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2023 SPECIAL

TAX FACTS AND STRATS

TAX

TAX FACTS AND STRATS - TAX-PLANNING STRATEGIES IN THE AGE OF INFORMATION

INTRODUCTION

"See things in the present, even if they are in the future."

Larry Ellison

We We are delighted to present the 2023 Private Client Tax Special, where our authors discuss a variety of topical issues including taxation of art and cultural property, clean capital, and other key developments we will see over the coming year.

Thank you to our contributors, members and community partners for their support as we begin another busy year for the Private Client community. Please do keep an eye out for our quarterly magazines, with the first issue of 2023 being published in March.

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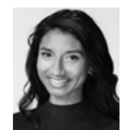

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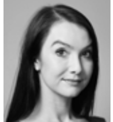

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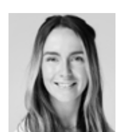

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PRIVATE CLIENT UPCOMING EVENTS

Date / Location	Event
MAR 21ST HALLAM CONFERENCE CENTRE, LONDON	LANDED ESTATES & FARM TAX CONFERENCE; THE 2ND EDITION
MAR 28TH LONDON	CONTENTIOUS PROBATE AND INHERITANCE CLAIMS - DEATH IN THE MODERN AGE
MAY 2023 LONDON	NON-DOM TAX CONFERENCE: AN ANNUAL REVIEW OF ALL THAT'S KEY FOR THOSE ADVISING NON-DOM CLIENTS
JUN 28TH LONDON	CRYPTO IN DISPUTES
JUL 2023 LONDON	CONTENTIOUS TRUSTS
31ST AUG – 1ST SEPT DOWNING COLLEGE, CAMBRIDGE	PRIVATE CLIENT SUMMER SCHOOL
SEP 2023 LONDON	TRANSATLANTIC TAX & ESTATE PLANNING
OCT 2023 JERSEY	THOUGHTLEADERS4 PRIVATE CLIENT: JERSEY
OCT 2023 GUERNSEY	THOUGHTLEADERS4 PRIVATE CLIENT: GUERNSEY
NOV 2023 DUBAI	PRIVATE CLIENT MIDDLE EAST
DEC 2023 LONDON	SPORT STARS, INFLUENCERS & ENTERTAINERS TAX CONFERENCE: THE DIGITAL AGE

A BRIEF GUIDE TO TAX RELIEFS ON ART AND CULTURAL PROPERTY

Authored by: Simon Malkiel (Partner) – Howard Kennedy

Collectors of art and cultural property may benefit from several tax-saving and deferral schemes put in place by the UK Government.

These schemes enable the public to benefit from access to cultural items that might otherwise be kept privately or sold abroad, in return for some form of tax saving or deferral for the collector or their estate.

The four principal schemes are as follows:

- **Acceptance in Lieu scheme (AIL) – reduces or eliminates UK inheritance tax (IHT) payable usually on an estate after death;**
- **Cultural Gifts scheme – a relief from income tax, CGT and corporation tax to encourage people to make gifts of works of art during their lifetime.**
- **Conditional Exemption from IHT – a deferral of tax that would otherwise be due following a taxable event, rather than a complete exemption.**
- **Gifts for National Purposes – a relief from CGT and IHT where heritage assets are transferred to one of a list of specified institutions, e.g. the British Museum, National Gallery etc.**

ACCEPTANCE IN LIEU SCHEME

The AIL scheme allows people who are liable to IHT (including executors of an estate) to apply to settle the tax by offering property in full or part payment of the tax liability.

To qualify for the scheme, objects or collections must be:

- **of pre-eminent importance on the grounds of their national, scientific, historic or artistic interest; or**
- **associated with an important historic building in public ownership or belonging to a charity such as the National Trust; or**
- **land or buildings that are important to the National Heritage. The procedures for land or building differ from those for objects and are not discussed further.**

How does the scheme work?

HMRC initially checks any offer in lieu, to ensure it meets the basic criteria of the tax scheme. If so, the Acceptance in Lieu (AIL) Panel, made up of independent experts, determines whether the object is pre-eminent and of acceptable physical condition, and the value at which it may be accepted.

The Department for Culture, Media and Sport (DCMS) (or the appropriate Minister in Scotland and Wales) considers the Panel's recommendations and determines whether to recommend acceptance of the object to HMRC.

Once accepted, objects or collections are allocated to a public institution or charity, for example, the National Trust.

Benefits for the property owner

If property is accepted in lieu of tax, its agreed value, i.e. the open market value of the property (net of CGT and IHT) had it been sold, is deducted from the estate's IHT liability (where the tax liability arises following the owner's death). No IHT is payable on the property itself.

