# Tax update – 31 October 2016

**AAT Tax Update 31 October 2016**

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## 1. HMRC's duty of care and confidentiality

It was always understood that anything disclosed to the taxman was confidential and that officers of HMRC owed a duty of care and confidentiality to taxpayers. I was surprised to learn that Dave Hartnett had disclosed details of the Ingenious Film scheme in an off the record briefing to journalists. I was disappointed that the issue has proceeded all the way to the Supreme Court which has criticised the disclosure.

HMRC tried to justify the briefing apparently given in June 2012 informally by Dave Hartnett claiming that it had tried to form good relations with the media and wanted to publicize its views regarding elaborate tax avoidance schemes. From memory, Mr Hartnett retired in 2012. Without reading the Supreme Court Judgement, I think it is obvious that Mr Hartnett made a mistake. He should have apologized and recognized that he made a human error and disclosed information which he should not have.

It has been reported that an HMRC spokesperson said: 'Having earlier won this case in the High Court and Court of Appeal, HMRC is naturally disappointed by the judgment handed down by the Supreme Court.

'HMRC defended this case because it considered that the disclosure made by Mr Hartnett was lawful. However, the Supreme Court has decided otherwise and we will examine the judgment in detail."

As a taxpayer, I am annoyed to think about the expense which has been incurred in taking this action all the way to the Supreme Court. The legal costs will have been astronomic and at the end of the day the detail of Ingenious Film schemes became public knowledge when the appeal came before the First tier Tribunal. So the error made by Mr Hartnett breaching confidentiality was not catastrophic.

Do I think that Mr Hartnett should be prosecuted for the mistake he made and the disclosure of confidential information? Of course not. I think that the criminal prosecution contained within section 19 Commissioners of Revenue and Customs Act 2005 (which makes it a criminal offence for a person to contravene section 18(1) by disclosing revenue and customs information relating to a person whose identity is specified in or can be deduced from the disclosure, subject to a statutory defence if the defendant shows that he reasonably believed that the disclosure was lawful or that the information had already been lawfully made available to the public) should be retained and used to prosecute any serious breach of confidentiality.

I wonder how many millions of pounds will have been spent in relation to this judicial review case. And what is the final outcome going to be. Will the tax avoidance scheme creators be able to recover damages? I hope not because this dispute was not in the public interest and should never have happened.

http://www.bailii.org/uk/cases/UKSC/2016/54.html

## 2. Negligible value claim fails because shares were worthless at acquisition

Dyer v Revenue and Customs [2016] UKUT 381 concerned claims that shares held by Mr and Mrs Dyer in JD Designs Limited ("JDDL") had become of negligible value so as to engage the provisions of s 24 of the Taxation of Chargeable Gains Act 1992 ("TCGA"). It is common ground that, had that section been engaged, Mr and Mrs Dyer would have been entitled to set their capital losses against their net income for the tax years 2007-08 and 2008-09, or to carry them forward, in accordance with ss 131 and 132 of the Income Tax Act 2007.

Mr Dyer decided to present his appeal to the Upper Tribunal. He believed that the absence of contracts and legal agreements was unimportant in relation to valuing a family company which his daughter ran. In reality, the company had been trading at a substantial loss and the intangible assets like employment contracts and intellectual property did not exist. Mr Dyer argued that the company had a value and that the contractual deficiencies would have been sorted if a third party had been buying the company.

I suspect that Mr Dyer mistakenly believed that he was entitled to some form of tax relief having spent the money. He could have done things differently and if he had done it differently he could have obtained tax relief.. We are all familiar with the principle that in tax it isn't what you do but the way that you do it. In Mr Dyer's case he did it wrong.

I feel very sorry for Mr Dyer. He has been denied tax relief on a technicality. He thought he was obtaining shares which were worth something and he thought the value existed because his daughter owned any intangible assets and would have transferred these assets to the company if asked. He was probably correct in that thought but in the tax world, the decision turns on the facts and when he (and his wife) invested in the shares they were worthless. His subsequent claim for negligible value was successful confirming the shares were worthless but that he had not suffered any loss in value for the shares which he bought. The finding of fact decided by the First Tier Tribunal was that when the couple acquired the shares they were worthless. There was plenty of evidence to show that the decision was fully justified.

