Tax update

May 2019

In this month's update we report on (1) HMRC's consultation on private residence relief; (2) HMRC's revised guidance on agreeing the value of shares with HMRC Shares and Assets Valuation when operating an EMI or SIP; and (3) HMRC's guidance on calculating tax and NICs due on the loan charge. We also comment on three recent cases relating to (1) the IR35 legislation; (2) case management directions; and (3) the existence of a bare trust notwithstanding the absence of a trust document.

News items

HMRC publishes consultation on CGT Private Residence Relief

On 1 April 2019, HMRC published a consultation document on plans announced in the Autumn 2018 Budget to reduce the final period exemption for capital gains tax (CGT) principal private residence relief (PPR) from 18 months to nine months. more›

Revised guidance on agreeing the value of shares with Shares and Assets Valuation when operating an EMI or SIP

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HMRC publishes guidance on how to calculate tax and NICs due on the 2019 loan charge

On 1 April 2019, HMRC published guidance for employers on how to manually calculate income tax and NICs arising on the 2019 loan charge. more›

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Albatel – TV presenter wins £1.2m tax case

In *Albatel Ltd v HMRC*, the First-tier Tribunal (FTT) has held that the so-called IR35 legislation (contained in section 49, ITEPA 2003 and Regulation 6, Social Security Contributions (Intermediaries) Regulations 2000) did not apply to the provision of services by the well-known TV presenter, Lorraine Kelly, to ITV. more›

Any comments or queries

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About this update

Our Tax update is published on the first Thursday of every month, and is written by members of RPC's Tax team.

We also publish a VAT update on the final Thursday of every month, and a weekly blog, RPC's Tax Take.

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Gardner Shaw – directions subject to a pending appeal should not have been varied

In *Gardner Shaw UK Ltd and others v HMRC*, the Upper Tribunal (UT) has held that the FTT should not have varied directions which the FTT had previously issued, when they had been the subject of an unsuccessful appeal to the UT and when an appeal to the Court of Appeal was pending. **more›**

Tang – bare trust existed notwithstanding lack of trust document

In *Lily Tang v HMRC*, the FTT has held that there was a bare trust despite the absence of a trust document and that the bare trustee did not have to notify HMRC nor was she liable for tax in relation to the funds she held on trust. **more›**

News items

HMRC publishes consultation on CGT Private Residence Relief

On 1 April 2019, HMRC published a consultation document on plans announced in the Autumn 2018 Budget to reduce the final period exemption for capital gains tax (CGT) principal private residence relief (PPR) from 18 months to nine months. Relief will also be limited so that letting relief will only apply when the owner shares occupancy with the tenant. These changes will apply to disposals on or after 6 April 2020.

The consultation also seeks views on the following proposed technical changes that were not announced in the Autumn 2018 Budget.

- legislating for extra statutory concessions D21 (late claims in dual residence cases) and D49 (short delay by owner-occupier in taking up residence) in their current form
- extending job-related accommodation relief to service personnel in cases where they live in accommodation not technically provided by the Ministry of Defence (MOD) but where they rent in the private rental sector as part of the MOD's future accommodation model
- making changes to no loss/no gain treatment for transfers of residences between spouses or civil partners, in certain circumstances.

The consultation closes on 1 June 2019.

A copy of the consultation document can be viewed here.

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Revised guidance on agreeing the value of shares with Shares and Assets Valuation when operating an EMI or SIP

On 1 April 2019, HMRC published its revised guidance on agreeing the value of shares with HMRC Shares and Assets Valuation when operating enterprise management incentives (EMI) and share incentive plan (SIP) schemes.

Share valuations agreed for EMI schemes will remain valid for 90 days from the date of agreement, an extension from the previous time limit of 60 days.

The guidance states that when the share valuation team has all the information it needs, it aims to reach an agreed valuation within four weeks of receiving the request.

A copy of the guidance can be viewed here.

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HMRC publishes guidance on how to calculate tax and NICs due on the 2019 loan charge

On 1 April 2019, HMRC published guidance for employers on how to manually calculate income tax and NICs arising on the 2019 loan charge.

The guidance is intended to assist employers whose payroll software is not able to perform the calculations automatically.

The guidance indicates that employers should put the loan charge through as arising on 5 April 2019, in the final pay period for 2019. Different procedures apply depending on whether the employee remains in employment or a P45 has been issued. The guidance contains detailed instructions about calculating the income tax and NICs due. It also contains information on the interaction between the 2019 loan charge and student loan deductions, earlier tax year updates and the apprenticeship levy.