As an incentive to use the scheme rather than sell on the open market, a "douceur" is also offered. For land and buildings this is 10% of the potential tax liability of the property, and for valuable objects it is 25%. This is added to the net value of the property, and set against the tax liability of the estate.

For example:

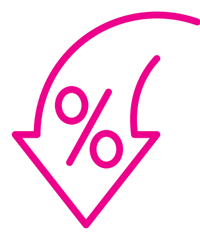
- **Mrs A's art collection has an open market value of £20 million and a potential IHT liability of £8 million – a net value of £12 million.**
- **The collection is accepted onto the AIL scheme, and a douceur of 25% of the IHT liability (£2 million) is added to the net value.**
- **The collection is accepted in lieu of £14 million of IHT that would otherwise be payable on the other assets in Mrs A's estate.**

Unfortunately, HMRC cannot give change if a piece of property is valued at more than the IHT payable on the estate. However, institutions may be able to pay the difference if this is agreed with them beforehand. These are known as "hybrid offers".

CULTURAL GIFTS SCHEME

The Cultural Gifts Scheme (CGS), also known as "Gifts to the Nation", enables UK taxpayers to donate pre-eminent works of art and other cultural objects for the benefit of the public in return for a reduction of income tax or CGT for individuals, or corporation tax for companies, proportionate to the value of the gift made.

The decision as to pre-eminence is made by the AIL panel and based on the same criteria as the AIL Scheme. The overall process is similar, but acceptance will depend on the annual budget available for both schemes.

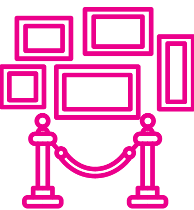


Eligible tax savings

For individuals, the tax reduction available is a maximum of 30% of the agreed value of the object, which may be spread across up to five tax years starting with that in which the offer is registered by the Arts Council.

Subject to certain rules and exceptions, the donor will not be liable to IHT or CGT on the gift itself.

For companies, the limit is 20% of the agreed value and the corporation tax liability may only be offset in the accounting period in which the offer is registered.



Non-tax benefits to the donor and public

Individual owners will see their valuable objects and collections placed in institutions for the benefit of the public during their lifetime. The property will be maintained in good condition and will be available to the public, generally for a minimum of 100 days per year. Donated objects may not be sold without the prior consent of the relevant Minister.

CONDITIONAL EXEMPTION (IHT)

This scheme provides relief from IHT on a conditional basis following a taxable event, for example, the death of the owner, or a gift. Relief is offered in exchange for the provision of undertakings to preserve the property, to allow reasonable public access and publicise arrangements for such access, and, in the case of works of art and other objects, to keep them in the UK unless otherwise approved by HMRC.

If the item is sold, or any undertaking is breached, the conditional exemption is withdrawn and a charge to tax arises. This will also occur on the death of the person then treated as beneficially entitled to the property.

To be eligible for the conditional exemption, the property must be:

- **a building, estate or parkland of outstanding historical or architectural interest;**
- **land of outstanding natural beauty and spectacular views;**
- **land of outstanding scientific interest, including special areas for the conservation of wildlife, plants and trees; or**
- **an object with national scientific, historic or artistic interest, either in its own right, or due to a connection with historical buildings.**

HMRC decides whether an asset qualifies for exemption on the advice of the government's heritage advisory agencies.

GIFTS FOR NATIONAL PURPOSES

An exemption from CGT and IHT is also available for gifts of heritage assets to certain qualifying bodies approved by the Treasury, e.g. the National Gallery.

The exemption has no value limit and applies to transfers made during lifetime and on death. One advantage of this exemption over the other heritage property reliefs is that it is not necessary to prove the pre-eminence of the item.

BENEFITS AND POINTS TO CONSIDER

In addition to providing valuable tax savings and deferrals for property owners and their estates, the schemes discussed above benefit institutions by giving them ownership, or a long-term loan, of valuable pieces of art and cultural property at no, or a lower than market value, cost to themselves.

Nevertheless, the conditions and rules for the reliefs summarised above are potentially complex, and may have implications for how and where heritage property may be enjoyed by its owner. Where relevant, consideration must be given to security, both of the work of art or other item, and the location in which it is kept, especially if this is a residential address.

TAX INVESTIGATIONS AND ENQUIRIES: NAVIGATING A DISCLOSURE STRATEGY

Authored by: Helen McGhee CTA TEP (Partner) and Julia Glukhikh (Paralegal) – Joseph Hage Aaronson

During the course of an enquiry or investigation it is common for HMRC to ask for documents and information to help them establish what if any tax is due. Such requests are usually made by HMRC utilising powers made available to them by virtue of the widely drawn legislative provisions found in Schedule 36 FA 2008. Any disclosure exercise whether formal or informal can be emotionally and financially draining for the taxpayer thus it is important to establish the limits to HMRC's powers and the statutory safeguards available to the taxpayer; there may be different avenues to explore over the course of the investigation in relation to the provision of information and it is key to understand the strategic objectives of any disclosure in the context of the specific enquiry sometimes keeping an eye on the end point of what will happen before a tribunal.