Experienced practitioners know that a finding of fact can only be overturned if that finding of fact is unreasonable and obviously incorrect. The result may be unfair but others should learn from the series of mistakes made by Mr & Mrs Dyer. If you hope to get tax relief, you need to arrange things in the right way and if a case goes to appeal you need to make sure that the evidence supports your argument.

http://www.bailii.org/uk/cases/UKUT/TCC/2016/381.html

### 3. Guidance on Creative industry Tax reliefs

Creative industry tax reliefs are a group of 7 Corporation Tax reliefs (Film Tax Relief, Animation tax relief, High end TV tax Relief, Children's TV tax relief, Video Games tax Relief, Theatre tax relief and Orchestra Tax Relief)that allow qualifying companies to claim a larger deduction, or in some circumstances claim a payable tax credit when calculating their taxable profits.

These reliefs work by increasing the amount of allowable expenditure. Where your company makes a loss, you may be able to surrender the loss and convert some or all of it into a payable tax credit.

The following tax reliefs are state aid:

- Film Tax Relief
- Animation Tax Relief
- High-end Television Tax Relief
- Video Games Tax Relief

- Children's Television Tax Relief
- Theatre Tax Relief
- Orchestra Tax Relief

For all of these reliefs (except Video Games Tax Relief) when your company receives more than €500,000 a year in state aid, details will be published annually on the European Commission website.

To read more go to: https://www.gov.uk/guidance/corporation-tax-creative-industry-tax-reliefs#FTR

### 4. HMRC Publishes its measure of the tax Gap

According to HMRC the tax Gap is 6.5% or some £36bn. In an 83 page report found at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/561312/HMRC-measuring-tax-gaps-2016.pdf

HMRC explains why it attempts to measure the tax gap. Many commentators believe that the tax gap is much larger than HMRC estimate. Whatever that tax gap might be, no one should condone tax evasion and we should all appreciate the efforts made by HMRC officers to close the tax gap. HMRC's tax gap analysis provides insight into which strategies are most effective at reducing the tax gap.

A series of bar charts discloses that SMEs are responsible for £18.3 bn and that some £6.2bn arises from the hidden economy. What did not surprise me is that HMRC estimate that £5.5bn of the gap arises from a failure to take reasonable care but only £3.2bn arises from error.

My intuitive reaction to such statistics is to treat them with a very large degree of scepticism. I have commented recently about how many cases are getting to tribunal when it is obvious that a mistake has been made and yet HMRC are seeking a substantial penalty contending that the error arose from a failure to take reasonable care. I am concerned that HMRC are abusing the penalty regime but everyone should recognise that HMRC are working hard to close the tax gap and improve compliance.

### 5. HMRC Publishes Agent Update issue 56

I think that reading this is required reading for all advisers even though some of the content makes me feel uncomfortable. Making Tax Digital, mentioned below, is covered with the reminder that responses to the consultation are required by 7 November.

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/560850/Agent_Update__WT_56.pdf

### 6. Observations on the paper filing deadline

The deadline for filing paper returns of 31 October seems academic these days. When self-assessment was introduced less than a decade ago there were many comments about the increasing burden imposed on compliant taxpayers in order to achieve efficiencies and staff cuts within the then Inland Revenue.

HMRC has achieved significant reductions in staff numbers but unfortunately, in my view, service has suffered. The calibre of staff and their attitude towards taxpayers has all declined. Repayments seem to take far too long to be processed. Telephones are not answered. Local offices and enquiry centres have been shut down. For most taxpayers with straightforward tax affairs, the leaner HMRC still does a good job of processing returns and collecting the tax but these days if there is an unusual aspect, it seems excessively difficult to talk to an informed officer and get difficult areas resolved.

Making tax digital (MTD) is going to be introduced.  HMRC can be expected to behave as they have done in the past by selfishly introducing something in a timescale which is necessary for them but has little regard to the costs and burdens imposed on many taxpayers.  If MTD is inevitable, now is a good time to start preparing and more importantly trying to help those clients who will need to invest in technology and training to make it work.  With quarterly reporting of financial information the environment for many practitioners will change.  Good software and technology may mean that many clients will be tempted to do more themselves.  There the issue will be how can the adviser add value and help the client make better decisions, perhaps, for example, by buying a low emission car which is more tax efficient.

Some businesses may not be willing to invest in technology and training and they will want their adviser to do more work.  That has implications for cost as well as potential staffing levels.  Some clients may not be willing to change and for them the future looks difficult with potential late filing and possible penalties.

Some clients may not be worth retaining and now might be a good time to review such clients and suggest they find new and different advisers.  The pace of change in the last decade has been dramatic and demanding.  Planning for the future creates opportunity.
Derek Allen
31 October 2016

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

There will be a general tax podcast updating AAT members on recent developments and decisions available on the website on 30 November 2016.