. If there are unpaid liabilities, this will almost certainly mean a higher penalty at the very least.

Tax payments and debt

152. Paying tax – where to send cheques

We have had reports from practitioners that in the absence of payslips, they do not know where to send tax payments, and it wastes time finding out. We have contacted HMRC which has provided the following useful information.

All tax payments should now be sent to the following address at Shipley:

HM Revenue and Customs Accounts Office
Bradford, BD98 1YY

However, note that cheques will still reach HMRC if either:

- payment is sent to the Cumbernauld address; or
- the old pre-paid envelopes with slightly different postcodes are used.

Speedy and effective processing will be aided if you use the client-specific payslip with the relevant barcode. If the payslip is not available, note that HMRC is shortly going to issue a blank payslip (SA361) which you can use. It will be published on the HMRC website and we will put details in our newswire as soon as it is available.

Contributed by Philippa Stedman

153. Equitable liability – feedback please!

It was announced at the 2009 Budget that HMRC plans to withdraw the non-statutory practice known as 'equitable liability' with effect from April 2010.

HMRC published details of equitable liability in 1995 in *Tax Bulletin* 18. The practice allows HMRC to collect a reduced amount of tax in certain cases, even though there is no statutory right to amend the actual legal liability because the relevant time limits have passed. In essence, it enables HMRC to collect only the 'right' amount of tax where there is good evidence to show what this would have been if returns, etc had been made on time. Its use was perhaps more frequently seen in the days before income tax self assessment, when estimated assessments became final once the appeal period had expired and all other remedies had been exhausted. However, it is still relevant now, for example where HMRC has made a determination and the statutory period for amending it has expired.

More details are in the Tax Faculty's 26 May 2009 news item (see www.ion.icaew.com/TaxFaculty/17683), and in HMRC's Technical Note *Withdrawal of Extra-statutory Concessions* and further statement dated 22 May 2009 (see www.hmrc.gov.uk/news/statement220509.htm).

HMRC says that equitable liability no longer falls within its discretionary power, in the light of the *Wilkinson* decision, and that the practice is no longer relevant under self assessment.

The Tax Faculty is opposed to the abolition of equitable liability, as we believe it still has a role in cases where claims or amendments are time-barred but collecting the estimated amounts would cause considerably hardship. HMRC has said it will still accept late information where there is a 'reasonable excuse', but this test may be a difficult hurdle for some taxpayers, depending on what criteria HMRC applies.

We will be meeting with HMRC to discuss the issue. Meanwhile, some members have sent us their thoughts on this, and we are keen to get more feedback. Have you ever used equitable liability and do you have a view about its usefulness? Please send any comments to jane.moore@icaew.com.

CORRECTIONS AND CLARIFICATIONS

Below are details of corrections to three items in the April and June 2009 issues of *TAXline*.

As Editor it always pains me to discover that we have printed any error, and I would like to apologise to readers for any confusion caused by these three points. Also, thank you to those readers who contact us to point out mistakes in *TAXline* – even if painful, I would far rather know about these things so that we can publish a correction.

April 2009 issue, pages 13–14

Divorce and the family home

We have had a number of comments from readers about the briefing by John Newth on pages 13–14 of April 2009 *TAXline*, and specifically about a point in Example 2.

Example 2 looked at the situation of Mr B, who had moved out of the family home (which had been his main residence) and bought another property. His share of the family home was subsequently transferred to his ex-wife and the example states: ‘no relief for the final 36 months is available, as Mr B had purchased another property’. Members questioned whether Mr B would in fact have been entitled to the exemption for the final 36 months, as the property had been his main residence.

We put the point to John Newth, who has provided the following clarification:

I apologise to readers who have queried the final paragraph of Example 2. I should have explained my statement ‘no relief for the final 36 months is available’ in more detail.

Mr B could, of course, have claimed the ‘36 month’ relief, had he so desired. As some readers have pointed out correctly, s 223(2), TCGA 1992 states that the exemption for the final 36 months is given ‘in all circumstances’.

June 2009 issue, page 15

VAT failure to notify – penalties

One of the points we reported from Rebecca Benneyworth’s talk on VAT at the Tax Faculty conference contained some incorrect dates. The correct version of the point is as follows:

Failure to notify - penalties

New rules for penalties for failure to notify a liability to tax come in on 1 April 2010. Where a trader incurs a penalty for failure to register for VAT, then the penalty regime that applies depends on when the trader first went over the registration threshold. Thus the old regime applies if the trader was liable to register before 1 April 2010 and the new regime applies if the trader was hit the thresholds on or after 1 April 2010.

By way of explanation, although the new penalty regime for incorrect returns started on 1 April 2009, the appointed start date for the new penalties for failing to notify in Sch 41, FA 2008 is 1 April 2010 (see the Finance Act 2008, Schedule 41 (Appointed Day and Transitional Provisions) Order 2009, SI 2009/511).

Therefore, the penalty for failure to notify a liability to VAT depends on whether the person first went over a registration threshold before 1 April 2010 or on or after that date – not 1 April 2009.

It is very rare that an expert lecturer like Rebecca slips up on any point of law, but it happens to the best of us (and the Editor missed it too). Rebecca would like to convey her apologies to readers.

June 2009 issue, page 21

Trusts: the going gets tougher!

A very unfortunate typo appeared in Malcolm Gunn’s briefing about trusts, for which both author and editor apologise. In the fifth paragraph, second line, the first word should be ‘revocable’ not ‘irrevocable’. Thus the whole sentence should read:

What trustees must now consider, therefore, is revocable appointment of the trust income on interest in possession trusts for one or more beneficiaries.