HMRC Information Requests

HMRC are not strictly entitled to any information from the taxpayer unless and until a formal request has been made, but a balance between cooperating and not volunteering copious amounts of confidential data in response to an ultra vires request to HMRC must be struck between the taxpayer and HMRC. Inevitably HMRC will at times push the boundaries and try their luck at extracting information that is beyond their remit.

Requests made pursuant to Schedule 36 are limited to seeking information that is reasonably required for the purposes of checking the taxpayer's tax position. The meaning of reasonably required is a point of contention and has been widely debated through the tribunals. The taxpayer must provide documents requested in so far as the information is within their control or easily accessible to the taxpayer.

Physical possession of a document without a right to possession is not sufficient – the taxpayer must have the right to possession of the document. The First-tier Tribunal considers that it is in a taxpayer's power to produce a document if the taxpayer can obtain it by requesting it from another person, even if that person has a legal right to refuse the request. It is then for the taxpayer to demonstrate that such request to another party would be or already has been denied (HMRC v Parissis & Ors [2011] UKFTT 218 (TC)). The requirement of possession or power applies to documents but does not apply to information (HMRC v Mattu [2021] UKUT 245 (TCC)).

The Tribunal found (obiter) that in the context of the preparation of information for HMRC that there may be a point where the volume of requests become so excessive that the information is not reasonably required (Matharu Delivery Service Ltd v HMRC [2019] UKFTT 553). In several cases, the Tribunal found that the information was not reasonably required because the information or documents sought related to periods outside the normal enquiry window, and HMRC failed to show reasonable, evidence-based grounds to suspect an insufficiency of tax due (see Barty Party Co Ltd v HMRC [2017] UKFTT 697 (TC), Perring v HMRC [2021] UKFTT 110 (TC)). In Ahmed v HMRC [2020] UKFTT 337 (TC), the First-tier Tribunal confirmed that HMRC had the burden of proving that a taxpayer had not complied with a Schedule 36 notice. The unreasonableness of HMRC's requests may also be demonstrated when HMRC persist in asking for more information without good reason, or

when HMRC take an unreasonably long time to process the information provided to them. Note that HMRC may reasonably request information that is contained in non-business records, such as personal bank accounts thus it is always advisable to keep personal and business transaction, as well as bank accounts, separate.

Beyond only providing what is reasonably required, there are other avenues to explore in considering whether or not to deliver requested information- it may be that legal privilege may offer some protection and/or it might be appropriate to apply for a closure notice.

Legal Privilege

Legal professional privilege is a common law rule that protects from disclosure communications between a client and their legal representative who is a legal professional. Legal professional privilege applies to both communications by the client or the legal professional. Privileged material in the possession of a third party is also protected from disclosure.

HMRC cannot use an information notice to require a person to provide privileged information, or to produce any part of a privileged document. Legal professional privilege belongs to the client, and not their legal representative: this means that the client can choose to waive their right to privilege and provide the information to HMRC. However, when waiving privilege, a person cannot simply cherry pick parts of the advice to disclose as privilege applies to the entirety of the advice. The taxpayer also needs to be careful not to waive privilege inadvertently through their conduct.

There are two types of legal professional privilege: legal advice privilege and legal litigation privilege.

Legal advice privilege applies to documents or information containing confidential communications between a client and their lawyer for the purpose of obtaining or giving legal advice whereas legal litigation privilege applies to documents produced for the dominant purpose of contemplated or actual litigation and advice from lawyers for that purpose. The effect of paragraph 19(1) of Schedule 36 is such that HMRC cannot require a person to provide information or produce a document that relates to the conduct of a pending tax appeal, including in an appeal of an information notice.

It is important to remember that legal advice privilege does not apply to an accountant's advice, such as tax law advice (Prudential v Pandolfo [2010] EWCA Civ 1094). However, subject to paragraphs 24, 25 and 26 of Schedule 36, an auditor or anyone appointed to give advice about tax affairs cannot be required to produce documents that are the auditor's property and were created in the course of carrying out a statutory audit or which consist of "relevant communications" with the taxpayer for the purpose of giving or obtaining tax advice.

