

Tax Update

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1. General

1.1 Autumn Statement scheduled

The Chancellor has announced that the Autumn Statement is scheduled for Wednesday 22 November. The Office for Budget Responsibility will publish economic and fiscal forecasts to be presented to Parliament along with the Statement.

www.gov.uk/government/news/autumn-statement-2023-date-confirmed

1.2 Film LLP found not to be trading

In a lengthy decision, the FTT rejected a film LLP's appeal against HMRC's decision to disallow losses. The FTT found that the LLP was not trading, and if it had been it was not doing so with a view to profit. LLP expenditure was found to be capital, and the members were not permitted relief on loans taken out to finance their investments.

The LLP was set up as a vehicle for individuals to invest in arrangements devised by a company. Each individual member would borrow to loan a sum to the LLP, which the LLP would use in its film related business. Members would receive annual royalties from film rights owned by the LLP, and the loans would be repaid after a set period. In 2003/04, the LLP filed a return showing over £110m in losses. It claimed that these arose in the course of its trade of film distribution.

The FTT found that the LLP was not trading after a lengthy analysis of its activities. There was no reasonable expectation of profit, it did not supply goods nor services for reward. Information given to potential investors was just about the tax advantages, not the potential profits. The business was not run on a commercial basis with a view to profit. Loss relief for the members was therefore denied.

The FTT also found that the members could not claim tax relief for interest paid on the loans they took out to fund their investments, as there was no trade, and even if a trade had existed then the monies were not used wholly and exclusively for its purposes.

The FTT also found that the LLP accounts were not computed correctly in accordance with generally accepted accounting practice (GAAP).

The Gala Film Partners LLP v HMRC [2023] UKFTT 699 (TC)

www.bailii.org/uk/cases/UKFTT/TC/2023/TC08891.html

2. Private client

2.1 CGT avoidance was not main purpose of arrangements

A family of taxpayers have won an appeal on CGT, as the FTT found that although CGT was considered in the sale of a company, structured partly as a share for share exchange, the main purpose of the arrangements as a whole was not tax avoidance.

Just before the sale of a family business, a married couple transferred some of their shares to their three daughters. The sale was structured as an exchange of their shares for shares and loan notes in another company. The rights attached to the new shares, alongside the non-executive directorships taken on by the daughters, meant that the daughters qualified for what was then called entrepreneurs' relief (ER) on subsequent redemption of the loan notes.

In order for the CGT relief for a share for share exchange to apply, the main purpose of arrangements must not be the avoidance of tax. HMRC denied the claims for CGT relief on those grounds, arguing that the exchange was part of arrangements mainly to avoid CGT.

The FTT allowed the taxpayers' appeals. It considered that the CGT planning involving the initial transfer to the daughters was not a scheme or arrangement in its own right, but that the scheme or arrangements of which the exchange formed part was the deal itself. It went on to find that the CGT planning was not the main purpose of the deal. The deal would have happened with or without the CGT planning. The family made £73m under the deal, and the tax savings were £3m. The main purpose of the deal was to realise the value in the family business, with the tax planning, including entitlement to ER, being a side benefit.

Wilkinson & Ors v HMRC [2023] UKFTT 695 (TC)

www.bailii.org/uk/cases/UKFTT/TC/2023/TC08887.html

3. PAYE and employment

3.1 Penalty appeal dismissed on employee benefit trust

The FTT agreed with HMRC that a company that used a marketed tax avoidance scheme to underreport earnings, and therefore underpay income tax and NICs, acted carelessly and deliberately. The penalties were upheld.

The taxpayer company used a marketed tax scheme where it paid contributions to an employee benefit trust (EBT) and used a third party company to recommend use of the funds and distributions into sub-funds. This meant that an immediate corporate tax deduction was claimed without the employees becoming immediately liable to PAYE and NICs. The amounts allocated to the EBT were excluded from the employer's pay bill.

The scheme did not work, and HMRC charged penalties. The issue before the FTT was just the penalties, as the taxpayer argued that it had taken reasonable care. On analysis of the scheme and its operation, the FTT found for HMRC. The behaviour in one year was careless, as the taxpayer failed to follow its accountant's advice, and in the next deliberate, as the directors knew HMRC was looking into it the scheme but did not re-evaluate its use of it.

Delphi Derivatives Limited v HMRC [2023] UKFTT 722 (TC)

www.bailii.org/uk/cases/UKFTT/TC/2023/TC08912.html

4. Business tax

4.1 Taxpayer loses appeal on SSE

The UT has rejected the taxpayer's appeal, agreeing with the FTT that SSE was not available.

The taxpayer, a standalone company, created a new subsidiary in June 2015, hived down its trade to this subsidiary in September 2015 and sold it in May 2016. The taxpayer went on to claim substantial shareholding exemption (SSE), exempting the gain on disposal from capital gains tax.

For SSE to apply, a subsidiary must be held for more than 12 months before sale which was not the case.

The taxpayer sought to rely on a provision that allows the period in which the trade has been carried on by another group company to be considered when looking at the 12 month ownership period. The taxpayer had in fact been a standalone company for the period between May and June 2015 and so the case focused on whether you can have a group with just one member.

In their argument, the taxpayer's counsel provided some interesting examples of when you may have a group with one, or indeed no members. The tribunal rejected these arguments, agreeing with the FTT that such a liberal interpretation of the legislation would give a result that could not have been intended by parliament. The claim for SSE was therefore rejected.