A copy of the guidance can be viewed here.

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Case reports

Albatel – TV presenter wins £1.2m tax case

In *Albatel Ltd v HMRC*[1], the First-tier Tribunal (FTT) held that the so-called IR35 legislation (contained in section 49, ITEPA 2003 and Regulation 6, Social Security Contributions (Intermediaries) Regulations 2000) did not apply to the provision of services by the well-known TV presenter, Lorraine Kelly, to ITV.

Background

Albatel Ltd (Albatel), is the personal services company (PSC) of Lorraine Kelly (Ms Kelly). Albatel contracted with ITV Breakfast Ltd (ITV) to provide the services of Ms Kelly in relation to the television programmes *Daybreak* and *Lorraine*.

HMRC relied on the IR35 legislation which, if applicable, treats fees paid to PSCs as the deemed salary of the worker rather than company revenue. As such, the fees are subject to PAYE and NICs rather than corporation tax.

Ms Kelly was under an obligation to personally perform services for ITV. There was no actual employment contract between Ms Kelly and ITV. HMRC considered that the IR35 legislation applied because, had there been a direct contract between Ms Kelly and ITV (the Hypothetical Contract), it would have been a contract of service, an employment contract, rather than a contract for services.

HMRC therefore issued PAYE and NICs decisions to Albatel in the sum of £1.2m.

Ms Kelly also incurred agency fees which were paid to her agent, Roar Global Ltd (Roar Global) by Albatel. HMRC contended that those agency fees were not deductible expenses pursuant to section 352, ITEPA 2003.

Albatel appealed to the FTT.

FTT decision

The FTT was required to determine:

1. whether the Hypothetical Contract was a contract of service ie an employment contract, or a contract for services which would mean Ms Kelly was an independent contractor, and
2. if the Hypothetical Contract was one of service, and therefore the IR35 legislation applied, whether the agency fees paid to Roar Global by Albatel were a deductible expense.

The Hypothetical Contract

HMRC contended that mutuality of obligation was clearly evidenced as Ms Kelly was obliged to perform if called upon by ITV to do so, there was a guaranteed minimum payment under the contract and certain contractual terms, such as providing Ms Kelly's services for up to 42 weeks to allow for holidays, were akin to an employment contract.

HMRC relied on *Christa Ackroyd Media Limited v HMRC*[2], to argue that despite there being no express term dealing with control, ITV clearly had control over the ultimate output of Ms Kelly's shows and had a veto over, for example, suggested guests. Although no situation had arisen where ITV had exercised its veto.

1. [2019] UKFTT 0195 (TC).
2. [2018] UKFTT 69.

Viewed as a whole, HMRC argued that the Hypothetical Contract was an employment contract.

Albatel argued that the nature and range of Ms Kelly's work (both for ITV and more broadly) meant that she should be treated as being self-employed and the IR35 legislation cannot be invoked so as to deem there to be an employment relationship where one does not exist.

Responding to the criteria identified in *Ready Mixed Concrete (South East) Limited v Minister of Pensions & National Insurance*[3], Albatel argued that there must be mutuality of obligations which required the provision of Ms Kelly's services, not those of a substitute. Albatel highlighted that Ms Kelly's services were provided for 42 weeks of the year, and for the weeks outside of that period Ms Kelly was instrumental in finding a substitute presenter for the programmes. Additionally, there was no obligation for Ms Kelly to provide any services to ITV, it merely had the right to call on Ms Kelly "on an exclusive first call basis". Indeed, ITV had broad powers to terminate the contract for reasons outside of Ms Kelly's or Albatel's control.

Albatel also contended that Ms Kelly had a significant degree of control over her performances. In contrast to the presenter in the *Christa Ackroyd* case, ITV had no right to instruct Ms Kelly or Albatel what to do. Ms Kelly controlled the interviews she carried out and chose how to manage her schedule. Additionally, it was clear that many of the clauses in the agreement were industry standard and neither party felt completely bound by the terms. For example, Ms Kelly undertook other activities, such as a documentary trip to Antarctica for another broadcaster, despite the terms of the contract and ITV consented to these activities.

Ultimately, the overall arrangement was not consistent with that of an employment contract. There was a financial risk for Ms Kelly and Albatel, ITV could terminate the contract, there was no ongoing obligation for ITV to pay for Ms Kelly's services, and Ms Kelly was not subject to fixed hours.

The FTT considered that the principles relevant to its consideration of the nature of the Hypothetical Contract were:

- mutuality of obligation
- sufficient degree of control
- existence of a right to substitute
- whether the worker was in business on her own account, and
- the duration of the contract, degree of continuity and whether the worker was "part and parcel" of the organisation.

