Briefing

Private client review for January

Speed read

This month, we discuss further success for taxpayers in the realm of PPR relief, in both the FTT decision of *Ives* and recent updates to HMRC helpsheet HS283. The Supreme Court's decision in *Fisher* provides welcome clarity for taxpayers on who is regarded as a 'transferor' under the Transfer of Assets Abroad regime. *Parker Hannifin* serves as a reminder for taxpayers to consider carefully the scope of information being requested by HMRC (here, emails): HMRC are entitled only to see documents which are reasonably required to assess the taxpayer's tax liability. A win by HMRC in *Bottomer* reminds us of the limits imposed by TCGA 1992 s 38 on allowable deductions when calculating the tax due on the disposal of an asset. Finally, in addition to serving as a warning of the dangers of the improper use of generative AI, the FTT's decision in *Harber* confirmed that the taxpayer's ignorance of the law and her mental health condition did not qualify as a 'reasonable excuse' for failure to notify a CGT liability.

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PPR relief: more success for taxpayers

In our November 2023 article (*Tax Journal*, 24 November 2023), we discussed the recent taxpayer win in the case of *HMRC v G Lee and another* [2023] UKUT 242 (TCC), in which the UT upheld the decision of the FTT that, in the context of a claim for Principal Private Residence (PPR) relief, 'period of ownership' of a dwelling-house meant the period during which the relevant house was in existence, and did not include a longer period of ownership of the land before the house was built.

Following this decision, HMRC announced that they would not appeal the judgment. HMRC have now gone a step further and updated their PPR helpsheet (HS283) to reflect the decision. This now makes clear that:

- '[i]f you acquire land on which to build a house, your period of ownership begins at the time the dwelling-house comes into force'; and
- the permitted delay of 24 months in taking up occupation during which period an individual is nonetheless deemed to occupy the property also applies where land has been purchased to build a house on.

Continuing on this streak of taxpayer wins, *Ives v HMRC* [2023] UKFTT 986 (TC) involved the purchase and sale of three properties by the taxpayer in relatively quick succession, each at a substantial gain after having carried out significant works to them. HMRC opened enquiries into the taxpayer's returns and issued closure notices on the basis that the transactions amounted to trading.

Allowing the taxpayer's appeal, the FTT held that the transactions did not amount to trading. Whilst there were clear factors pointing towards trading when applying the 'badges of trade', the FTT considered that the transactions could also be explained by the substantial evidence put forward by the taxpayer on his personal and financial circumstances, which led to the frequent changing of houses (notwithstanding that a profit was generated on each transaction). Indeed, the evidence showed that all three homes were used by the taxpayer as family homes, with each house furnished to meet his family's requirements. The profits on the disposals were therefore not trading profits and instead were investment gains to which PPR relief applied.

It should be noted that the FTT acknowledged it 'found this a very difficult case to decide' but the taxpayer's evidence (including witness evidence from a large number of his family and friends) persuaded them to find in favour of the taxpayer. This demonstrates the importance in dealings with HMRC or the tax tribunals of taxpayers retaining records and contemporaneous evidence to support their position.

Supreme Court victory for the Fishers

The Supreme Court (SC) has handed down its long-awaited judgment in *HMRC v Fisher* [2023] UKSC 44.

The taxpayers, the Fisher family, owned a betting business through a UK company. To avoid UK gaming duty, the business was sold by the UK company to a Gibraltar company. Both companies were owned by the Fisher family (although none held a majority) and the shareholders were also the directors.

The key issue was whether the taxpayers should be taxed under the primary charge in the Transfer of Assets Abroad (TOAA) regime, under which income arising to a non-UK resident entity can be taxed on a UK resident individual who has transferred assets to that entity.

The judgment broke the issue down into two questions.

The first of these was whether the primary TOAA charge bites only on the 'transferor' of the assets. The UKSC confirmed (perhaps unsurprisingly) that the transfer must be made by the same person who had the 'right to enjoy' the assets under the TOAA rules.

Next, the SC considered in what circumstances, if any, the shareholders of a company could be treated as transferors under the TOAA rules where there is a transfer of assets by that company. In this context, HMRC argued that, notwithstanding that the legal transferor of the assets had been the UK company, the taxpayers should have been treated as 'quasi-transferors' (i.e. individuals who procured the transfer by the UK company) as together they had owned the controlling interest in the UK company. Handing down the judgment, Lady Rose considered that the absence of any definition of what it means for an individual to 'control' a company under these rules (as compared to the existence of a definition in other tax legislation) not only meant that there were no criteria in statute to determine the position, but in itself meant that the primary TOAA charge was not intended to apply to transfers by companies. In the SC's view, therefore, where the transfer is made by a company, the mere fact that an individual is a shareholder in a company does not, in itself, make them a transferor regardless of their percentage shareholding and whether they might otherwise also be a director. HMRC's counterargument, the SC thought, 'bristles with difficulties'.

As such, the Fishers were neither singly nor collectively the transferors of the business.

The SC acknowledged that, on the face of it, its decision might appear to leave a 'lacuna' in the legislation, since an individual could simply transfer assets into a company and then get the company to transfer the asset abroad. However, it equally noted that:

- a non-transferor can still be liable to tax if they receive a benefit from the transferred assets under the secondary TOAA 'benefits charge';
- the concept of 'quasi-transferor' would still be applicable to, for example, a taxpayer who intentionally transfers assets into a UK company – as a 'device' – that then transfers those assets to a person abroad; and
- the government is free to legislate to fill the 'lacuna' should they choose to.

