

# Tax Update

A round-up of recent issues

## 12 November 2019

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## 1. Private client

### 1.1 CA finds period of ownership for PRR purposes starts from completion

*The CA has overturned an UT decision, finding in the taxpayer's favour that the period of ownership for private residence relief (PRR) purposes starts from the date of completion, not the date of exchange as HMRC had argued.*

The taxpayer entered into an 'off-plan' contract in October 2006 for the lease of a flat under construction. Work began in 2009 to construct the apartment and it was physically completed in December

2009. Legal completion took place on 5 January 2010. He then occupied it as his main residence until it was sold two years later.

The FTT found that a period of ownership cannot begin before the taxpayer has a legal title to the property and a legal right of occupation. The UT overturned this decision, finding instead that the relevant period of ownership is the period between exchanges of contracts and therefore started with the original contract to purchase.

The CA has now overturned the UT decision. It focused on the fact that there is nothing in the legislation to indicate that a short gap between contract and completion can be ignored, even though it is common for this interval to exceed one month. The CA referred to the inherent implausibility of Parliament having intended the PRR provisions to have a meaning that does not afford complete relief from CGT in the typical case of an individual or couple buying and occupying a property as their only home.

The CA also found that it is not necessary to measure the period of ownership for the purposes of the PRR rules by the statutory deemed times of acquisition and disposal. The term 'period of ownership' should be given its ordinary meaning. The period of ownership should therefore begin from the date that the purchase was completed.

*Higgins v HMRC* [2019] EWCA Civ 1860

[www.bailii.org/ew/cases/EWCA/Civ/2019/1860.html](http://www.bailii.org/ew/cases/EWCA/Civ/2019/1860.html)

## 1.2 CA overturns a follower notice on an Eclipse Film Scheme Member

*HMRC used the CA judgement in the Eclipse 35 film scheme as the final ruling necessary for the issue of a follower notice to a member of the Eclipse 10 scheme. On judicial review, the CA unanimously overturned the follower notice on the basis that the earlier decision was not the necessary authority for the view HMRC had formed. The Court again confirmed it will keep a tight rein on the use these notices.*

HMRC had issued the taxpayer with a follower notice, with its potentially serious consequences for the taxpayer, that cited *Eclipse Film Partners No 35 LLP v HMRC* [2015] STC 1429 (Eclipse 35) as the relevant final judicial ruling required for HMRC to issue a follower notice.

Under the follower notice procedure, the taxpayer made representations that the case was not relevant to his case. Eclipse 35 had decided that the LLP in question was not trading. HMRC had extrapolated from that that the taxpayer could not obtain tax relief by reference to a loan for a subscription to the LLP because those circumstances could not give rise to tax relief as the LLP was not trading. The taxpayer represented that he was seeking relief for a purchase of, as opposed to a contribution to, an LLP interest, where there was no such trading requirement. The Eclipse 35 decision was about the LLP's tax position, not that of its members. The CA accepted this argument and the appeal succeeded. The judge, Lady Justice Rose, went on to reiterate the CA's previous position that the power to issue follower notices must be kept within narrow bounds, because of their impact on access to courts and the rule of law.

*Locke, R. (On the Application of) v Revenue And Customs* [2019] EWCA Civ 1909 (07 November 2019)

[www.bailii.org/ew/cases/EWCA/Civ/2019/1909.html](http://www.bailii.org/ew/cases/EWCA/Civ/2019/1909.html)

## 1.3 Assessing tax is valid purpose for issuing notice to file

*The UT has overturned a FTT decision, finding that a notice to file can be issued for the purposes of assessing the amount on which a taxpayer is chargeable to IT and CGT. Late filing penalties issued by HMRC were therefore valid, as the notice to file a return was issued for a correct purpose.*

Insufficient tax was deducted through the taxpayer's PAYE and, as a result, he was sent a tax calculation (Form P800) showing an underpayment. The taxpayer did not pay this amount, which HMRC said was not capable of being coded out. A notice to file a return was subsequently given by HMRC and late filing penalties were raised.

The FTT found that the penalties were invalid, as the notice to file a return had only been issued to establish an enforceable debt arising from self-assessment, not for a purpose set out in the legislation, which is to establish the amount on which the taxpayer is chargeable to IT and CGT. HMRC did not need to establish the taxpayer's income or the tax payable as this had already been detailed in the P800.

The UT has now overturned this decision. It found that 'establish' means more than just calculate, and its normal meaning would be closer to the idea of securing, or making permanent or final, what is calculated. A self-assessment therefore does two things:

- it calculates the taxpayer's liability; and
- it assesses and makes enforceable that liability by HMRC.