The FTT also considered the wider circumstances including the conduct of the parties and the actual contractual terms.

The FTT concluded that Ms Kelly was personally obliged to perform the services. ITV was obliged to pay Ms Kelly and there was an expectation that Ms Kelly would work for 42 weeks of the year. However, ITV was not obliged to call on Ms Kelly. Although there was mutuality of obligation, it only amounted to an "irreducible minimum", which was not determinative of an employment contract.

3. [1968] 1 All ER 433.

The FTT held that Ms Kelly had a sufficient degree of control. She was engaged for her specific skills and used her skills as she saw fit, with a free rein; she provided the programme in any manner she considered appropriate and was free to carry out other work and activities without any real restrictions. Additionally, Ms Kelly was not entitled to sick pay, holiday pay or other employee benefits, nor was she entitled to training or appraisals by ITV. The FTT therefore concluded that the Hypothetical Contract was one for services, rather than a contract of service and that the IR35 legislation did not apply.

Agency fees

By determining that the IR35 legislation did not apply, the FTT was not required to make a decision on whether the agency fees were a deductible expense, however, at the request of the parties, it did decide this issue.

Section 352(1), ITEPA 2003, provides that "a deduction is allowed from earnings from an employment as an entertainer for agency fees". Section 352(4) defines "entertainer" as "actor, dancer musician, singer or theatrical artist".

HMRC contended that the only agreement was between Albatel and Roar Global, rather than Ms Kelly and Roar Global. It relied on the fact invoices were addressed to and paid by Albatel. As such, it argued the fees were not deductible as expenses incurred by Ms Kelly.

Additionally, HMRC argued that Ms Kelly was not an actor, dancer, musician or theatrical artist. She was merely a lead presenter on a morning television show. Relying on *Madeley & Finnigan v Revenue & Customs*[4], HMRC submitted that there was no evidence of regular sketches on the shows and Ms Kelly was under no obligation to attend rehearsals as she was not acting out a part.

Albatel argued that although Ms Kelly was a sole presenter, the performances she gave were undoubtedly theatrical and the sketches she performed were clear examples of her being an entertainer.

The FTT rejected HMRC's contention that there was no contract between Ms Kelly and Roar Global. The FTT found that a contract existed between Roar Global and Ms Kelly as both an individual and Albatel. The fact that the invoices were paid through Albatel did not alter this.

In considering whether Ms Kelly was an "entertainer", the FTT said that Ms Kelly's role was to provide light entertainment, regardless of whether that was on the *Daybreak* news programme or on *Lorraine*. The FTT concluded that the programmes were light in nature and Ms Kelly regularly dressed up in skits and ad-libbed live on air. The services provided by Ms Kelly were a performance, presenting a persona of herself which was the brand that ITV sought to engage.

Comment

This decision is a setback for HMRC, who continue to challenge the employment status of a large number of taxpayers. Although HMRC was successful in the *Christa Ackroyd* case (it is understood that decision is on appeal to the Upper Tribunal), it has since suffered a number of defeats on the issue (see *MDCM Ltd v HMRC*[5] and *Jensal Software Ltd v HMRC*[6]).

4. [2006] UKSPC SPC00547.
5. [2018] UKFTT 201 (TC) .
6. [2018] UKFTT 271 (TC).

This decision highlights the difficulties businesses are likely to face from April 2020 when the IR35 legislation will be extended to the private sector. Businesses will be required to determine the IR35 status of contractors who use PSCs and they will be subject to penalties if they get it wrong.

Given the importance HMRC attaches to the IR35 legislation and the employment status of workers, HMRC is likely to continue to challenge taxpayers in this area.

A copy of the decision can be viewed here.

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Gardner Shaw – directions subject to a pending appeal should not have been varied

In *Gardner Shaw UK Ltd and others v HMRC*[7], the Upper Tribunal (UT) has held that the FTT should not have varied directions which the FTT had previously issued, when they had been the subject of an unsuccessful appeal to the UT and when an appeal to the Court of Appeal was pending.

Background

The circumstances of the underlying substantive appeals are set out in the decision of the UT in *HMRC v Smart Price Midlands Limited*[8] and it is not necessary to repeat them here. They concern the introduction of the so-called Alcohol Wholesalers Registration Scheme 15 with effect from 1 April 2016. The underlying appeals by the appellants are against HMRC's decision, in each case, that they are not fit and proper persons to carry on the controlled activity of wholesale trade in duty-paid alcohol

Between November 2016 and May 2017, the FTT issued directions in respect of the substantive appeals which included a requirement that HMRC send a list of all documents which were considered by the relevant HMRC officer when reaching his decision. The directions included a provision that any party could apply at any time "for the directions to be amended, suspended or set aside".

