

# PRACTICE UPDATE

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## HOLIDAY OFFICE CLOSURE

Please note that the office will be closed from Friday 15<sup>th</sup> August 2008, and will re-open on Monday 1<sup>st</sup> September 2008.

### 1. BPR Developments

RECENT CASES BEFORE the Special Commissioners have dealt with two issues of uncertainty on Business Property Relief (BPR) claims for IHT purposes.

Business property does not qualify for BPR if the business consists wholly or mainly of dealing in securities, stocks or shares or land or buildings, or in making or holding investments (although there are some limited exceptions, in respect of market makers or discount house businesses carried on in the UK). There is an important exception in group situations, if a company's business is wholly or mainly as the holding company of one or more companies whose business is not an excluded one (IHTA 1984, s 105).

#### Letting of land

It is not uncommon to find surplus land being let to farmers on short-term grazing licences, in the hope that it will be a business which qualifies for BPR. In *McCall and Anor (Personal Representatives of McClean, dec'd) v Revenue and Customs Comrs* (2008) SpC 678, property consisting of farmland, which was let for grazing under conacre (ie a temporary easement creating a licence to use land) or agistment (ie the letting of land for grazing) agreements in Northern Ireland was held to be enough to

constitute a business within IHTA 1984, s 105(1) on the facts of the case. The Special Commissioner stated:

*"On it's own I do not believe that the mere letting of land under agistment arrangements for each season would constitute a business..."* However, he added that what 'tipped the scales' towards a business in that case was extra work done in terms of tending the land.

**However, that business was held to be excluded from BPR, on the grounds that it consisted wholly or mainly of making or holding investments, within s 105(3).** The Special Commissioner considered that the business in that case consisted wholly or mainly of the making of investments, on the basis that:

*"...the activities of the business consisted of the making available of its major asset to other persons for payment without the separate provision of any substantial other goods or services."* He added:

*"The activities surrounding the letting (except perhaps the provision of water) were not so substantial as to constitute themselves a part of the business distinct from holding the land: this was not like a car hire business where income derives from the letting of a car but where the cleaning, servicing, insuring and dealing in the cars may be such a large part of what*

*is done to say that it is not just a business of holding cars; instead the major part of what was done was letting the land and the other activities a necessary part of that or small in comparison.”*

Whilst the letting of land does not necessarily constitute an investment business on the basis of the decision in *McClean*, the availability of BPR is likely to depend upon what other services are provided as well, and the extent of those services.

### **BPR on business or business asset?**

Prior to the Special Commissioner's decision in *Trustees of The Nelson Dance Family Settlement v Revenue and Customs Commissioners* (2008) SpC 682, it was commonly thought that the transfer of business assets (as opposed to a transfer of the business itself) did not qualify for BPR.

The *Nelson Dance* case concerned the transfer of some farmland with development value to the trustees of a family settlement. The trustees claimed BPR on the basis that there had been a transfer of value which resulted in a reduction in the value of 'relevant business property' within IHTA 1984, s 105. HMRC sought to disallow the BPR claim, but the trustees' appeal was successful. **The Special Commissioner held that BPR was due on the basis that "...all that is required is that the value transferred by the transfer of value is attributable to the net value of the business."**

BPR is clearly a very valuable relief from IHT. If there are any BPR issues affecting your clients, please do not hesitate to contact Mark McLaughlin.

## **2. Employees working abroad**

IT IS BECOMING MORE COMMON in this age of international markets for businesses to send employees on overseas assignments. This will result in accommodation and subsistence

expenses being incurred, which normally requires the employee to obtain expense receipts for P11D purposes. Fortunately, a welcome optional simplification of the rules regarding accommodation and subsistence payments to employees traveling outside the UK was announced earlier this year.

### **Scale rates**

HMRC have published tables of 'benchmark scale rates' that employers can use to pay accommodation and subsistence expenses to employees traveling abroad on employment duties, without income tax or NIC, or the need for the employees to produce expenses receipts. HMRC's Employment Income Manual confirms that employers do not need to report payments within those rates on the employee's form P11D (EIM5250). In addition to these tax and NIC-free expenses, employers may also pay or reimburse employees for 'Incidental overnight expenses' of up to £10 per night during periods of work overseas in appropriate cases (ITEPA 2003, ss 240-241).