On this basis a notice to file can be issued for the purposes of calculating and assessing the amount on which a taxpayer is chargeable to IT and CGT. The notice to file was therefore valid and the penalties upheld.

*Goldsmith v HMRC* [2019] UKUT 0325 (TCC)

[https://assets.publishing.service.gov.uk/media/5dc01ebc40f0b63799f21a25/HMRC\\_v\\_David\\_Goldsmith.pdf](https://assets.publishing.service.gov.uk/media/5dc01ebc40f0b63799f21a25/HMRC_v_David_Goldsmith.pdf)

#### 1.4 Capital loss on loan disallowed

*A taxpayer has been denied loss relief on money lost when a company collapsed. He was unable to prove that the company was trading, or that the money was a loan, so the amount was held to be an investment.*

The taxpayer had made a payment to a company, that later collapsed. He claimed capital loss relief on this amount, on the grounds that the payment was a loan to the company for trade purposes. HMRC denied the claim, holding that the company was not trading, so no loss relief could be claimed, and that the payment was an investment rather than a loan.

The FTT agreed with HMRC. The company in question marketed a scheme and signed up investors, but was not involved in trading. The taxpayer was unable to provide evidence that the company had been trading, and admitted that he did not fully understand its activities.

*Flashman v HMRC* [2019] UKFTT 643 (TC)

[www.bailii.org/uk/cases/UKFTT/TC/2019/TC07419.html](http://www.bailii.org/uk/cases/UKFTT/TC/2019/TC07419.html)

#### 1.5 Loan found not to be 'in connection with' pension

*The FTT has overturned an unauthorised payment charge for a taxpayer who was given a loan by a company related to her new pension provider. Previous cases have taken the opposite approach, but here the documents produced by HMRC were insufficient to demonstrate a connection between the specific pension fund and the loan.*

The taxpayer transferred her pension to a new provider. At around the same time, she was offered and accepted a loan from another company. She was unaware that the loan was connected to her pension fund. HMRC applied tax charges for an unauthorised payment, as she was below the age at which she could receive funds from the pension, and as the charge is a strict liability, rather than related to behaviour.

The FTT found, on examination of the inconsistent documents, that HMRC had not demonstrated a connection between the specific funds loaned and the taxpayer's pension. It was therefore not an unauthorised payment, and the charges could not stand.

This stands in contrast to *West* case, where a man who had dealt with the same companies as *Hughes*, and also been unaware of a link between loan and pension, had lost his appeal against the charge as the FTT found that the loan funds were derived from his pension.

*Hughes v HMRC* [2013] UKFTT 328 (TC)

[www.bailii.org/uk/cases/UKFTT/TC/2019/TC07417.html](http://www.bailii.org/uk/cases/UKFTT/TC/2019/TC07417.html)

*West v HMRC* [2019] UKFTT 602 (TC)

[www.bailii.org/uk/cases/UKFTT/TC/2019/TC07385.html](http://www.bailii.org/uk/cases/UKFTT/TC/2019/TC07385.html)

## 1.6 FTT finds notices not received by taxpayer

***The FTT has found that, although HMRC sent notices to file and late filing penalty notices to a taxpayer, based on his evidence and behaviour it was satisfied that he had not received the notices. The late filing penalties were therefore cancelled.***

The taxpayer filed several tax returns late and HMRC issued late filing penalties, against which the taxpayer appealed.

The FTT found that the taxpayer did not receive the notices to file or penalty notices for the latter two years, 2009/10 and 2010/11. It noted that although notices are deemed to have been properly effected if sent to the address on HMRC's records, that deeming can be displaced if the contrary is proved. The taxpayer lived in the Philippines at the time the 2009/10 notices were sent. He explained that the postal service was chaotic and letters commonly went astray. He lived in Italy at the time the 2009/10 notices were sent but could not explain why he did not receive these. Based on the taxpayer's evidence and the evidence of his prompt responses to other letters from HMRC that he did receive, the FTT was satisfied that the notices had not been received.

The FTT also found that while the 2008/09 notices were received, the taxpayer had a reasonable excuse for late filing. He had registered for online filing but the pin code that was posted to him did not arrive because of the postal issues. He therefore completed a paper return which was rejected by HMRC, before it was corrected and accepted as a valid return. The FTT found this to be the behaviour of a reasonable taxpayer.

The penalties were all cancelled.