PAYE CODING – WHY DO THINGS GO WRONG?

Angela Williams provides some answers and explains what improvements we can expect

The Tax Faculty regularly receives complaints from members about PAYE coding errors and associated issues. I recently met with HMRC to get answers to some of your questions and hear about the new PAYE computer system which HMRC is introducing, referred to as 'MPPC'.

What is MPPC?

MPPC stands for 'Modernising PAYE Processes for Customers'. Until June, PAYE records for employees were held on 12 separate regional databases which were not linked. From the end of June 2009 all PAYE records will be brought together in a single database.

How will MPPC improve on the current situation?

Staff at HMRC Contact Centres will now be able to see all PAYE sources for an individual. Previously an officer would not generally have had an overview of the taxpayer's position. The new database should therefore result in improved coding accuracy for those with multiple sources of PAYE income, typically pensioners, students and casual workers, and for those who change employer frequently.

The new database will automatically link taxpayer records from different PAYE sources, which will improve year-end review processes. In addition, calculations will now be triggered automatically for the previous tax year, although for 2008/09 these will be checked before issue.

Another improvement will be that all PAYE notices of coding (forms P2) for an individual will be issued at the same time which should assist taxpayers in checking them. For the time being, however, there will be no changes to the paper and electronic outputs such as the form P2 and associated notices.

Will clients receive fewer forms P2 once MPPC has been introduced?

In the short term agents and taxpayers should expect to receive rather more forms P2, employment enquiry forms (forms P810) and calculations than usual. This is because, for about a year after the introduction of the new database, HMRC staff will be matching

unmatched records to taxpayers and setting up new records where a P14 has been received but there is no existing PAYE record for that taxpayer.

Why does each copy P2 arrive in a separate envelope, wasting money on envelopes and postage?

Unfortunately HMRC's IT systems do not allow agent copies of forms P2s to be identified separately because, unlike the self assessment (SA) database, there is no inbuilt ability within the PAYE databases to sort output by agent. This means that copies for one agent cannot be batched and sent out together.

HMRC has secured some funding to introduce better agent-client databases for all taxes so there may be improvements in the future.

Why do agent copies of forms P2 arrive after client copies?

About 12m forms P2 are issued each year from three separate print centres. Of the 12m, about 8% to 10% are copied to agents. All notices are batched. HMRC has been advised that the underlying IT cannot be changed to include the agent copy in the same batch as the client copy.

Why do agents receive the explanatory leaflets as well as the form P2, resulting in waste?

It is not possible for the existing systems to identify separately which forms P2 are being sent to an agent and which to the taxpayer. HMRC would prefer that the additional material is not included with agent copies but there is currently no way to eliminate it except by manual intervention, which would be very costly.

Why are our clients' tax codes changed so often for a tax year?

Tax codes are updated each time HMRC receives a piece of information which affects figures in the code. If HMRC did not change the code promptly, it would be failing in its duty of care to use information on a timely basis for the benefit of both the Treasury and the taxpayer. Unfortunately, for a variety of reasons, this results in numerous forms P2 being issued.

My client ticked the box to ask for non-PAYE income not to be coded out but it has been. How has this happened?

This is a result of human error and seems more likely to occur when the SA tax return is submitted on paper because there are two opportunities for the process to go wrong.

The tick in box 3 on TR5 is automatically captured from an electronically submitted return (and the scanned short return). It is then a manual process to carry out the instruction, so errors can arise. HMRC staff inputting paper tax returns sometimes overlook the tick so it is not captured in the first place.

Agents can ask Contact Centre staff to set a flag to exclude non-PAYE income permanently from tax codes, which should eliminate the problem.

How are non-PAYE income and claims dealt with?

The general principle is that items of non-PAYE income and claims (for example pension contributions and gift aid) will be carried forward from year to year. When an SA return or P810 (annual review form) is received by HMRC, the code should be updated from this information. Despite regular reminders, HMRC staff do sometimes overlook checking taxpayer contact history before making changes. This can result in incorrect codes being issued. The new system should allow a clearer view of previous contacts and improve this process.

Why is it so difficult to get the correct benefits, reimbursed expenses and claims in a client's code and then to keep them that way?

This is indeed a very difficult and imperfect area of the tax coding system and a major source of complaint. It may therefore be helpful to know how the information is fed through to the PAYE code.

First, there is no link from benefits and reimbursed expenses included on SA returns to the PAYE code, so agents should not expect figures from the tax return to appear automatically in PAYE codes. The figures reach the code only from the P11D. Once this is captured, the current year code will automatically be updated to include the figures from the previous year's P11D.

Second, expenses and other claims are only picked up from the SA return and other correspondence. When this information is received, HMRC staff should update the tax code for the expenses.

It should also be noted that benefits are carried forward from employer to employer and, in the absence of a P11D, from year to year. Furthermore, benefits no longer shown on the P11D are not automatically identified and removed. HMRC relies on the employee to contact it when there is a change of benefits and if they do not do so, there is a risk that the benefits could be carried forward indefinitely.

The new system does, however, bring two major improvements. Where up-to-date information is received in-year, the new system will automatically stop this information being over-written by the P11D information. Then, from April 2010 tax codes will automatically be updated from returns, eliminating human error. These should reduce the number of incorrect forms P2.

The system cannot, and probably will never be able to, pick up the information on benefits and on expenses and claims at the same time automatically, because the information is coming from two different sources (employer and individual) at different times.

