Briefing

Private client review for February

Speed read

This month, we consider the FTT's recent decision in *Patwary* and the importance of evidence when making a claim for PPR relief. In *Trustees of the Peter Buckley Settlement*, a failed claim for entrepreneurs' relief by trustees demonstrates the importance of checking the requirements of the relief well in advance of a disposal. *Keighley and another* looks at the circumstances in which another person's behaviour can be attributed to the taxpayer. Finally, we consider privacy in two contexts: first, examining the tension between open justice and privacy in respect of the taxpayer's application to have their tax appeal heard in private with an anonymised judgement, and then looking at how the UK and other jurisdictions are dealing with the tension between transparency and privacy in the context of beneficial ownership registers.

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PPR relief: the importance of evidence

In last month's column, we considered the FTT's decision in *Ives v* HMRC [2023] UKFTT 986 (TC). There, the taxpayer argued successfully that PPR relief applied in respect of the sale of three properties in relatively quick succession, each at a substantial gain, thanks largely to the extensive evidence put forward to support the taxpayer's assertion that all three properties had been used by him as family homes.

This month, the impact of the absence of evidence re-emphasises the point in a complementary decision relating to PPR relief, this time a taxpayer loss. In *S Patwary v HMRC* [2024] UKFTT 53 (TC), the taxpayer appealed against a closure notice issued by HMRC, disallowing a PPR relief claim on the sale of his property. The property was purchased in 2010 and the taxpayer claimed that he had lived there (with his girlfriend and a lodger) until 2013, at which point he had rented the property out and moved back to live with his parents until its sale in 2016.

The FTT accepted that the taxpayer's version of events 'does not seem improbable'; however, he had failed to provide sufficient evidence to support it. The taxpayer submitted a brief witness statement, mortgage statements and letters addressed to the property; however, it was noted that he had not changed his address with his bank, HMRC, the electoral roll or on various other bills. He was also unable to provide council tax statements, despite the fact that there was supposedly a period during which he and his girlfriend lived in the property on their own.

It was noted that 'the burden of proof is on the Appellant to show that the assessment by HMRC is incorrect or excessive' and that, whilst the tribunal 'should not be prescriptive about what evidence shows residence ... this case has seen remarkably little evidence from the Appellant to demonstrate a period of residence in the property.' A distinction was to be drawn between (a) evidence demonstrating residence at the property and (b) evidence that might be addressed to a property owner (even if someone else was living in it). The taxpayer had not provided any witness statements, whilst in *Ives*, the taxpayer's witness evidence had been an important factor in persuading the FTT to rule in favour of the taxpayer. The appeal was therefore dismissed.

This decision reminds taxpayers to ensure they accumulate and retain evidence which fully supports any claims they make for tax reliefs. In the event of future challenge, the burden of proof will be on the taxpayer to show that HMRC's assessment is wrong.

No entrepreneurs' relief for trustees

In *Trustees of the Peter Buckley Settlement v HMRC* [2024] UKFTT 29 (TC), the FTT rejected a trust's application for entrepreneurs' relief on a share disposal.

> If there is a qualifying beneficiary, the trustees and beneficiary would be well advised to consider the technical components of the relief well in advance of any disposal to ensure that they qualify

Where the conditions for entrepreneurs' relief (now business asset disposal relief) are met, this can reduce the CGT rate on gains realised on material disposals of business assets (including shares in a company) by individuals and trustees. In the context of trusts:

- there must be a 'qualifying beneficiary' (i.e. a life tenant entitled to the trust's income); and
- for at least two years ending within the three years before the date of the disposal:
  - the company must be (i) the qualifying beneficiary's personal company, and (ii) either a trading company or the holding company of a trading group; and
  - the qualifying beneficiary must be an officer or employee of the company (or another company within the trading group).

For a company to be an individual's personal company, they must hold at least 5% of the share capital and voting rights of the company.