*Knewstubb v HMRC* [2019] UKFTT 0642 (TC)

[www.bailii.org/uk/cases/UKFTT/TC/2019/TC07418.html](http://www.bailii.org/uk/cases/UKFTT/TC/2019/TC07418.html)

## 2. Trusts, estates and IHT

### 2.1 FTT allows agricultural relief and business relief claims for farmer

***The FTT has allowed claims for agricultural relief (AR) and business relief (BR), rejecting HMRC's claims that the buildings were not used for the purposes of agriculture, and that the business consisted wholly or mainly of making investments.***

Mr Gill died in 2013. He lived in a property called Woodlands Farm which comprised the main house, a yard and barn, some other outbuildings and 21 acres of bare agricultural land. He also owned further agricultural land. He did not own any livestock himself at the time of his death, although he had in the past, but allowed farmers to graze their livestock on his agricultural land under annual grazing licences. He also cultivated a small amount of crops, although HMRC argued that this was no more than a vegetable patch.

His executors claimed AR and BR on the relevant IHT return. HMRC refused the claim for AR in respect of the value of the house, barn and other outbuilding and refused the full BR claim for agricultural vehicles and equipment.

The FTT found that:

- the house was a farmhouse and the activities carried out by Mr Gill were those of a farmer, working an active farm. Even though they had modified over time, they did not become those of an investor. The farmhouse was occupied for the purposes of agriculture, being the dwelling from which he farmed and managed the farm. It was not occupied solely as a residence;

- while Mr Gill received income as a result of his ownership of land, the farming undertaken by Mr Gill was of such a nature and extent that it was not merely a business of holding investments.

The claims for AR and BR were allowed.

*Executors of the Estate of Thomas Gill (deceased) v HMRC* [2019] UKFTT 0650 (TC)

<http://financeandtax.decisions.tribunals.gov.uk/judgmentfiles/j11380/TC07425.pdf>

### 3. PAYE and employment

#### 3.1 Review of Loan Charge delayed

*The Treasury has written to Sir Amyas Morse asking him to delay publication of his report into the Disguised Remuneration Loan Charge until after the General Election. The All-party Parliamentary Group (APPG) has issued a further scathing update to its report calling for the January deadline to be scrapped.*

Rt Hon Jesse Norman MP has written to Sir Amyas suggesting that it would be more appropriate for him to submit his finding to the new Government after the General Election. This will leave those affected caught in a position of uncertainty with the very close deadline of 31 January 2020 for the payment of any tax due, even if a new government can be formed promptly after the election.

The APPG's report contained very strong criticism of the Treasury and HMRC. In its update, it has made a series of further recommendations, including that the deadline of 31 January be scrapped as being 'illegitimate and unfair'. There should be a suspension of all related HMRC activity, and a bereavement unit should be set up. It also says 'a full, independent inquiry into the Loan Charge scandal is required'.

[www.ft.com/content/a3a0f8e8-ffe4-11e9-be59-e49b2a136b8d](http://www.ft.com/content/a3a0f8e8-ffe4-11e9-be59-e49b2a136b8d)

[www.loanchargeappg.co.uk/wp-content/uploads/2019/11/Loan-Charge-Inquiry-Update-Nov-2019-FINAL.pdf](http://www.loanchargeappg.co.uk/wp-content/uploads/2019/11/Loan-Charge-Inquiry-Update-Nov-2019-FINAL.pdf)

#### 3.2 FTT rules another TV presenter is not an employee

*In another TV presenter IR 35 case, the taxpayer's company successfully defeated HMRC's claim that the presenter was employed by ITV. The presenter's company had a series of contracts, including one with ITV that included a sufficient degree of control by ITV for the contract to be one of employment, but overall it was not.*

In another of the seemingly continual stream of IR35 cases involving personal service companies of TV presenters, Canal Street Productions Limited, the company of Janet Fospero, defeated HMRC over its contract with ITV. As in other cases, there was a wide-ranging review of the case law test to of the hypothetical contract between the worker and the end user company. In this particular instance, there was a favourable fact pattern for the taxpayer. Notwithstanding the fact that ITV had the degree of control for it to be employment, the other factors decided the matter. Under the hypothetical contract, there would be no mutuality of work-related obligation as the presenter worked on an assignment by assignment basis with no assurance of future work. HMRC also sought to argue that there was no real prospect of the IR 35 company making a loss under the contract. This did not take account of the wider picture that such fees generally had to reflect a price for the consultant's work.

*Canal Street Productions Ltd v Revenue & Customs* [2019] UKFTT 647 (TC)

[www.bailii.org/uk/cases/UKFTT/TC/2019/TC07422.html](http://www.bailii.org/uk/cases/UKFTT/TC/2019/TC07422.html)

## 4. Business tax

### 4.1 HMRC updates its advice on cryptoassets

*HMRC has produced some guidance for the tax treatment of cryptoassets by businesses. The guidance is based on two premises: that the cryptoassets are capital assets and are not money or currency.*

HMRC's new guidance looks in very general terms at the possible roles of cryptoassets in businesses. Important consequences flow from the proposal that cryptoassets are not money or currency. Thus the foreign currency rules and the disregard regulations does not apply. Similarly, the loan relationship rules, which apply if a money debt has arisen, do not apply because exchange tokens do not create a (money) loan relationship in the first place. This is equally the position on the acquisition of the tokens and their exchange.