Issuing incorrect forms P2 causes HMRC, agents and employers additional work. Why doesn't HMRC take more care to ensure forms P2 are correct?

HMRC is very aware that an incorrect form P2 is likely to result in telephone calls and letters, leading to additional costs for everyone involved. The coding process is, however, prone to human error and constrained by IT limitations and data flows. As more processes are automated, there should be fewer incorrect codes arising from human error.

Why does HMRC send out coding notices in January, our busiest time?

There are two main reasons for the codes being mailed from the second week in January until the end of February. The first is the practical one that printing and distributing 12m forms P2 takes time. The second is that HMRC has to allow time for taxpayers to contact them to have a code corrected before the new tax year.

As it is not possible separately to identify SA taxpayers, their codes cannot be held back until after the SA return has been captured.

How does HMRC arrive at the figure for state benefits in the form P2?

Each February the Department for Work and Pensions (DWP) sends HMRC details, for each recipient, of the current rate of benefit or pension and the amount which will be paid from the following April. The new rate is then coded for the next tax year. Where there is a problem linking the DWP data to HMRC records, the current figure will be uplifted by the general percentage increase applied to that category of benefit or pension.

The DWP does not send HMRC details of other changes to amounts being paid, for example when a widow's pension becomes payable. The only way HMRC will know about this during the tax year is if the taxpayer notifies HMRC. Failing to do so will usually result in an under- or over-payment of tax and, if HMRC records cannot be linked to the DWP figures in the following year, this could continue for many years.

The annual amount included in a tax code will always be 52 times the weekly amount, even where the taxpayer is due to receive 53 weeks in the tax year. (We will provide more detail about the implications of this in a future issue of TAXline.)

Why were there so many coding changes in February and March 2009 for the 2008/09 tax year?

HMRC had set an inhibition signal on about 400,000 cases which required clerical review, to prevent P11D information flowing through in the usual way. These cases were processed much later than usual, in February and March 2009. HMRC had expected that most of those affected would already have had codes amended during the year and a signal set to stop automatic updating from the P11D for 2008/09. Unfortunately it seems that, in many cases when the inhibition signal was removed, revised forms P2 were automatically issued

The procedures have now been changed so this doesn't happen again.

Can HMRC improve the explanation for tax underpayments being coded out?

Unfortunately not. In an ideal world underpayments would be separately identified by tax year and would state whether they are actual underpayments or projected ('notional' or 'estimated') underpayments.

This is an enhancement which HMRC is considering but it is unlikely happen for several years due to lack of funds.

Why is a reduction in allowances being applied on a cumulative basis?

This is an error. It can only happen if a member of HMRC staff made a manual change to the code. Any in-year reduction in total allowances (or increase in K code number) should always be operated on a non-cumulative ('week 1/month1') basis. If the employer notices, it can call HMRC to ask permission to operate the code on a non-cumulative basis. Agents will be able to identify this error because the form P2 will not refer to the use of 'the new code on a special basis' in the 'Special Note'.

Why doesn't HMRC make all the improvements agents have asked for?

Very little money is available to fund improvements so HMRC has to demonstrate tangible customer benefits and financial savings. Furthermore, certain changes are impossible unless the entire IT system is replaced.

What other improvements are planned for the PAYE coding process?

HMRC will be considering enhancing its systems to automatically remove taxable benefits no longer being reported and also to issue a single composite form P2 showing the allocation of allowances between all income sources.

In conclusion, many incorrect codes are a result of timing issues, inappropriate human intervention (or lack of it) and the inability of different HMRC systems to 'talk' to each other. Unfortunately only some of these issues can be addressed by the new system and it is too costly to deal with others. However, practitioners should find some improvements over the next couple of years.

Angela Williams is the Technical Manager at the Tax Faculty with responsibility for the Personal Tax and Finance Committee.

VAT CHALLENGE – REVOKING AN OPTION TO TAX ELECTION

1 August 2009 brings a new opportunity, as Neil Warren explains

In this article I will consider the procedures for, and benefits of, revoking an option to tax election on a property, which will be a possibility for some businesses from 1 August 2009

An option to tax election made by a VAT-registered business means that all income it generates from an elected property becomes standard rated rather than exempt, including the proceeds from the eventual sale of the building. This creates an opportunity for input tax recovery on the related costs of the building, including the cost of purchase, refurbishment or improvement costs and general running costs such as repairs and maintenance. Once it has been made, an election cannot be revoked for 20 years, apart from an initial cooling-off period in limited circumstances.

The option to tax rules were introduced on 1 August 1989 (when Margaret Thatcher was still PM!), so there is an opportunity for some options to be revoked for the first time on or after 1 August 2009.

This article considers the procedures for revoking an election and some practical examples of when there are benefits to be gained.

The legislation concerning the option to tax procedures is contained in Part 1, Sch 10, Value Added Tax Act 1994, with provisions concerning the revocation of the option after 20 years contained in para 25 of Sch 10.

The 20-year rule

In recent months, I have had several queries from practitioners who have been a bit confused about the exact terms of the 20-year rule. The key date is when the option to tax election was first made with HMRC, not when the property was bought or when rental income was first generated.

HMRC always confirms an option to tax election in writing, but what is the situation if your clients cannot recall when they made an election and cannot find the relevant paperwork? The suggested approach is to



Neil Warren

write to HMRC's Option to Tax Unit in Glasgow (see below) and ask for details of the option to tax elections in place for your client:

Option to Tax National Unit
HMRC
Cotton House, 7 Cochrane Street
Glasgow, G1 1GY

T: +44 (0)141 285 4174/5
email: optiontotaxnationalunit@hmrc.gsi.gov.uk.