HMRC applied to the FTT to vary the disclosure direction, seeking an order for standard disclosure ie an order that it only disclose those documents on which it intended to rely or that it intended to produce at the substantive appeal hearing.

HMRC's application was refused. The FTT was of the view that the case was one in which it was exercising a supervisory jurisdiction over decisions made by HMRC, and concluded that a more extensive order for disclosure was necessary for the fair hearing of the substantive appeals. Accordingly, any confidential material considered by the decision-maker should be included in HMRC's list of documents. HMRC could then apply, on a case by case basis, to exclude any confidential material from disclosure.

HMRC appealed this decision to the UT. The FTT ordered a stay of the substantive appeals until after the UT's decision.

The UT rejected HMRC's appeal and HMRC applied for permission to appeal to the Court of

7. [2018] UKUT 419 (TCC).
8. [2017] UKUT 465 (TCC).

Appeal. The UT refused permission to appeal and HMRC applied to the Court of Appeal for permission to appeal.

HMRC also applied to the FTT for a further stay of the substantive appeals but that application was refused by the FTT on the basis that the potential prejudice to the taxpayers in delaying the substantive determination was considerably greater than the potential prejudice to HMRC in having to conduct a disclosure exercise that the Court of Appeal might later decide to be inappropriate.

HMRC then applied to the FTT to vary the disclosure direction to exclude "sensitive" documents that did not support the taxpayers' cases or were not adverse to HMRC's case.

FTT decision
HMRC's application was granted.

The appellants objected to the application on the basis that the disclosure direction had already been unsuccessfully appealed to the UT and was subject to a pending appeal to the Court of Appeal.

HMRC argued that (1) the FTT had held the disclosure direction could apply on a case-by-case basis; (2) there was a change in circumstances because there was new evidence of the substantial cost to HMRC in carrying out the disclosure exercise; (3) this was the first application to vary the directions; and, (4) the circumstances were such that the variation was in the interests of justice.

Rule 5(2) of the FTT Rules gives the FTT discretionary power to vary directions. The CPR equivalent is CPR Rule 3.1(7), which was considered in *Tibbles v SIG Plc*[9]. *Tibbles* considered the circumstances in which a court might vary or revoke a previous interim decision giving directions. Where there is no material change of circumstances and no prior misleading of the court, only a "rare" case and something "out of the ordinary" will lead to a rejection of the normal appeal procedure in favour of varying an interim order.

In the view of the FTT, of all the circumstances described in *Tibbles* in which it might be appropriate to vary the terms of an interim order, only the residual category of something "rare" and "out of the ordinary" could assist HMRC.

In allowing HMRC's application, the FTT held that it would be against the interests of justice to require HMRC to carry out the full disclosure exercise previously ordered because: (1) the additional documents sought on disclosure would be irrelevant and the taxpayers were adequately protected by HMRC's acceptance that documents that supported their case would be disclosed; (2) the very substantial cost that would be involved, which, since the documents were irrelevant, would inappropriately increase the costs and time incurred of all parties; and, (3) the disclosure exercise would take four months which would be contrary to the taxpayers' interests in having an early resolution of their appeals.

The taxpayers appealed to the UT.

9. [2012] EWCA Civ 518.

UT decision
The taxpayers' appeal was allowed.

In the view of the UT, the fact that the FTT was persuaded that there was a more appropriate and better approach to disclosure, contrary to the decision of the UT, was not capable of being a reason why, exceptionally, the FTT should revisit and change its earlier direction on disclosure.

The fact that there had been an appeal to the UT was a strong reason why the disclosure direction should not be varied by the FTT. The appropriateness of the disclosure direction had already been reviewed by the UT and upheld and an appeal to the Court of Appeal was pending. The interests of justice include upholding finality of court and tribunal decisions and not undermining the appeal process.

Furthermore, there had been no change in circumstances. HMRC's belated realisation of the cost involved in the disclosure exercise did not amount to something out of the ordinary that would justify revisiting the directions.

Although the taxpayers had an interest in having the substantive appeals determined as soon as possible, a potential delay of four months while disclosure was carried out, as the taxpayers wished it to be, could not amount to circumstances out of the ordinary that justified revisiting the order for disclosure.