In this case, the life tenant was a director of the company and had formerly been its sole shareholder, but he transferred the share to the trust more than three years prior to the sale. HMRC's contended that the company did not qualify as the life tenant's personal company, as he had not personally held 5% of its share capital for the required period.

As the life tenant was also one of two trustees of the trust, the trustees' representative attempted to argue that this gave him the necessary level of ownership. The FTT disagreed, holding that the life tenant did not own the share *in his personal capacity* as required by the legislation.

This is a helpful reminder that, although trustees can obtain relief on disposals of business assets, if there is a qualifying beneficiary, the trustees and beneficiary would be well advised to consider the technical components of the relief well in advance of any disposal to ensure that they qualify.

When is another person's behaviour attributed to the taxpayer?

The FTT's decision in *Keighley and another v HMRC* [2024] UKFTT 30 (TC) involved various issues relating to the corporation tax return of Primeur Ltd, including the following:

- Mr Keighley, a shareholder and senior manager of Primeur, used a company credit card for personal expenditure which was then settled by the company; however, no adjustments were made to the company's accounts or Mr Keighley's personal tax return. HMRC therefore issued assessments and penalties to Mr Keighley based on deliberate behaviour, as well as assessing Primeur to NICs and penalties.
- Mr Keighley was also a shareholder in Valley Dale Properties Ltd (VDP). He, along with other shareholders and Primeur, made loans to VDP, some of which were written off following a sale of VDP's assets. HMRC argued that these write-offs were not allowable deductions for corporation tax purposes for Primeur and issued discovery assessments.

In respect of the first issue, the FTT held that deliberate behaviour extended not just to actual knowledge, 'but also where the taxpayer has blind eye knowledge' and, on this basis, the inaccuracies on Mr Keighley's tax returns were due to deliberate behaviour. HMRC also argued that Mr Keighley's deliberate conduct 'transfers to the company'; however, the FTT did not agree. It noted that: 'this is not a one man company where the guiding mind of the company can, effectively, be directly attributable to the owner manager. It is a substantial organisation with ... a number of systems...' Whilst those systems had fallen into disarray, meaning that Primeur had been careless, HMRC had not proven deliberate behaviour on the part of Primeur.

As for the second issue, HMRC needed to prove carelessness to ensure that they had a six-year period for issuing a discovery assessment. Primeur had sought advice from a reputable accountancy firm, and the FTT accepted that it was 'wholly reasonable' for the company to rely on this advice, and in doing so, had exercised reasonable care (meaning that Primeur's appeals against penalties in respect of the loan issue were allowed). However, FA 1998 Sch 18 para 43 provides that a discovery assessment can be made where there is careless behaviour by 'a person acting on behalf of the company'. Here, the tribunal found that the advice from the accountants (i.e. a person acting on behalf of Primeur) had been careless and so the discovery assessment was not out of time.

In this column, we have previously mentioned decisions such as *Cruise* [2023] UKFTT 41 (TC), *Golden Grove Trust* [2023] UKFTT 27 (TC) and *MPTL* [2022] UKFTT 472 (TC) which emphasised that reliance on advisers is not always a 'get out of jail free' card for the taxpayer. This maintains the trend that taxpayers cannot always distance themselves from the actions of others.

Open justice versus privacy

In the context of heightened media and public interest in tax and, in particular, tax avoidance, the recent HMRC win in the case of *HMRC v The taxpayer* [2024] UKUT 12 (TCC) is a reminder that, if a taxpayer challenges HMRC in court, the principle of open justice means there will almost certainly be some loss to their privacy.

In this case, the taxpayer appealed to the FTT against HMRC's decision to deny him deductions for income tax purposes and applied to have the appeal heard in private, with an anonymised judgement.

The starting point in tax cases is that hearings must be in public. However, a departure from the principle of open justice can be justified, for example, if it is necessary:

(i) in the interests of public order or national security;
(ii) to protect an individual's private and family life;
(iii) to maintain the confidentiality of sensitive information;
(iv) to avoid serious harm to the public interest; or
(v) to avoid prejudice to the interests of justice.