Automatic revocation in most cases

A taxpayer who meets the 20-year rule in relation to a property will be able to revoke his or her option automatically in most cases, without the need for HMRC's permission. Form VAT1614J must be completed and sent to HMRC.

However, in completing VAT1614J, a taxpayer needs to pass three anti-avoidance tests shown as Conditions 3 to 5 on the form. If any of the conditions are not met, then HMRC's permission is needed before the election can be revoked, ie it is not automatic. The aim of the anti-avoidance tests is to prevent a business gaining an unfair tax advantage.

An important point for advisers to appreciate is that all of the tests at Conditions 3 to 5 must be met in order to revoke an option without HMRC permission, as well as Condition 2 regarding the 20-year time limit.

Example 1 (below) illustrates a situation where all of the conditions are met. The four conditions are:

- 20-year time period (Condition 2) – the taxpayer must have held a relevant interest in the building or land at the time when the option first took effect and more than 20 years have now passed.

Note – if this condition is not met, then the other issues are irrelevant. The option to tax election cannot be revoked.

- No input tax adjustments are needed under the capital goods scheme (Condition 3). The capital goods scheme mainly applies in relation to the purchase of certain buildings and building works exceeding £250,000 – input tax is adjusted over a 10-year period.
- Valuation condition (Condition 4) – in the 10-year period before the option to tax is revoked, there must have been no supply of a relevant interest in the building that was made at less than open market value (eg undervalued rents).
- Prepayments condition (Condition 5) – no payments have been made in relation to the property that relate to a period that is more than 12 months after the option is revoked – see Example 2.

Example 1

Janet made an option to tax election on a property when she first bought it on 1 August 1989, which was the same day as she purchased it. For the last 21 years the property has been rented out to a firm of accountants who have been able to reclaim input tax on the rent charged by Janet.

It is now 1 January 2011 and Janet wishes to revoke her option to tax election because the accountants are leaving and the new tenants are a firm of insurance brokers (exempt activity – input tax cannot be reclaimed).

Janet has always charged a proper market rent to the accountants in the last 10 years; she has not prepaid any expenses in relation to the property; there are no capital goods scheme issues ... and more than 20 years have passed since she made her option to tax election with HMRC (or Customs and Excise in those days).

Janet can automatically revoke her option to tax election without prior permission from HMRC but must still notify them by completing form VAT1614J.

Example 2

Just before she revokes her option to tax election (December 2010), Janet from Example 1 decides to make a payment of £200,000 plus VAT to the maintenance company that carries out all repair work on her property. The payment will cover all repair works for the next five years to 31 December 2015. Janet thinks this payment will allow her to claim £35,000 input tax on her December 2010 return because it has been incurred in a period when income from the property is still taxable, ie before the option to tax election has been revoked.

The prepayment means that Janet cannot revoke her election without prior permission from HMRC. However, all is not lost. If she does not reclaim input tax on the maintenance payment (on the basis that it relates to a period when only exempt supplies of the property will be made), then HMRC will almost certainly grant permission to revoke the option. She will need to write a letter to HMRC, giving the full facts of the transaction, at the time she submits form VAT1614J.

Motives for revoking an option – including SDLT savings

Janet in Example 1 had an excellent motive for wishing to revoke her option to tax election. The new tenants renting the building were not able to reclaim input tax (exempt activity), so the VAT charge would be a significant extra cost to their business.

Imagine the situation where Janet was trying to sell the property. Potential buyers might also have an exempt activity (financial services, insurance, health, etc) where input tax claims are restricted. I recently dealt with a query concerning a building that is to be sold to a dentist (exempt activity as medical services) but unfortunately the option to tax election was only made 12 years ago, so the dentist will either have to pay VAT on the property and buy it now or wait another 8 years until the option to tax election can be revoked.

Example 3

Evans Solicitors Ltd is buying a building from Smith Chartered Accountants Ltd for £240,000 plus VAT on 1 July 2010 (standard rate of VAT back to 17.5% again). Smith made an option to tax election on the building on 1 August 1989.

It might be tempting not to worry about revoking an option to tax election because Evans can reclaim input tax on the cost of the building (no partial exemption problems). However, there is a significant saving in SDLT to be made by revoking the election:

With option to tax:

£240,000 + VAT at 17.5% = £282,000

SDLT = £282,000 × 3% = £8,460 (because purchase price exceeds £250,000, SDLT is charged at 3% rather than 1%)

Without option to tax:

£240,000 – no VAT

SDLT = £240,000 × 1% = £2,400

SDLT saved = £8,460 – £2,400 = £6,060

A major cost of buying a property is stamp duty land tax (SDLT), and the SDLT charge is based on the VAT-inclusive cost of the property. There can be significant savings to be made if an election is revoked and it takes the cost of the building into a lower SDLT bracket. See Example 3.

Six-year rule

As a final tip, which will apply in very limited circumstances, an option to tax election is automatically revoked if a taxpayer has held no relevant interest in opted land or property for six years.

For example, if a building is sold by a taxpayer in 2004, the option to tax election automatically ceases to apply in 2010 because he or she has held no interest in the building for six years. So if, for example, the taxpayer then purchased the same building again the following year in 2011, he or she would have to make a new option to tax election if this was in his or her best interests.

Neil Warren was the Taxation Awards Tax Writer of the Year for 2008 and is an independent VAT author, lecturer and consultant. He can be contacted by email on neil@nwas.freemove.co.uk.

AT A LOSS?