Closure Notices

When HMRC conclude an enquiry into a tax return, they issue a formal document called a closure notice (section 28A Tax Management Act 1970). Closure notices have traditionally been issued at the end of the enquiry when the taxpayer and HMRC have reached agreement on the tax due. However (following the introduction of partial closure notices ("PCN") by the Finance (No.2) Act 2017) if HMRC's information requests are unreasonable, there has been a rise in taxpayers or their agents making an application to the tax tribunal asking it to direct HMRC to issue a closure notice within a period specified by the Tribunal in an attempt to narrow the scope or limit the parameters of an enquiry to make the disclosure exercise more manageable and "fair".

In an important recent decision, the Court of Appeal (Supreme Court permission to appeal has been denied) in Embiricos v HMRC [2022] EWCA Civ 3, held that HMRC had no power to issue a PCN in respect of the taxpayer's remittance basis claim, without specifying the tax payable. Having regard to the High Court

decision in R (Archer) v HMRC [2016] EWHC 296 the Court of Appeal held that a final closure notice was not valid unless it stated the amount of tax due, and that this principle applied equally to partial closure notices. Note that the question before the court in Embiricos was whether the taxpayer's claim for the remittance basis was a matter to which HMRC's domicile enquiry was related. HMRC asserted that a valid PCN would therefore potentially have to state that the remittance basis was disallowed and as a consequence there would need to be amendments made to the self-assessment to bring into charge any relevant foreign income. Mr Embiricos was therefore called upon to provide all the details of his worldwide income and gains even though none of it would be taxable unless and until it has been established that the taxpayer had acquired a UK domicile. The result of this decision is to perhaps erode the usefulness of a PCN but certainly to consider very carefully if it is an appropriate tactic to be deployed.

The Disclosure Exercise

Should the enquiry or investigation continue and proceedings are issued, what formed part of any information request quickly becomes the subject matter of the disclosure exercise.

The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the FTT Rules") contain various provisions regarding the disclosure of documents. In both complex and standard cases, subject to any direction by the Tribunal to the contrary, each party is expected to advise the opponent of the documents on which that party intends to rely or produce, and unless the documents are privileged, to permit the other party to inspect and take copies of them (rule 27). Notably, the provisions in rule 27 do not extend to require a party to disclosure documents which are prejudicial to their own case (by contrast, see CPR rule 31.6(b)(i), which requires a party to disclose the documents which adversely affect their own case). Rule 27 also does not have an express requirement to disclose documents referred to in statements of case, witness statements, affidavits, however, a party may ask the Tribunal to make directions which require the other party to disclose documents.

The Tribunal has powers (under rule 5(3)(d) and 16) to direct a party to produce a document to the Tribunal and/or another party. The guiding principle for the Tribunal to exercise such powers is to ask what is required to deal with the case fairly and justly in accordance with the overriding objective, as stipulated in rule 2(1) (Addo v Revenue and Customs Commissioners [2018] UKFTT 530 (TC) applying Revenue and Customs Commissioners v Ingenious Games LLP [2014] UKUT 62 (TCC)). Under rules 2(2)(a) and 2(2)(e), dealing with cases fairy and justly includes "dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties" and "avoiding delay, so far as compatible with proper consideration of the issues".

Whilst the case of Addo concerns disclosure by HMRC to a taxpayer, the decision provides helpful guidance on how the Tribunal approaches the disclosure exercise: the approach is generally broad and will assess the proportionality of a party's request for disclosure, as well as what would be fair and just in the circumstances.

Conclusion

In any tax investigation there is a fine line and delicate tipping point between providing the necessary information and becoming the subject of an unduly onerous fishing expedition. Expert advice will provide invaluable. The decision in Embiricos has made it clear that in some circumstances the taxpayer is out of options in resisting the provision of information. There is also a timing argument to consider - comply now or ultimately be compelled to provide information by a court.

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THE REMITTANCE BASIS OF TAXATION IN THE UK

A FUTURE IN THE BALANCE

Authored by: Paul Huggins (Partner) – Rawlinson & Hunter

The 'remittance basis' of taxation is the UK's favourable tax treatment available to UK resident but foreign domiciled individuals. Broadly, it allows this category of taxpayer to avoid UK tax on many types of foreign income and on capital gains realised on foreign assets, provided that the income and the proceeds of sale are not used in (remitted to) the UK. This tax regime has been a significant factor in the choice of many wealthy foreigners to establish residence in the UK.

The remittance basis of taxation periodically attracts negative publicity on the grounds of 'fairness', and has become something of a political football at the moment. But before we catch up with the present and look forward, it may be helpful to provide some historical context.

The origins of the remittance basis of taxation go all the way back to the Napoleonic Wars, when Pitt the Younger introduced income tax in Britain in 1799 to fund the war effort. Significant profits were generated in the colonies and had it been practical to do so, income tax would have been imposed on those foreign profits as they arose. However, the reality at the time was that Britain was the only trading partner for colonial businesses, and profits could only be crystallised on the importation of produce to Britain. Income tax was therefore imposed on foreign earnings when they were remitted to Britain.