The benchmark scale rate tables for accommodation and subsistence expenses payments to employees traveling outside the UK, together with accompanying guidance, can be accessed via the HMRC website: (<http://www.hmrc.gov.uk/employers/emp-income-scale-rates.htm>). The tables run to 136 pages in total, and contain various rates (e.g. a 'room rate' per night and a 'subsistence only rate') covering a wide range of countries and regions. The Employment Income Manual includes examples of how the HMRC published rates may be used by employers to reimburse employees' accommodation and subsistence expenses for travel outside the UK. This guidance can be accessed via the HMRC website: <http://www.hmrc.gov.uk/manuals/eimanual/EI M05280.htm>

## **3. Penalties in Enquiries**

A NEW PENALTY REGIME was introduced in FA 2007, and extended in FA 2008. It is expected to apply to inaccuracies in returns (or other documents) due to be filed from 1 April 2009, where the return (e.g. personal, **Practice Update (July / August 2008)**

company, VAT) relates to a tax period beginning on or after 1 April 2008 (e.g. self-assessment returns for individuals in respect of 2008/09 and later years).

### Current regime

Penalties for incorrect tax returns submitted negligently (or fraudulently) under current legislation are tax-g geared (i.e. based on potential lost revenue) and expressed as a percentage of the additional tax due. The maximum penalty is 100% of the culpable tax lost, but is subject to reductions, based on the following abatement factors as described in HMRC Leaflet IR160 ('Enquiries Under Self-Assessment'):

- Disclosure – up to 20% (or exceptionally 30%);
- Co-operation – up to 40%; and
- Seriousness – up to 40%.

When negotiating the level of penalties with HMRC, it helps to know those factors that could result in penalty reductions. Penalties can often be negotiated down by reference to the guidance in HMRC's Enquiry Manual. This outlines various circumstances to be taken into account in determining the level of abatement for disclosure (EM6070), co-operation (EM6075) and seriousness (EM6080).

### New regime

There are fixed maximum and minimum penalties under the new regime (FA 2007, Sch 24 para 10), which depend on the following factors:

- Behaviour, i.e. whether 'reasonable care' was taken (in which case no penalty is chargeable), or whether it was 'careless', 'deliberate' or 'deliberate and concealed'.
- Disclosure category, i.e. whether it was 'prompted' or 'unprompted'; and
- Disclosure quality, i.e. 'telling', 'helping' and 'giving access'

For example, the level of penalty for a prompted careless error is between 15

and 30 per cent, whereas a penalty for an unprompted careless error can be reduced from 30 to 0 per cent. When the maximum level of penalties is established under the first two bullet points, the reduction will depend on the quality of disclosure. HMRC's guidance on penalty reductions for disclosure under the new regime is contained in the Compliance Handbook. This suggests (at CH82430) that the above three elements of disclosure may be weighted as follows:

- Telling HMRC about the error (or failure to disclose) – 30 per cent;
- Helping (i.e. giving HMRC reasonable help) – 40 per cent; and
- Giving access to records – 30%

### Similarities and differences

There are similarities between 'disclosure' under the old regime and 'telling' under the new one, and also between 'co-operation' and 'helping' and 'giving access' respectively. The current abatement factor of 'seriousness' does not feature in the new regime, which is unfortunate in some cases, e.g. those involving one-off, relatively small errors. The emphasis under the new regime seems to be on encouraging a proactive approach by clients (and agents) in resolving enquiries as quickly and efficiently as possible. For example:

- HMRC state that, in the context of 'telling': "The person needs to show a positive approach to telling what has happened, not just reacting to questions" (CH82440);
- 'Helping' includes "positive assistance as opposed to passive acceptance or obstruction" and "actively engaging in the work to accurately quantify the inaccuracies" (CH82450);
- in HMRC's view 'giving access' includes allowing access to "their business and other records" and their officers are advised that "...you should only seek access to records that are reasonably required for the purpose of

ensuring that the document is corrected". Whether HMRC consider that access should be provided to private account statements to secure the full disclosure reduction for this category remains to be seen.

The scope for negotiating penalties is generally restricted by maximum and minimum levels. It also seems likely that the level of penalty within those ranges will be difficult to predict, particularly in the early stages of the new regime, due to the numerous reduction factors involved, and also because those factors are relatively subjective in nature. **Even though there is less scope and discretion to negotiate penalties, the scope that does exist is subject to opinion and judgement to a significant degree.** Please do not hesitate to contact me if you need any assistance with either the old or new enquiry regimes. *(This article is based on an article in 'Busy Practitioner', which is published by Tottel Publishing.)*

#### 4. Dates For Your Diary!

CHANGES TO LEGISLATION and practice affecting tax compliance seem to be happening at a rapid pace. Below is a summary of some recent significant practice procedural changes, and when they take effect.