The extension of loss reliefs for tax purposes highlights an often overlooked NIC issue, as Peter Arrowsmith explains

Where a trading loss of a sole trader business or partnership is carried back for tax purposes (s 64, Income Tax Act 2007 (ITA 2007)) and is utilised against income of a kind that does not itself attract a Class 4 NIC liability (eg rents, bank/building society interest, dividends) such losses are nonetheless carried forward for National Insurance purposes. This has the result that even where tax losses have been fully utilised, there may still be an NIC loss carried forward to set against future profits liable to Class 4 (para 3(1), Sch 2, Social Security Contributions and Benefits Act 1992 (SSCBA 1992)). Software invariably copes with this perfectly well – provided all entries are input correctly – though whether users always understand **why** what is happening is happening is, of course, another matter.

The position can be illustrated by a topical example incorporating the extra two years' carry-back afforded by Clause 23 and Sch 6, Finance Bill 2009 (FB 2009). Para 3(1)(a), Sch 2, SSCBA 1992 is amended to accommodate the extended relief by virtue of para 2(6), Sch 6, FB 2009. The carry-back to the extra two years is, however, only possible against profits of the trade. This should not be a difficulty – in many cases it simply means that the otherwise wasted personal allowance can be utilised against some other income and so provides welcome flexibility.

The temporary extension of loss relief for non-corporates applies to losses of the years 2008/09 and 2009/10. Note that in the case of a loss of the year 2008/09 there is no requirement for the loss to be set first against other taxable income of 2008/09. Thus if there is other income the personal allowance does not have to be wasted in order to make the extra two-year carry-back available. The maximum that can be relieved outside of s 64, ITA 2007 (ie over the further two years) is £50,000. Similarly in the case of a loss of the year 2009/10 there is no requirement that the loss be set first against other taxable income of 2009/10, and the maximum that can be relieved outside of s 64 is a further £50,000.

Example

Chris Cross runs a manufacturing business. His tax adjusted trading results are as follows:

Year ended		£
31 January		
2006	Profit	80,000
2007	Profit	75,000
2008	Profit	30,000
2009	Loss	(90,000)
2010	Loss	(110,000)

Chris has assessable amounts of profit and other income as follows:

	Profit £	Rental income £
2005/06	80,000	5,000
2006/07	75,000	5,000
2007/08	30,000	5,000
2008/09	Nil	5,000
2009/10	Nil	5,000

If Chris claims relief for his 2008/09 loss of £90,000 under s 64, ITA 2007 solely against 2007/08 total income (£35,000), the other income of 2008/09 is covered by his personal allowance. The balance of the loss (£55,000) is then carried back under FB 2009 against trading profits of 2006/07 and then if necessary 2005/06 up to a limit of £50,000 in total, with any remaining balance carried forward to 2009/10 and beyond. As the loss to carry back prior to 2007/08 exceeds £50,000, that is the maximum amount that may be relieved across the two further years collectively, starting with the later year. This will result in revised taxable income as follows:

	Profit after loss £	Rental income £
2005/06	80,000	5,000
2006/07	25,000	5,000
2007/08	Nil	Nil
2008/09	Nil	5,000

While for tax purposes there remain £5,000 of losses to carry forward, for Class 4 purposes only £80,000 of the loss has been relieved (£30,000 in 2007/08 under s 64, ITA 2007 and £50,000 in 2006/07 under FB 2009). The remaining £10,000 must, therefore, be carried forward to 2009/10 (and subsequent years, as will be necessary in this example).

In order for the loss of 2009/10 to be carried back in total for three years, Chris must first claim under s 64, ITA 2007 against either total income of 2009/10 or total income of 2008/09 or both. In practice he will claim against only one of these to better utilise the other year's personal allowance, leaving £105,000 to be carried back to earlier years. However, after the claim for the 2008/09 loss there remains only £25,000 of available taxable trading profits in 2006/07 against which to set the loss. Thus £80,000 of the loss is carried forward for tax purposes to add to the £5,000 left from the 2008/09 loss. The total losses to carry forward are therefore £85,000 for tax but £95,000 for Class 4 purposes. The difference of £10,000 reflects the other income of £5,000 in each of two years that was required to be covered by the tax losses carried back (albeit wasteful of the personal allowances).

In summary, the losses have been dealt with as shown in the table below.

I accept the accusation you will rightly make that the example is necessarily contrived. In practice, losses will often be arising rather later than in this example, particularly for a business whose basis period ends

considerably earlier in the tax year. Further, if non-trading income is rather higher it may be desirable to 'waste' personal allowance for the sake of banking instant relief on the amount of non-trading income which does exceed allowances.

Whatever the situation the key points are, however, that:

- If there is any non-trading income there will be a higher amount of losses carried forward for Class 4 NIC than for tax (and even if there is no tax loss carried forward there will be losses carried forward for Class 4).
- The initial claim under s 64 is necessary in order to 'unlock' the extra two years.
- The s 64 claim does not have to be for both the current and preceding year if this produces an undesirable effect, but must be against total income of at least one of those years.
- The maximum amount to carry back outside of s 64 is £50,000 per loss-making year and can only be set against profits of the same trade.

Peter Arrowsmith FCA is a sole practitioner specialising in the provision of National Insurance consultancy services to professional firms. He is a member and previous chairman of the Tax Faculty Employment Taxes and National Insurance Committee. T: +44 (0)1933 411941, website: www.niconsultancy.co.uk.