This endured until 1914, when the remittance basis was abolished for overseas income. However, it was decided that there should be a carve-out for UK resident foreigners. It was necessary to adopt a legal definition for this category of taxpayer, and there was a readymade and convenient legal concept of 'domicile' which was adopted. The purpose of identifying a person's domicile is to connect that person to a particular system of law. This is important because the issue determines which country's jurisdiction would apply in matters such as marriage and divorce, legitimacy and succession (such as how an estate devolves on death under a Will or on intestacy). The status of having a foreign domicile was now imported into British tax legislation.

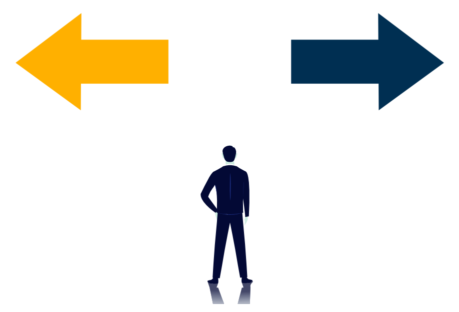
Although the remittance basis of taxation has limped through to the present day in a somewhat curtailed form, it has led a turbulent existence over the last 50 years:

- **The 1974 Finance Bill under the Harold Wilson Labour administration included draft 'deemed domicile' provisions which were to apply to a person who had been resident in 9 of the previous 10 tax years. The provisions were mysteriously dropped;**
- **In 1988, a Consultative Document was published, proposing the replacement of the remittance basis with a provision whereby those resident in fewer than 7 of the previous 14 tax years would be allowed to apply a 2% tax rate to foreign income. This too was abandoned;**
- **In 2002, there was another concerted campaign by elements of the press to address the perceived unfairness of the remittance basis regime for wealthy foreigners. Forced to respond, the Labour Government published a lukewarm and somewhat superficial document, which (unsurprisingly) led to nothing;**

- **The biggest, actual changes occurred in 2008 (the introduction of the Remittance Basis Charge) and in 2017 (the limitation of the remittance basis to those who had been UK resident for 15 or fewer of the previous 20 tax years), along with other significant changes, for example, to the tax treatment of trusts.**

And so to the present day, and what the future might hold. The Labour Party has made a very clear commitment to abolish the remittance basis, if it comes to power. Rachel Reeves, the Shadow Chancellor, made a speech to the Co-op Party conference in October 2022 in which she made clear the Party's view that if you make Britain your home, you should pay your taxes here.

'And that is why as Chancellor in the next Labour government, I will abolish non-dom status'.



Labour's position is very clear, then. The Conservative government has a different view. Jeremy Hunt, Chancellor of the Exchequer, when challenged on why he was allowing £3.6bn to be thrown away because 'he won't make them pay tax here', replied that non-doms pay around £8bn in tax per year and that he would rather that they 'stayed here and spent their money here'.

The differences between the two main political parties might be seen as ideology versus pragmatism, but this would be simplistic. The Labour Party's claim that an additional £3.6bn in tax would be collected if the remittance basis were abolished is based on Cage Policy Briefing no. 38 prepared by Warwick University's Economic and Social Research Council. Its conclusions assume that nearly all non-doms would remain UK resident and pay tax on worldwide income and gains. This is based on a study of what happened after the changes in April 2017, when very few long term resident non-doms who lost the ability to claim the remittance basis chose to depart these shores. However, the 2017 changes left some valuable continuing protections for income and gains arising within trust structures, and it is almost certain that this significantly influenced the low number of departures.

The future of the remittance basis probably rests on which political party wins the next general election, which is a maximum of two years away. As we face economic hardship and a 'Winter of discontent' in the UK, one might speculate that the government in power will struggle to gain much electoral appeal.

But one should never lose sight of Harold Wilson's (possibly misquoted) observation that 'a week is a long time in politics', an observation spectacularly validated by political events here in Autumn 2022.

One last thought on this is that the enactment in 2013 of a detailed test of UK tax residence has provided individuals with the means to work out exactly how many days they can spend in the UK without being UK resident. Many countries offer a favourable tax system to attract new residents and any government, whatever its colour, would do well to remember this. As Adam Smith wrote in 'The Wealth of Nations':

'The proprietor of stock is necessarily a citizen of the world, and is not necessarily attached to any particular country. He would be apt to abandon the country in which he was exposed to a vexatious inquisition in order to be assessed to a burdensome tax, and would remove his stock to some other country where he could either carry on his business, or enjoy his fortune more at his ease.'

If this was the case even in 1776, it is certainly the case now in the era of global mobility!