Companies that account for exchange tokens as intangible fixed assets may be taxed accordingly under the IFA rules if the tokens satisfy the accounting treatment. Although all exchange tokens are digital and therefore intangible, they nevertheless count as chargeable assets for CGT purposes and the ordinary CGT rules will apply where they are held as investments. Pooling will apply. For VAT purposes, tokens received for mining will be outside the scope of VAT and the financial services provided by bitcoin exchanges will be VAT exempt.

Paying employees in exchange tokens will be earnings as the tokens are 'money's worth'.

[www.gov.uk/government/publications/tax-on-cryptoassets](http://www.gov.uk/government/publications/tax-on-cryptoassets)

### 4.2 Nudge letters sent to tenants of non-resident corporate landlords

*The CIOT has published HMRC's responses to its questions regarding recent nudge letters sent to tenants of non-resident corporate landlords. HMRC has confirmed that there is no legal obligation to respond to the letters or to provide the information requested.*

The letters summarise the requirements for a tenant to withhold tax at source, and include a questionnaire for the tenant to return to HMRC. The questionnaire asks for the tenant's personal information, rent and details on his connection to the property. The CIOT submitted several questions to HMRC, emphasising the fact that such letters are likely to cause tenants undue alarm or worry. HMRC's responses have now been published, including confirmation that there is no legal requirement for a tenant to respond to either the letter or the questionnaire. Where no response is received from either the tenant or landlord, however, HMRC will issue a determination to the company under the ATED regime. HMRC has stated that it will amend future letters in line with some of the suggestions put forward by the CIOT.

[www.tax.org.uk/policy-technical/technical-news/corporate-non-resident-landlords-compliance-letter-tenants](http://www.tax.org.uk/policy-technical/technical-news/corporate-non-resident-landlords-compliance-letter-tenants)

## 5. Tax publications and webinars

### 5.1 Tax publications

*The following Tax publications have been published*

- [Selling UK residential property](#)
- [Corporate Criminal Offence - facilitation of tax evasion](#)
- [Furnished Holiday Lettings](#)

## 6. And finally

### 6.1 If it wasn't so sad it would be funny

Regular readers will not at all be surprised that in the absence of the Budget, our attention this week was given to the developments over the Loan Charge review, or as the APPG has it, the loan charge scandal. When we called recently for urgent and early consideration of Sir Amyas' report we could hardly have imagined the totally calamitous turn of events and how little our hopes would be met.

Squeamish readers may wish to skip over references in the report to the multiple suicides, bankruptcies and untold stress. When have we ever before seen a proposal to set up a bereavement unit to help those affected in the worst possible way by tax policy?

There is something of a debate over fairness in this matter with one side arguing that tax avoidance is unfair and therefore must be countered and the other side saying that retrospective taxation is unfair and ought not to be allowed. Argument over fairness in tax always ends up arid. Perhaps it is time to look for consensus in a more fruitful direction. Keeping taxpayers alive might be a place to start.

[www.ft.com/content/a3a0f8e8-ffe4-11e9-be59-e49b2a136b8d](http://www.ft.com/content/a3a0f8e8-ffe4-11e9-be59-e49b2a136b8d)

[www.loanchargeappg.co.uk/wp-content/uploads/2019/11/Loan-Charge-Inquiry-Update-Nov-2019-FINAL.pdf](http://www.loanchargeappg.co.uk/wp-content/uploads/2019/11/Loan-Charge-Inquiry-Update-Nov-2019-FINAL.pdf)

Glossary				
Organisations		Courts	Taxes etc	
ATT - Association of Tax Technicians	ICAEW - The Institute of Chartered Accountants in England and Wales	CA - Court of Appeal	ATED - Annual Tax on Enveloped Dwellings	NIC - National Insurance Contribution
CIOT - Chartered Institute of Taxation	ICAS - The Institute of Chartered Accountants of Scotland	CJEU - Court of Justice of the European Union	CGT - Capital Gains Tax	PAYE - Pay As You Earn
EU - European Union	OECD - Organisation for Economic Co-operation and Development	FTT - First-tier Tribunal	CT - Corporation Tax	R&D - Research & Development
EC - European Commission	OTS - Office of Tax Simplification	HC - High Court	IHT - Inheritance Tax	SDLT - Stamp Duty Land Tax
HMRC - HM Revenue & Customs	RS - Revenue Scotland	SC - Supreme Court	IT - Income Tax	VAT - Value Added Tax
HMT - HM Treasury		UT - Upper Tribunal		

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