	Profit	Rental income	Loss	s 64	Balance of loss	FB 2009	Total income	Tax loss c/f	NIC loss c/f
	£	£	£	£	£	£	£	£	£
2009/10	Nil	5,000	110,000	(5,000)	105,000	(25,000)	5,000	80,000	85,000
2008/09	Nil	5,000	90,000	(35,000)	55,000	(50,000)	Nil	5,000	10,000
2007/08	30,000	5,000		(35,000)			Nil		
2006/07	75,000	5,000				(50,000) (25,000)	5,000		
2005/06	80,000	5,000					85,000		
Total losses c/f								85,000	95,000

CORPORATE TAX AND UK COMPETITIVENESS

Lynnette Bober reports on Joel Walters' talk at the June meeting of London Tax Club

Our June Tax Club speaker was Joel Walters, Vodafone's Group Corporate Finance Director. To place his talk in context Joel started off with the statement that multinational companies such as Vodafone live in an incredibly competitive world, which means that they are always looking for competitive advantage and certainty. Tax is seen as just another cost of doing business, to be taken into account in pursuing these goals.

Joel explained that when Vodafone are making decisions about tax planning they have four hurdles that must be passed before they will go ahead with any planning idea. They will only do something where:

1. they are completely happy that technically their position is correct and the stance they are taking is, therefore, within the law;
2. they feel it is within the spirit of the law;
3. they are satisfied that they can be proud of their actions; and
4. they would be happy from a reputational point of view to see full details on the front page of the *Financial Times*.

Where these hurdles are passed and tax planning is entered into, Joel said that it is Vodafone's policy to be transparent about what they have done and why they have done it. Accordingly, they will give the local tax authority the facts and set down their entire technical argument.

Joel told us that within these parameters, and through only commercial transactions, his team has been successful in reducing the global tax paid by the various Vodafone companies.

On the issue of UK competitiveness Joel said that generally he does not think that the UK is in tax terms a bad place for large multinationals to do business. The 28% corporation tax rate, while not impressive, is not dramatically uncompetitive. He pointed out that, for large multinationals, a key consideration is the

relationship with the tax authorities. Joel was very positive about the steps taken by HMRC to build a relationship with him and his department. He spoke of the mutual respect built up between his team and HMRC, how they have a written document setting down the standards of behaviour each side should adhere to, and how they exchange regular feedback on how each side views the conduct of the other.

On the Finance Bill 2009 changes to the taxation of foreign profits, Joel said that the most important thing is that following consultation there has been a move away from the potentially damaging measures regarding controlled foreign companies. Joel feels that the consultation has been extensive and real. While the decisions taken are never going to please everyone, he thinks that some good decisions were made. There are areas to be worked through, but he believes that the new rules will not put off large multinationals.

Joel did say, however, that he feels that the UK Government really needs to have a change of mindset. Only 4% of Vodafone's profits come from the UK. Many large multinationals are in the same position, which makes them able to locate activities in a number of territories. As such the Government should be looking to introduce tax policies which will attract large multinationals. Joel thinks that there is now too much emphasis placed on the advantages of London and its infrastructure and that this gives the Government a false view that the UK does not need to compete on tax. Joel commented that while London remains an attractive city to live in, the advantages that London had 3 to 5 years ago have been eroded, and that more needs to be done to retain and attract large multinationals.

Members had many questions for Joel both about tax and about how he had built his own career. As ever the evening ended with discussion and socialising.

Lynnette Bober is a National Tax Consultant at Smith & Williamson, and a Tax Faculty committee member.

THE AGM

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Chairman's address

At the Tax Faculty's AGM on Tuesday 16 June, Paul Aplin made his final address as Chairman. He said that he had had an amazing two years and was so proud to have worked with such a wonderful team of staff and volunteers. He referred to the picture on the front of June 2009 *TAXline* of the baton being handed over, and said that what we couldn't see was the inscription which reads 'don't drop me!'. He said he knew he was passing it to a safe pair of hands, the very capable Chris Sanger.

2008 annual report and accounts

Frank Haskew presented the 2008 annual report and accounts and the vote to adopt them was taken using the ICAEW's brand new electronic voting system – this was its maiden run. The vote was proposed by Paul Aplin and unanimously approved, the evidence appearing in the form of a bar chart on the big screen.



Neil Hamper, Philip Levi and Nigel Hinton

David Heaton moved from Vice Chairman into the Deputy Chairman position. It is the duty of the TFC, not the membership, to appoint office holders, and their new posts were endorsed immediately after the AGM at a specially arranged EGM.

Details of the new Tax Faculty Committee can be seen on our website www.icaew.com/taxfac.

Following the AGM

After the AGM formal proceedings had finished, we had a guest speaker in the shape of Dave Hartnett, HMRC's Permanent Secretary for Tax. The theme of his talk is picked up in Chris Sanger's editorial this month.

The occasion finished with a very convivial buffet lunch for members, volunteers and the Tax Faculty team.



Paul Aplin and Chris Sanger

Handing over the baton

Chris Sanger, the incoming Chairman and former Deputy Chairman, congratulated Paul Aplin on handing over the Tax Faculty in such a good state and providing a superb base upon which to build further. He said that, with the rapid development of tax changes over the last few years, and the challenges that the tax system faces in the aftermath of the financial crisis, the role of the Tax Faculty would continue to increase in importance. Through the continued dedication of the faculty staff and the member volunteers, Chris could see that the Tax Faculty was up to the challenge and he looked forward to the future with anticipation.