Comment
The UT held that there was no basis on which a judge could reasonably conclude that this was one of the rare or out of the ordinary cases where it was appropriate for the FTT to vary the terms of the directions previously issued. The application for variation was in reality an attempt by HMRC to have a "second bite of the cherry".

The UT's decision serves as an important reminder that only in rare and out of the ordinary circumstances will it be appropriate to vary a case management decision which is the subject of a pending appeal.

A copy of the decision can be viewed here.

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Tang – bare trust existed notwithstanding lack of trust document

In *Lily Tang v HMRC*[10], the FTT has held that there was a bare trust despite the absence of a trust document and that the bare trustee did not have to notify HMRC nor was she liable for tax in relation to the funds she held on trust.

Background
Mrs Tang was a midwife working in the NHS. She worked night shifts so that she could care for her three children during the day. By 2015/16, Mrs Tang was earning about £40,000 per year. Her husband, Mr Tang, worked for the UK branch of the Singapore bank Oversea-Chinese Banking Corporation Limited, earning between £35,000-40,000 per year. They lived together in a house purchased in 1998 for £73,000 with the aid of a mortgage.

10. [2019] UKFTT 81.

On 15 November 2013, HMRC opened an enquiry into Mrs Tang's tax position following information it had received that Mrs Tang had over $900,000 in an account in her name with Standard Chartered Bank in Singapore (the fund).

Mrs Tang maintained that the fund belonged to her husband's parents and she had no personal liability to tax in respect of it as she held it on trust for her parents-in-law. Mrs Tang also argued that she had no obligation to complete a tax return as she was a basic rate taxpayer and all tax due from her was deducted through PAYE in relation to her salary and by her bank from whom she received a small amount of interest.

HMRC considered that, in the absence of a formal trust document, the fund belonged to Mrs Tang, and raised discovery assessments in respect of tax years 1998/99 to 2015/16, inclusive, pursuant to section 29, Taxes Management Act 1970.

In 2017, the fund was returned to Mrs Tang's parents-in-law on their instructions.

Ms Tang obtained the following sworn statement from her parents-in-law:

"We [names] confirm that the monies we currently hold with Standard Chartered Bank in Hong Kong of approximately $900k that were held in the name of our daughter-in-law Mrs Ping Tang between approximately 2008 and 2017 have always, and continue to be, beneficially owned by us ...

We confirm that when we placed these monies into Mrs Tang's name, it was not a gift; the funds were simply transferred into her name in order to allow the family to continue to access them. We reiterate that these funds have always been, and continue to be, beneficially owned by us."

Following receipt of this statement, HMRC withdrew the assessments for the years prior to 2008, but maintained that the fund belonged to Mrs Tang after this time and therefore she was liable to tax.

Mrs Tang appealed to the FTT.

FTT decision
The appeal was allowed.

It was common ground that Mrs Tang was the legal owner of the fund, she had control over the monies and she was entitled to give instructions to transfer the monies to other accounts. The issue was whether a trust existed.

Although HMRC relied heavily on the absence of a written trust document, the FTT noted that: "it is well settled under English law that a trust does not need to be in writing and may be made orally". Further, the FTT noted that a bare trustee's duty is to do as instructed by the beneficial owner.

Whilst from HMRC's perspective, Mrs Tang had been uncooperative to the extent that it issued information notices under Schedule 36, Finance Act 2008, the FTT said that Mrs Tang's claim to

be unable to provide documents and information was consistent with Mrs Tang's contention that the fund belonged to her parents-in-law and she was unable to provide statements for reasons of privacy and confidentiality. The FTT noted that Mrs Tang's circumstances were modest and her living situation was not consistent with someone having $900,000 at their disposal.

Finally, the FTT acknowledged the strength of the sworn statement of Mrs Tang's parents-in-law which it considered set out a coherent and credible account of where the fund came from and why it was dealt with as it was.

Based on all the evidence before it, the FTT concluded that Mrs Tang held the fund as bare trustee for her parents-in-law and that she transferred the fund back to them as beneficial owners in 2017. Accordingly, Mrs Tang was not personally liable to tax in relation to the fund and had no liability to notify HMRC.

Comment
Whilst the FTT's conclusion that a trust does not require a written document to be formed is not surprising and is a re-statement of settled law, the decision demonstrates that it is not always necessary to produce formal documentation before the FTT in order to establish the facts. It is not obvious why HMRC felt unable to accept the strength of the sworn statement which Mrs Tang's parents-in-law had produced. If it had, Mrs Tang would not have been put to the inconvenience of having to pursue an appeal to the FTT.

A copy of the decision can be viewed here.

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