

## AAT Tax Update 5 November 2013

In this week's edition of the tax update we look at:

1. Guidance to help litigants in person
2. HMRC publish new guidance on residence and domicile
3. HMRC announces a new approach to Business record checks
4. Can a contingent cost be deducted when computing CGT?
5. HMRC announce dormant PAYE schemes will be closed

### 1. Guidance to help litigants in person

In tax, appealing a decision or an assessment is a right but once the processes of internal review and Alternative dispute resolution have been exhausted, the remedy is to proceed to Tribunal or possibly Judicial Review. The process of litigation should not be undertaken lightly and it is usually advisable to obtain the support of an advocate or barrister. But many people may wish to take an appeal case (or other form of litigation) by themselves. Civil litigation can be an exacting process and navigating the technicalities of the law and the rules of civil procedure is no easy matter. Many litigants in person approach their advocacy without forensic legal skills or objectivity, two essential qualities for a competent lawyer. These observations would apply equally to an accountant thinking of taking a client's case for the first time.

The Judiciary of England and Wales has published a **170 page guide for those appearing in civil cases without legal representation**. The Handbook has been written by the six judges who comprise the Civil Sub-committee of the Committee of the Council of Circuit Judges; judges who, between them, have over 60 years' experience of sitting on the bench.

I think of this as being like an insurance policy. Hopefully you never need it but if you do it is nice to know it is there. The task of the judge in a civil court is to determine both the facts of the case and the law applicable to those facts. In determining the facts, the Judge may only rely on the evidence presented by the parties. A judge may not involve himself in the obtaining of evidence. It is simply not allowed. It is vital therefore that litigants present the evidence they need to succeed. Cases have been lost which might otherwise have been won because litigants have not thought carefully about the evidence they need, have not obtained that evidence, or have not presented it properly.

### 2. HMRC publish new guidance on Residence and domicile

HMRC have published new guidance which replaces the booklet HMRC6. **The booklet is called RDR1** and is a guide for UK residents and non-residents on the residence, domicile and remittance basis rules for tax years 2012-13 onwards.

This RDR1 guidance reflects the introduction of the legislative changes to the remittance basis that came into effect for tax year 2012-13 and the introduction of the statutory residence test for tax years 2013-14 onwards. However, comprehensive details of these changes are not yet included and are available in the following notes:

- **Information Note; Remittance Basis** (PDF 176K)
- **Guidance Note: Statutory Residence Test (SRT)** (PDF 425K)
- **Guidance Note: Overseas Workday Relief (OWR)** (PDF 89K)

### 3. HMRC announces a new approach to Business Record Checks (BRC)

**From 4 November 2013, HMRC's BRC activity in the Edinburgh, Glasgow, Leeds, Bradford and Stockport areas will explore new ways of using the checks.** As part of this, HMRC will evaluate new risk processes and ensure new approaches are cost-effective and fit with its wider compliance activity.

When BRC was first introduced, it earned criticism from the major professional accountancy bodies who were sceptical that officers of HMRC could give practical advice on record keeping requirements. HMRC's BRC programme uses on-site visits to encourage customers to keep better records, and keep up to date.

The checks help and encourage small and medium-sized enterprises to improve the standard of records they keep. This then helps them to send correct returns to HMRC.

HMRC will also work with tax agents' representatives including AAT to review the benchmarks of what good record-keeping should be. Many tax agents already do much to improve their clients' record keeping and HMRC wants to work with them to improve standards.

#### 4. Can a contingent cost be deducted in computing CGT?

Before examining the main issue in this case, it is interesting to note that the First Tier Tribunal (FTT) decided the issues on an anonymous basis and the parties wished the hearing by the Upper Tribunal to be held in private. This was rejected by the Court. Lord Glennie ruled:

*"So far as the protection of sensitive information was concerned, while this is always a concern of any court, it seemed to me to be unrealistic to think that disclosure of allegations about events back in 2000 could give rise to any issues of commercial sensitivity now, some 13 years later. Further, the fact that the parties to the Settlement Agreement had agreed that it should remain confidential cannot be allowed to prevail over the requirement for open justice. The circumstances in which the court will depart from that principle will be many and varied. Obvious examples are in cases involving children, in asylum cases where there is a genuine fear of danger to life, or where measures are required for the protection of genuinely sensitive information. That list is by no means exhaustive."*