CONSIDERATION V CAUSATION

IN THE CONTEXT OF S142 OF THE INHERITANCE TAX ACT 1984

Authored by: Jamie Holmes (Barrister) - Wilberforce Chambers

There are a number of circumstances in which it will be advantageous to a taxpayer that some part of a tax planning arrangement is other than for consideration. In at least some of those circumstances, HMRC have contended that mere causation is sufficient to establish such consideration. This article will use deeds of variation pursuant to the Inheritance Tax Act 1984, s142(1), and the requirement as to the absence of consideration at s142(3), as a worked example of this potential issue. It is contended that causation is (generally) not sufficient.

Consideration vs causation

It is submitted that as a matter of first principles causation is not sufficient to establish consideration, at least in circumstances in which the relevant chain of causation is unilateral and not bilateral.

The starting point is that the term consideration when used in legislation will generally be given the meaning it has in contract law.

C&E Comms v. Apple and Pear Development Council [1985] STC 383 was a decision of the Court of Appeal as to whether the taxpayer made taxable supplies so as to be entitled to claim credit for input tax for VAT purposes. The point turned on the proper construction of the Finance Act 1972 (as amended by the Finance Act 1977) Section 6(2)(a), which provided that "supply" in this part of this Act includes all forms of supply, but not anything done otherwise than for a consideration." At 389, Fox LJ stated the following (with which Kerr and Lawton LJJ agreed at 393d-e):

> ***The word 'consideration' is a term of art in English law, and I think that, used in an English statute, it must be assumed to bear its ordinary meaning in the law, save in so far as the provisions of the statute indicate some other meaning.***

The Court of Appeal went on to find at 389i that there was nothing in the 1972 Act that led it to suppose that another meaning was intended for the term in that case[1]. This is consistent with the general approach to the construction of any technical legal term that is used in legislation, as summarised for example in Bennion, Bailey and Norbury on Statutory Interpretation (8th, 2020) at paragraph 22.5.

HMRC appear to accept that in at least some circumstances consideration should mean what it does in contract law. This includes IHTM28382 as to IHT ("In law, consideration is an act or promise to do (or not to do) something in return for value, and the value given is enforceable.") and NMWM04040 as to the National Minimum Wage[2].

1 Notably, the Court of Appeal considered that although the term consideration had the meaning given to it in contract law, that did not necessarily require that all of the (other) requirements for a contract were present, or that a contract had been formed.

2 NMWM04040 notably also recognises that the approach in contact law to the 'intention to create legal relations' may also be material in that particular context, including that "there may be no such intention in certain family, domestic or social arrangements."

That said, it may be that there are circumstances (at least in theory) in which the legislative context shows that the term consideration is to mean something different; e.g. that mere causation would suffice.

Secondly, it is well-established that as a matter of English contract law, consideration is mutual and requires reciprocity[3]. Per C&E Comms at 289g-h:

… "In its usage in English law the central feature of consideration is reciprocity (see Treitel Law of Contract (6th edn, 1983), p 51). Something is given in return for something else. It may, for example, be a promise or a benefit to the promisor. But whatever its form, I think that reciprocity is involved. It is essentially mutual.

This need for mutuality highlights the basic inadequacy in an analysis rooted in causation. Lawyers generally conceive of causation as a chain of events flowing from one point to another. It is a line (or, at least, need only be a line) and not a circle. The caveat in brackets in the previous sentence flags that the point can only be taken so far, and that in some circumstances there may be no material difference between saying: 'A did X in consideration of Y from B' and 'A did X because of Y from B'. The crucial difference, it is submitted, is that between the unilateral (which is generally treated as a gift) and the bilateral (which is capable of being a contract).

This is well-captured in the decision of the Court of Appeal (Criminal Division) in R. v. Braithwaite [1983] 1 W.L.R. 385. The appeal concerned the proper construction of the term "consideration" in the Prevention of Corruption Act 1906. Lord Lane CJ, giving the judgment of the Court, held at 391G:

"In our judgment the word " consideration " connotes the existence of something in the shape of a contract or a bargain between the parties. … The word "gift" is the other side of the coin, that is to say it comes into play where there is no consideration and no bargain. …"

Application to s142[4]

In outline, subject to a number of detailed requirements and exceptions, s142 enables the beneficiaries of an estate to rearrange (by way of variation or disclaimer) what is to pass to them so that the outcome better suits their interests. This will typically be where some advantageous tax planning was not undertaken by the now deceased testator, which the beneficiaries seek to put in place. So long as the requirements of s142 are met, the variation will be treated for IHT purposes as if it had been effected by the testator in the first place, with retrospective effect.