Here, the taxpayer claimed that privacy and anonymity were necessary for reasons (ii), (iii) and (v), but without providing evidence of harm or prejudice.

> The Upper Tribunal held the principle of open justice does not apply with any less force to preliminary proceedings

The FTT directed that the preliminary proceedings should be heard in private and anonymised, as the taxpayer proposed to apply for privacy and anonymity in respect of the substantive appeal. The FTT considered this necessary to prevent the subsequent privacy and anonymity application from being futile. The Upper Tribunal disagreed and allowed HMRC's appeal, confirming that the principle of open justice does not apply with any less force to preliminary proceedings, and that rational and persuasive reasons are needed to depart from that principle, referring to previous case law which reinforces that there is 'nearly always a wider public interest … in even the most mundane-seeming tax dispute'.

The tension between public interest and privacy is not unique to tax cases. From 29 January 2024, the names of individuals involved in court hearings dealing with the division of assets on divorce will be published in court lists and a pilot scheme is being introduced to help journalists understand what is happening in the family courts. Reporters will have access to written case summaries and submissions; however, crucially, parties will not be named in judgments or media reports to ensure these developments do not come at the wholesale expense of privacy.

Transparency versus privacy: where will we end up on beneficial ownership registers?

In recent years, we have seen a general global drive towards greater transparency, with the Fourth EU Money Laundering Directive (4MLD) introducing a requirement for EU Member States to establish central registers containing details of the beneficial owners of legal entities. Under 4MLD, access to the public was subject to a 'legitimate interest' test, but the Fifth EU Money Laundering Directive (5MLD) removed this requirement, allowing full public access to these registers.

However, in November 2022, the CJEU held that unfettered access to beneficial ownership registers breached certain EU freedoms, including the right to privacy (joined cases *WM* (Case C-37/20) and *Sovim SA v Luxembourg Business Registers* (Case C-601/20)). As a result, it is now proposed that the Sixth EU Money Laundering Directive will reinstate the 'legitimate interest' test.

The Crown Dependencies and British Overseas Territories have also reacted to the CJEU's decision. Having previously committed to implementing publicly accessible beneficial ownership registers, the Crown Dependencies published a statement in December 2023, confirming that they would instead implement a legitimate interest test in respect of access to their registers. Many of the British Overseas Territories appear to be adopting the same approach.

The UK currently maintains three beneficial ownership registers:

- the persons with significant control (PSC) regime;
- the Trust Registration Service (TRS); and
- the Register of Overseas Entities (ROE).

There has never been a 'legitimate interest' test under the PSC regime, meaning these details are (in general) fully accessible to the public. Information under the ROE is also publicly available, although certain information on trusts within an overseas entity's ownership structure is private and currently can be disclosed only to enforcement authorities and HMRC. Public access to information on trusts registered with the TRS is also limited.

The fallout from the CJEU decision raises questions as to whether the UK will follow the same direction of travel as the EU, Crown Dependencies and British Overseas Territories in giving privacy more weight in respect of public access to its beneficial ownership registers.

However, there is little sign of this to date. In fact, a recent consultation, published by the Treasury on 27 December 2023, is seeking views on proposals to make information on trusts and their beneficial owners, in the context of land ownership, more publicly available. It therefore seems clear that the UK government remains committed to continuing its drive for greater transparency.

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However, the difference in approach between the UK and other jurisdictions risks placing the UK at a competitive disadvantage, and so the UK government will need to consider carefully the balance it wishes to strike between transparency and privacy. Watch this space. ■

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- Entrepreneurs' Relief: a BAD relief for trustees? (A Goldstone, 31.1.24)
- *Keighley*: connection, control and unallowable purposes (P Freeman & J Wormalda, 31.1.24)
- Cases: *HMRC v The taxpayer* (16.1.24)
- News: CJEU casts doubt on beneficial ownership registers (29.11.22)