In **HMRC v Morrison [2013] UKUT 0497** the major issue was whether a payment of £12 million made by Sir Fraser Morrison ("SFM") to settle an action arising out of representations made or allegedly made by him with respect to Morrison plc ("MPLC") in connection with an offer for the purchase of the company by Anglian Water plc (later renamed AWG Group Limited) ("AWG") was a "contingent liability in respect of a ... representation made on a disposal by way of sale of [SFM's shares in MPLC]" within the meaning of section 49(1)(c) of the Taxation of Chargeable Gains Act 1992 ("the Act"), requiring an adjustment to be made in terms of section 49(2) thereof.

AWG acquired MPLC in September 2000. The price paid by AWG for the whole issued share capital of MPLC was approximately £263.3 million. As a result of accepting the Offer, SFM received consideration for his shares (in the form of a combination of AWG shares and AWG loan notes) with an approximate value of £33.4 million for his 8 million shares.

In 2002 AWG alleged that it had been induced by a number of allegedly false representations and misstatements to offer more for the company than it was worth. It sought damages of £132 million, which was said to be the difference between the price paid by AWG for the whole issued share capital of MPLC (on the basis that the representations made by SFM were true) and the actual value of MPLC at the date of acquisition, plus consequential losses.

AWG and MPLC undertook to release SFM and the other director and each of the persons listed in a Schedule thereto as "the Morrison Interests", including SFM's immediate family and related trusts, from any liability that he or they might have (and whether or not known about at the date thereof). Without accepting liability, SFM was required by clause 2.1 of the Settlement Agreement to pay the sum of £12 million to AWG. He incurred legal costs to this point of £5 million which he also sought to deduct for tax purposes.

HMRC refused a deduction for the £12million in the computation of the capital gains liability but the FTT allowed some of this cost in principle leaving it to the parties to agree how much but the legal costs were denied a deduction in the computation of the gain.

The fact was that SFM had made a representation on the disposal of the shares and incurred a liability in respect of that representation. As a result, the proceeds to him of his disposal of his shares were less than it expected. The transaction left him £12 million worse off than he would otherwise have been.

There are numerous cases which confirm that capital gains tax is a tax which should follow commercial common sense and if that were the case, SFM should have won the appeal. But he lost because the £12million was not a contingent sum paid and arising from the disposal. The settlement was as a result of alleged misrepresentations which he made as chairman of the company and so the link to the disposal of the shares was too remote. Lord Glennie said in his judgment:

*“The liability of SFM on representations made by him as chairman of MPLC in connection with AWG’s purchase of its whole share capital is wholly distinct from the consideration received by him for his shares in MPLC. He received his price for his shares by virtue of his ownership of the shares. It was the same price per share as was received by any other shareholder...”*

In other words, the HMRC were right to deny SFM a deduction for the £12million he had paid to settle the dispute. Almost adding insult to injury, it seems that the process of litigation that led to the settlement had incurred legal costs of a further £5million and Lord Glennie ruled that these were not allowable in the computation of the gain on which SFM had to pay tax.

Tax can be very unfair at times. It seems SFM has been taxed as if he received £33.4 million but after paying for the legal costs and settlement totalling £17million it will seem to SFM that his net proceeds were £16.4 Million. Of course he will also face the additional costs of this litigation making him even poorer.

## **5. HMRC announce dormant Pay As You Earn (PAYE) schemes will be closed**

**HMRC has announced that dormant and unused PAYE schemes may be shut down if there has been no activity for 120 days.**

From 28 October the Revenue will be issuing letters to employers explaining that their PAYE schemes have been closed where records indicate that they have not operated PAYE or paid any subcontractors.

Any PAYE schemes opened after 5 April this year will be shut down automatically where the employer has not sent any PAYE returns or paid HMRC within four months of the scheme being set up. Schemes registered as annual schemes will not be closed by this process.

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5 November 2013

The views expressed in these podcasts are Derek Allen's personal views and do not necessarily represent AAT policy or strategy.