By s17(a) of the 1984 Act, a variation to which s142(1) applies is not itself is not a transfer of value. However, s142(3) provides as follows:

Subsection (1) above shall not apply to a variation or disclaimer made for any consideration in money or money's worth other than consideration consisting of the making, in respect of another of the dispositions, of a variation or disclaimer to which that subsection applies.

The application of s142(3) – and the 'external' consideration that it provides for – has been considered, to the knowledge of the author, in the following two cases.

In Lau v. HMRC [2009] S.T.C. (S.C.D.) 352, a Scottish appeal concerning s142(3), Special Commissioner Michael Tildesley OBE had to determine whether a disclaimer had been made for consideration. Mr Lau's will provided for £665,000 (free from IHT) legacies to his two daughters and stepson (Mr Harris), with a larger residue to his surviving spouse Mrs Lau (Mr Harris' mother). Mr Harris and the two daughters disclaimed their legacies by a deed of variation. A few days after the correspondingly-enlarged residue was transferred to Mrs Lau, she transferred £1m to Mr Harris[5]. HMRC contended that s142(3) applied. Mr Harris, along with his mother, contended the £1m payment was instead pursuant to other, unrelated arrangements and was not linked to the disclaimer. Their evidence was found to be incredible and unreliable (see especially paragraphs 92-93) and s142(3) was found to apply: paragraph 102.

The decision was one of Scottish law but that was explicitly found to be immaterial (see paragraph 105; and the approach to Lau in Vaughan below). HMRC's case is recorded in the judgment in terms of there being a "direct causal relationship" between the renunciation and the payment (see paragraph 10). The taxpayer does not seem to have challenged that, either at all or to the effect that consideration required something more. Rather, the case appears to have been contested on the basis of whether or not there was a causal relationship between the two payments (see paragraphs 86, 91, 94, 98 and 102). That said, it was clear that the ultimate issue was consideration (see e.g. paragraphs 87, 91 and 103), and the summary of the law at paragraph 87 refers to an exchange and/or a quid pro quo. In any event it would seem that the findings on the facts, including as to admissions that were found to be "fatal" to the taxpayer's case (paragraph 101), were found sufficient to dismiss the appeal.

3 It is beyond the scope of this article to summaries the law in this area and the reader is referred to works such as Chitty on Contracts (34th, 2021), Chapter 6.

4 See also the example of a similar issue in the context of nil rate band debt schemes: Kessler and John on Drafting Trusts and Will Trusts (14th, 2019), Third Appendix.

5 The Judge found that similar payments were proposed as to the two daughters but it is unclear to the author whether those were ever made.

Vaughan-Jones v. Vaughan-Jones [2015] EWHC 1086 (Ch) was a claim by executors for rectification of a deed of variation so that it would satisfy the requirements of s142; in particular s142(2) as to the need for the deed to state the intention that s142(1) is to apply. Mr Vaughan-Jones' will had passed his residuary estate in equal shares to his surviving spouse and three sons. The deed of variation gave the entire residue to the spouse. HMRC did not seek to be joined as a party but referred the Court by way of a letter to a number of points. This included the potential application of s142(3), the decision in Lau, that it appeared to HMRC that the variation had been made with the intention that the spouse would make payments back to the sons, and that such payments had been made. The Court granted rectification and held that it did not need to decide the s142(3) issue, that being a potential matter for the First Tier Tribunal in the future.

On the face of the judgment, HMRC did not adopt the same argument as to causation in Vaughan as it had in Lau: the word consideration does not appear and all references are to consideration. That said, this lack of a reference may only reflect a combination of HMRC's limited involvement and that the Court ultimately considered that it did not need to decide the point. Whether because or despite of that, to the extent that Lau might have been said to provide some support for the contention that causation alone is sufficient (which is doubtful for the reasons above), the dicta in Vaughan provide a helpful correction; at least as a general direction of travel. Vaughan held that Lau was a decision on its own particular facts that established no general proposition of law beyond that the onus of proof on the issue of consideration rests on the taxpayer (paragraphs 50-51). Further, it was accepted that consideration in this context is both (1) "a technical expression", and (2) one "which requires a bargain" (paragraphs 50-51).

It would be fair to say that the focus of the above paragraphs of the judgment were on whether a legally enforceable obligation had arisen, such that the spouse could not then simply change their mind; as opposed to whether consideration meant what it does as a matter of contract law. Nor does the word contract appear in the judgment. Nonetheless, at least as a general direction of travel, the analysis in Vaughan provides a helpful correction to the extent that Lau steered off course.

Conclusion

It remains open to a taxpayer to contend that the term consideration, in the context of s142, requires more than causation. Subject to the context of particular legislation suggesting otherwise, the better view is that this starting point will generally hold.