Dave Hartnett

FACULTY NEWS

Set out below are details of the latest developments at the Tax Faculty including technical and representational work

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We welcome the election of Chris Sanger as Chairman and David Heaton as Vice Chairman of the Tax Faculty. In this month's editorial, Chris Sanger looks at some of the challenges that we face over the next few years. They are likely to be many. In the run up to a 2010 election, UK tax policy seems set to be a key area for debate and, as a former special adviser on tax policy to HM Treasury, Chris is well placed to lead the Tax Faculty's response and continue to raise our profile in this area. We will, of course, continue to work with politicians of all parties in accordance with our Royal Charter obligation to act impartially in the public interest.

The focus of our technical work during June continued to be on making further representations on the Finance Bill 2009. As noted last month, after the submission of our main representations, our attention moved to the preparation of more detailed Parliamentary briefings to assist the committee debates. Key areas upon which we submitted briefings were: the proposed pensions anti-forestalling rules; the senior accounting officer changes; the 'naming and shaming' of tax defaulters; and the proposed Taxpayers' Charter. These briefings have been published in our TAXREP series and full details are set out below.

The lobbying process is having some positive results although progress is always much harder than we would like. Key developments are set out below.

- Pensions anti-forestalling changes – the Government has undertaken to review the concerns and it is likely that some beneficial changes will be introduced at Report Stage.
- Senior Accounting Officer proposals – the size requirements have been increased so that it will only affect large companies with a turnover of over £200m or with assets of more than £2bn (the latter test aimed at banks) and the requirement to tell the auditor about inadequate systems has been dropped.
- Taxpayers' Charter – we are lobbying for further changes to the Finance Bill provisions but are pleased to report that the draft Charter itself has been amended substantially to reflect the concerns we and others have raised. The current draft now sets out taxpayers' rights and responsibilities and HMRC's responsibilities much more clearly.

As noted by Chris Sanger in his editorial, the HMRC paper *Working with tax agents* has stirred up some controversy and a considerable amount of adverse criticism. While there are some aspects of it that may not be welcome, the paper contains much that is very positive. It recognises the essential role played by agents, that most agents do a good job for their clients, and that the UK tax system would not function properly without them. By the time this issue of *TAXline* is published we will have met with HMRC to discuss the consultation and areas of concern and we will report back to members via our website and newswire.

HMRC's service standards remain a cause for concern. We have said for some time now that service standards do not appear to have improved over the past two years and in some areas seem to have fallen further. Our survey into HMRC's standards earlier this year was referred to recently by the *Evening Standard* which echoed the concerns we have raised. We continue to raise service issues either directly to senior staff at HMRC or through the Working Together initiative.

Faculty News is written by Frank Haskew, Head of the Tax Faculty

Tax representations

TAXREP 39/09 – Finance Bill 2009: Part 7 excluding Clauses 91 to 93

Parliamentary Briefing submitted on 22 June 2009, setting out concerns about the Finance Bill provisions arising out of the continuing review of HMRC's powers.

TAXREP 38/09 – Finance Bill 2009: Clause 93, Publishing details of deliberate tax defaulters

Parliamentary Briefing submitted on 18 June 2009, setting out concerns with the proposed clause which will allow HMRC to publish the names of deliberate tax defaulters.

TAXREP 37/09 – Finance Bill 2009: Clause 91, HMRC Charter

Parliamentary Briefing submitted on 17 June 2009, setting out concerns with the proposed clause which will give statutory backing to a 'Taxpayers' Charter'.

Some changes to the Tax Faculty team

There has been a reorganisation of non-technical staff within the ICAEW's Technical Strategy Department, which is where the Tax Faculty sits within the Institute structure. The object of the reorganisation is to pool resources across the department and, by working in a centralised structure, to provide more efficient delivery of publications, events and admin generally.

What does this mean for the Tax Faculty?

Pat Hollamby, who currently typesets *TAXline* and other publications and also looks after our corporate membership scheme, will now work in the dedicated publications team. She will still be responsible for the typesetting and layout of *TAXline*, but will also provide a desk-top publishing service to the rest of the department. Pat has been with the Tax Faculty for 12 years.

Zoë Jeakins, our Services Manager, will be taking up the new role of Events Manager, running the Technical Strategy events team. While this is an exciting opportunity for Zoë, she says she has very

mixed emotions about leaving the Tax Faculty, having worked here for nine years.

We will be very sad to see Zoë and Pat move on from the Faculty, but wish them every success in their new roles.

Welcome Katerina!

However, it's a very warm welcome to our new Services Manager Katerina Nichols. Katerina presently works for the Financial Reporting Faculty, and her new role will be to look after member services for both Tax and Financial Reporting. Good luck, Katerina, we are delighted to have you on board.

The Tax Faculty Team

After these changes, effective from mid-July, the Tax Faculty's support team will comprise: Chrissie O'Connor (Manager), Nina Turner and Katerina Nicholas.

Our technical team of Frank Haskew and seven technical managers remains the same.

TAXREP 36/09 – Finance Bill 2009: Committee stage briefing on Clause 92 and Schedule 46, Duties of senior accounting officers of large companies
Parliamentary Briefing submitted on 17 June 2009, setting out concerns on the proposed introduction of new duties and obligations on 'Senior Accounting Officers' of large companies to maintain appropriate tax accounting arrangements.

TAXREP 35/09 – Finance Bill 2009: Committee stage briefing on Part 4, Value Added Tax
Parliamentary Briefing submitted on 11 June 2009, setting out concerns on the VAT measures being introduced in the Finance Bill 2009 to implement the UK's obligations under the EU VAT package.