This judgement demonstrates a clear push-back to the broad interpretation often adopted by HMRC previously in relation to the TOAA rules. It will be interesting to see whether the government will decide to make any changes to the current rules and, if so, where on the spectrum these will sit between HMRC's interpretation and the SC's position.

Information notice expressed by email search terms is valid, but requirements are too wide

In *Parker Hannifin (GB) Ltd v HMRC* [2023] UKFTT 971 (TC), HMRC had issued a Sch 36 information notice to the taxpayer company. However, instead of describing the information or documents to be produced, the notice required the company to carry out a search of emails using a list of specific terms and to submit the output to HMRC.

The company engaged PwC to carry out the search, which resulted in over 11,000 results (the search terms provided by HMRC included, for example, '441' – this was the relevant section of Corporation Tax Act 2009, but it also captured thousands of phone numbers, post codes and figures in financial records). PwC then filtered the results down to 1,695 emails which it considered relevant, and the company provided those emails to HMRC. However, HMRC argued that the taxpayer company should disclose all of the emails.

The FTT held that the information notice was not rendered invalid simply because it was expressed by reference to search terms (rather than a description of the documents to be produced). However, the tribunal did think that the notice was 'far too wide' and noted that, had the appeal been made before PwC had carried out the search exercise, they would have set it aside completely. Given that the search had already been done, the FTT decided to vary the information notice so that any emails identified by PwC as irrelevant would not need to be provided to HMRC.

This decision is a helpful reminder for taxpayers to consider carefully the scope of information being requested by HMRC, and to remember that HMRC are entitled only to see documents which are reasonably required to assess the taxpayer's tax liability.

'Finder's fee' not deductible for CGT purposes

In *Bottomer v HMRC* [2023] UKFTT 893, the taxpayers had bought, renovated and sold a property at a gain. The question for the FTT was whether the sum of £31,906.50 (representing 50% of the profit on the transaction), paid to a third party who had introduced the taxpayers to the opportunity and subsequently performed some oversight functions in connection with the renovations, was deductible as an expense when computing the taxpayers' CGT liability on the disposal under TCGA 1992 s 38.

The FTT considered whether the payment qualified as 'incidental costs' of the acquisition or disposal (under TCGA 1992 s 38(1)(a) or (c)), or as 'expenditure wholly and exclusively incurred on the asset' by the taxpayers 'for the purpose of enhancing the value of the asset, being expenditure reflected in the state or nature of the asset at the time of the disposal' (under TCGA 1992 s 38(1)(b)).

The FTT considered that the wording of s 38(1)(b) is directed at allowing relief for expenditure where the result of that expenditure is clearly discernible in the 'state or nature' of the asset when it is disposed of, and this did not apply here. In respect of s 38(1)(a) and (c), it was noted that s 38(2) restricted the allowable 'incidental costs' to 'expenditure wholly and exclusively incurred' by the taxpayer for the acquisition or disposal, 'being fees, commission or remuneration paid for the professional services of any surveyor or valuer, or auctioneer, or accountant, or agent or legal adviser.' Although the FTT accepted (contrary to HMRC's arguments) that a profit-sharing arrangement could be regarded as 'fees, commission or remuneration', the tribunal did not consider that the payment was for 'professional services' of one of the categories of professional parties listed in s 38(2); instead, it was payment under a profit-sharing arrangement that had been agreed between the parties on what had become a shared project. As such, the payment was not allowable as a deduction in the computation of the gain accruing on the disposal.

This decision serves as a helpful reminder of the limits imposed by s 38 on allowable deductions.

Ignorance of the law and health conditions held not to be reasonable excuses

In *Harber v HMRC* [2023] UKFTT 1007 (TC), HMRC had issued the taxpayer with a 'failure to notify' penalty in respect of a CGT liability on the disposal of a residential property. The taxpayer appealed, arguing that she had a reasonable excuse on the grounds of (a) her mental health condition and (b) her ignorance of the law.

The FTT dismissed the appeal on both grounds. Noting that the taxpayer's health condition had not prevented her from dealing with the sale of the property and calculating the approximate CGT liability, the FTT held that 'the reasonable person in Mrs Harber's position would not have been prevented by her mental health condition from contacting HMRC and informing them of the sale and the likely CGT liability.' This accords with the approach taken by the FTT in *White Breeze Ltd v HMRC* [2023] UKFTT 862 (TC), mentioned in our November 2023 article. Furthermore, noting that the taxpayer was aware that tax would be due on the disposal and that she had called HMRC on previous occasions for advice, the FTT concluded that 'the reasonable taxpayer in Mrs Harber's position ... would have contacted HMRC, Tax Aid, an accountant or a lawyer to find out what she needed to do.'

An interesting side issue in this case was the fact that the taxpayer sought to rely on nine FTT decisions in support of her arguments; however, it transpired that these were fictitious cases, produced through the taxpayer's use of a generative AI system. The FTT took a dim view of her attempt to rely on these cases and the judge noted the potentially damaging impact on the tribunal system of citing fake authorities. ■

For related reading visit taxjournal.com

- Certainty vs deterrence: the Supreme Court's approach to anti-avoidance legislation in *Fisher* (B Elliot, 30.11.23)
- Cases: *Parker Hannifin (GB) Ltd v HMRC* (29.11.23)
- Cases: *F Harber v HMRC* (12.12.23)