##### Tax return filing dates

The changes to personal tax return filing dates announced in FA 2007 apply to tax returns for 2007/08 and later years. 31 July has become a significant date under the new filing regime. The general rule is that paper returns must be filed on or before 31 October following the end of the relevant tax year, or alternatively electronic returns must be filed by 31 January. However, an exception to this rule is that if HMRC issue a paper tax return (or filing notice) after 31 July, the filing date is extended to three months beginning with the date on the return (or notice).

##### Tax return enquiries

HMRC's tax return enquiry 'window' also changed in respect of personal tax returns for 2007/08 and later years, and most company returns for accounting periods ending after 31 March 2008. The enquiry window is no longer linked to the filing date for the return, but now normally runs for twelve months from the date on which the return was delivered to HMRC. **Firms would therefore be well-advised to maintain a log showing the dates on which tax returns for 2008 and later years were delivered to HMRC, if they do not already do so.**

##### Penalties for errors

As indicated in the previous article, a new penalty regime applies to return periods starting on or after 1 April 2008, where the due date for filing is on or after 1 April 2009. Firms will probably need to be familiar with the 'old' and 'new' penalty regimes for some time to come. For example, suppose a self-employed taxpayer submits his 2007/08 self-assessment return on 30 January 2009. HMRC open an enquiry into the return in January 2010, by which time the taxpayer's 2008/09 return has already been filed. HMRC's enquiry into his 2007/08 return uncovers understated cash sales, and an enquiry is also opened into the 2008/09 return, which results in the individual making a prompted disclosure of a similar error. When discussing the level of penalties with HMRC, the taxpayer's agent will need to take account of the different methods by which penalties can be mitigated for 2007/08 and 2008/09 respectively.

##### Assessment time limits

Provision was made in Finance Act 2008 to amend the time limits for assessments, claims etc, in an attempt to provide greater uniformity and alignment where possible across the various taxes (e.g. income tax, corporation tax, VAT). For example:

- The general time limit for taxpayers to make relief claims for income tax (including PAYE and under the Construction Industry Scheme) and CGT purposes (in TMA 1970, s 43) is changed to 4 years after the year of assessment, from the previous 5 years and 10 months (or 6 years for corporation tax). The same time limit applies to error or mistake claims (under ss 33 or 33A).
- The ordinary time limit for assessments by HMRC is also reduced to 4 years, from 5 years and 10 months (or 6 years for corporation tax). This time limit also applies to discovery (or mistake) assessments.
- However, an extended time limit of 6 years after the year of assessment (previously 5 years and 10 months, or 6 years for corporation tax) applies if a loss of tax is brought about carelessly, or 20 years (previously 20 years and ten months, or 21 years for corporation tax) if the loss of tax has been brought about deliberately, and also to recover a loss of tax resulting from failing to notify HMRC of liability to tax under TMA 1970, s 7, or failing to disclose tax avoidance schemes.
- For VAT purposes, the normal period for VAT assessments is increased to 4 years (from 3 years). An extended time limit of 4 years also applies to VAT claims. However, the time limit for assessments to recover a deliberate loss of VAT is 20 years, which was also previously the time limit for VAT assessments in cases of fraud.

The Finance Act 2008 changes to time limits will enter into force on a future date to be specified by Statutory Instrument. All in all, there are interesting times ahead for firms and clients!

*(This article is based on an article in 'Busy Practitioner', which is published by Tottel Publishing.)*

## Nearly There!

A TAX WRITER'S (or publisher's) life is never uneventful at this time of year! It is always a relief to reach Summer in one piece. In addition to being the General Editor of Tottel's 'Core Tax Annuals 2008-09 and co-author of 'Inheritance Tax 2008-09' from that series, I am also General Editor of 'Tax Planning 2008-09'.

No sooner has the ink dried on FA 2008 than 'Tottel's Tax Planning 2008-09' is in the final stages of editing, and is about to go to press! It also includes information on new tax cases, as well as other changes in tax law and practice.



Commentary is included on current 'hot topics' in tax planning, including major reforms to the CGT regime and the introduction of 'entrepreneurs' relief', and also for IHT purposes the introduction of a transferable nil rate band between spouses and civil partners.

To order a copy of 'Tax Planning 2008-09', visit the TaxBookShop website: <http://www.taxbookshop.com/bk-676-tax-planning-2008-09>

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