M Group Holdings Ltd v Revenue and Customs Commissioners [2023] UKUT 213 (TCC)

www.bailii.org/uk/cases/UKUT/TCC/2023/213.html

4.2 Allocation of purchase consideration for the purposes of calculating goodwill

The FTT has dismissed an appeal in respect of the valuation method used for property acquired as part of trade and asset purchases.

When calculating the value of goodwill as part of a trade and assets purchase, it is the difference between the total consideration and the fair value of all the identifiable assets. Under UK GAAP, that fair value should be market value if there is an open market for similar assets, in a similar condition. If no such market is available assets should be valued at depreciated replacement cost.

The taxpayer, who had purchased several care home businesses, argued that in most cases properties used as care homes were sold as part of an on-going business and so there is not an active market for such properties to be valued as stand-alone assets. On that basis depreciated replacement cost was an appropriate valuation method for the properties. HMRC disagreed.

The FTT concluded that operational care homes are sufficiently like the properties in question, such that it is possible to ascribe their values by reference to the sales of operational care homes on the open market, with appropriate adjustments as per the Royal Institution of Chartered Surveyors (RICS) guidance. Although the market value should reflect the properties as stand-alone assets, without staff, residents, contracts, chattels etc, the values, as per RICS guidance, will reflect the trading potential of the properties.

For SDLT purposes the apportionment of the total consideration on a trade and assets purchase is done on a 'just and reasonable' basis. HMRC argued and the FTT agreed that market values, where available, should form the basis for any apportionment. The taxpayer has been given the right to appeal.

HMRC v Nellsar Ltd [2023] UKFTT 718 (TC)

www.bailii.org/uk/cases/UKFTT/TC/2023/TC08908.html

5. VAT and Indirect taxes

5.1 Rented garage did not mean property non-residential

The FTT has found that residential rates of SDLT applied although the taxpayer let out a garage from the time he bought a property. It was not let commercially.

The taxpayer arranged to let out a garage from the day he purchased the property which included it. It was a separate building from the main home, on a strip of land adjoining the gardens of the substantial property. The garage land had a separate title, but the titles had been in common ownership for many years and were bought together. This was a second property, so subject to the higher residential rates. He made a claim for mixed-use treatment.

The FTT rejected his appeal against HMRC's refusal of the claim, finding that this was not a commercial lease. The tenant was a company with which the taxpayer was associated, no real effort had been made to set the rent at a commercial rate, the taxpayer used the garage to store his own possessions, and paid for the electricity supplied to it in the common supply. It was simply part of the garden and grounds.

Kozłowski v HMRC [2023] UKFTT 711 (TC)

www.bailii.org/uk/cases/UKFTT/TC/2023/TC08902.html

6. Tax publications and webinars

6.1 Tax publications

The following Tax publications have been published.

- [Expanding into the US – transfer pricing considerations](#)
- [Packaging Extended Producer Responsibility \(EPR\) | Evelyn Partners](#)
- [More time to decide asset splitting: CGT changes on divorce | Evelyn Partners](#)
- [Help! I have received a Code of Practice 9 \(COP9\) letter | Evelyn Partners](#)

6.2 Webinars

The following client webinars are coming up soon.

- 20 September: [US expansion and fundraising](#)
- 26 September: [ESG 101: How to navigate the plastic packaging tax and EPR regulations](#)
- 28 September: [The Changing Face of Investment for International Individuals](#)

7. And finally

7.1 364 pages

The FTT is a marvellous institution. What has particularly taken our fancy this week is not just its technical expertise, but the incredible variety of cases it deals with. In just the cases we have read this month, the output spans a 9 page judgment on high income child benefit charge penalties to a 364 page behemoth on a claimed loss of £110m. The mind boggles. Hats off to the judge who produced 744 coherent paragraphs, in presumably the most concise form possible, and sincerest commiserations to any judge who faces it on appeal.

The Gala Film Partners LLP v HMRC [2023] UKFTT 699 (TC)

www.bailii.org/uk/cases/UKFTT/TC/2023/TC08891.html

Glossary				
Organisations		Courts	Taxes etc	
ATT – Association of Tax Technicians	ICAEW – The Institute of Chartered Accountants in England and Wales	CA – Court of Appeal	ATED – Annual Tax on Enveloped Dwellings	NIC – National Insurance Contribution
CIOT – Chartered Institute of Taxation	ICAS – The Institute of Chartered Accountants of Scotland	CJEU – Court of Justice of the European Union	CGT – Capital Gains Tax	PAYE – Pay As You Earn
EU – European Union	OECD – Organisation for Economic Co-operation and Development	FTT – First-tier Tribunal	CT – Corporation Tax	R&D – Research & Development
EC – European Commission	OTS – Office of Tax Simplification	HC – High Court	IHT – Inheritance Tax	SDLT – Stamp Duty Land Tax
HMRC – HM Revenue & Customs	RS – Revenue Scotland	SC – Supreme Court	IT – Income Tax	VAT – Value Added Tax
HMT – HM Treasury		UT – Upper Tribunal	LBTT – Land and Buildings Transaction Tax	

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Tax legislation is that prevailing at the time, is subject to change without notice and depends on individual circumstances. You should always seek appropriate tax advice before making decisions. HMRC Tax Year 2023/24.

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