TAXREP 34/09 – Shares acquired before 10 April 2003 by exercising employee share options, allowable deductions: Revenue & Customs Brief 30/09

Text of a letter submitted on 4 June 2009 to HMRC following publication of Revenue and Customs Brief 30/09 on 12 May 2009.

TAXREP 33/09 – The new technical guidance on domicile

Representations submitted on 8 June 2009 in response to guidance published by HMRC on 31 March 2009.

TAXREP 32/09 – Finance Bill 2009: Pensions, special allowance charge: Committee stage briefing on Clause 71 and Schedule 35

Parliamentary Briefing submitted on 9 June 2009, setting out concerns and suggested amendments on the anti-forestalling provisions being introduced in advance of new legislation limiting tax relief on pension contributions for high income individuals.

TAXREP 31/09 – Tax Law Rewrite Bill 6: Corporation tax, Co-operative housing associations and self-builds

Memorandum submitted in May 2009 commenting on Paper CC/SC(09)06 issued in April 2009 by HMRC's Tax Law Rewrite Team.

Wyman Debate

If taxes have to rise, which goose should be plucked first?
Thursday 16 July 2009 – 5.30pm for a 6.00pm start at Chartered Accountants' Hall, followed by a light supper. The debate will explore four sectors which could each bear the brunt of tax increases. The evening will be introduced by incoming Tax Faculty Chairman, Chris Sanger. If you would like to attend, email:

taxfac@icaew.com

ICAEW Tax Conference

Are your clients getting all they can from the tax man?
Tuesday 15 September 2009, Manchester – venue to be confirmed. Following the success of the recent London event, Tax Faculty members in the North West can update their tax knowledge and hear how giving the right tax advice is crucial to business survival. An early bird booking discount still applies. Find out more at:

www.cchpd.co.uk/taxfaculty

Younger Members' Tax Club – Nottingham

Wednesday 6 October 2009 – 6pm for a 6.15pm start. Canal House, Nottingham, NG1 7EH. Chris Jones of LexisNexis will explain the key changes in the 2009 Finance Act and how they will apply in practice. Tax Club events are free to young professionals. All local members who work in tax or who are interested in tax as a career are welcome. If you intend to come, please email:

taxfac@icaew.com

Dates for your diary

2009 activities take a break for the summer months but return later in the year.

Autumn events include:

Tax Club, London – 9 September

Tax Club, London – 5 October

Hardman Memorial Lecture – 12 November

View all forthcoming events at:

www.icaew.com/taxfacevents

OBE for Paul Aplin



The Tax Faculty was delighted to hear that Paul Aplin, outgoing Tax Faculty Chairman and partner in Taunton based firm AC Mole & Sons, has been awarded an OBE for services to the accountancy profession in this year's Queen's Birthday honours. Paul said:

I've found the past two years as Tax Faculty Chairman as enjoyable as they have been challenging. The OBE was completely unexpected and I was left utterly speechless when the letter arrived few weeks ago. I still can't quite believe it.

Paul has worked tirelessly for the Tax Faculty and it was largely thanks to him that the original plan announced in the Carter Report on online filing in March 2006, to bring forward the tax return filing date to 30 November, was abandoned.

DEADLINES AND DATES

www.icaew.com/taxfac

1 July 2009

New advisory fuel rates come into effect, see Practical Point 144.

5 July 2009

Last day for reaching a PAYE settlement agreement for 2008/09.

Deadline for returns of rent paid by agents to non-resident landlords in 2008/09 and of tax deducted by tenants from rents paid to non-resident landlords. Note that effective deadline for these to reach HMRC is Friday 3 July since they cannot be filed online.

6 July 2009

Deadline to file forms P11D, P9D and P11D(b) for 2008/09.

Copies of forms P11D and P9D to be given to employees by today.

A third party who has provided benefits to someone else's employee must give the employee a statement of the cash equivalent and other details.

An employer who has provided a redundancy package in 2008/09 worth more than £30,000 and which included benefits-in-kind must report it to HMRC.

Deadline to file Form 42 for 2008/09 – returns of 'reportable events' in connection with unapproved share schemes.

Deadline for a close company to elect that all beneficial loans to a director be treated as a single loan for calculating 2008/09 benefits in kind.

19 July 2009

Due date for 2008/09 Class 1A NICs.

30 July 2009

Private companies with 30 September 2008 year-ends should file their accounts at Companies House.

31 July 2009

SA tax returns for 2007/08 must be filed by today to avoid the second £100 late filing penalty.

SA tax and Class 4 NIC due for 2007/08 must be paid by today to avoid a 5% surcharge.

Due date for second SA payment on account for 2008/09.

CTSA returns for accounting periods ended 31 July 2008 should reach HMRC, but ESC B46 gives seven days' grace, making the absolute deadline 7 August 2009.

Deadline to renew tax credit claims for 2009/10, and return final income figures for 2008/09 (or an estimate, with final figures supplied by 31 January 2010).

Furnished holiday lettings – HMRC announced at the 2009 Budget that the tax treatment is extended to include accommodation anywhere in the European Economic Area, and this applies to prior years. HMRC will accept amendments to returns within the usual time limits; but also late amendments to individual tax returns for 2006/07 and corporation tax returns for periods ended on or after 31 December 2006, if these are made by 31 July 2009.

1 August 2009

First date on which a VAT option to tax land and buildings can be revoked (see the briefing on page 17).

31 August 2009

Private companies with 31 October 2008 year-ends should file their accounts at Companies House.

Corporation tax returns for accounting periods ended 31 August 2008 should reach HMRC by this date, but under ESC B46 a week's grace is allowed, making the absolute deadline Monday 7 September 2009.



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