CLEAN CAPITAL THE STRUCTURING & PITFALLS

Authored by: Tahir Mahmood (Director) and Ed Johnson (Senior Manager) - London & Capital

The remittance basis (RB) is a preferential basis of taxation in the UK, which is available to taxpayers that are non-domiciled under UK general law and not yet deemed UK domicile under tax law. A taxpayer claiming the RB is subject to UK tax on any UK sourced income/gains, or any income/gains remitted to the UK.

There have been various changes over the last 15 years since the Finance Act 2008 where major reforms were made to the RB rules. Since then, the Finance Act 2013 and later in 2017 have brought around further change to determining UK tax residency and UK deemed domicile for long-term residents (the 15/20 rule).

These rules can create tax efficient investment opportunities, but there are complexities that need to be managed in real time as part of any wealth planning for a UK client. Without professional help it is easy for clients to trip up on the rules with what they may see as basic day-to-day decisions.

The Structuring

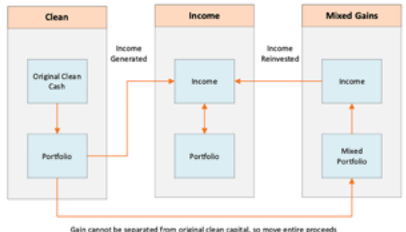
Keeping it Clean

Clean capital – the term used for any funds that can be brought to the UK without being subject to additional UK tax charges (for a client that is claiming or has previously claimed the RB). This will usually be already UK taxed capital or income / gains that have arisen prior to becoming UK resident. This concept is important as once capital has been identified as ‘clean’ it needs to be preserved and remain easily accessible in the UK.

Achieving this whilst investing clean capital can be difficult as without knowledge of these rules, clean capital can easily become trapped with other mixed funds.

How do we structure?

This would be a basic structure for a client that is investing a pot of clean capital with a non-UK custodian and whilst still claiming the RB:



Within an individual's main clean portfolio there will be three distinct sub portfolios:

1. **Clean –** The clean pot contains the original clean (as defined above) funds being invested; these can be brought into the UK without a charge. This pot can be invested into a portfolio of direct stocks and bonds, which are preferably non-UK situs for tax efficiency, but this will depend on the UK cash flow needs of the client.
2. **Income –** Any income generated on the non-UK situs clean portfolio is not subject to UK tax and therefore needs to be segregated out from the clean pot, this would go into pot 2. Segregation of this income is fundamental, given a remittance of this would be subject to full UK tax. This income should be ringfenced for non-UK spending in priority.
3. **Mixed Gains –** There are anti-avoidance rules for offshore-to-offshore transfers, which means it is not possible to split a capital gain from the original clean proceeds on the disposal of an asset. This means when an asset is sold at a profit, the entire proceeds need to be moved to the mixed gains account. By putting the gain into the "Mixed Gains" sub portfolio this is not tainted with the "Income" portfolio and can be remitted to the UK at a lower cost, 20% capital gains vs 45% income tax.

Often clients have other funds that are not deemed clean capital for UK tax purposes. This could broadly include mixed funds but may also include things such as non-UK employment earnings and overseas workday relief claims.

A similar structure as the above will need to be operated for these amounts and importantly must always be kept separate from any identified clean capital.

I claimed the remittance basis but now am on the arising basis, how does this change?

A common mistake here is thinking that everything can be unwound and used in the UK without any issues, which unfortunately is not the case. As a rule of thumb, if you have income which has benefitted from the remittance basis (pot 2 or 3 in our example above), this cannot be transferred to the UK without paying the corresponding UK tax.

It is imperative to understand the full tax history of a client at the fact find process, which should at least date back to when they arrived in the UK and any activity since.

If you have switched to the arising basis of taxation, you will be generating clean income from all pots (including the mixed funds). The structuring should be adjusted at this point to ensure this additional clean capital can be segregated for use in the UK.

Common Pitfalls

This article is meant to give you a flavour of how you can structure your assets and is by no means a comprehensive guide. If any of the below apply to you, we strongly recommend speaking to someone:

UK situs - Have you purchased UK situs assets in an offshore account? This can give rise to a remittance. Therefore, it is important to allocate exposure to UK markets in a clean capital portfolio.

UK Service Fees - How do you pay for UK professional service fees? This can give rise to a remittance and structuring the payment of professional fees offshore should be considered.

Loans - Loans can also give rise to indirect remittances if not collateralised or serviced using clean capital and so this should always be managed. It is important to know where the loan proceeds are being used and repaid from.

Relevant Persons - Not understanding who is a 'relevant person' for UK tax purposes. For example, transfers of funds offshore to a spouse or a minor child that are then transferred by them to the UK can still give rise to taxable remittances.

Mixed marriages - Is your spouse a non-dom? Shifting assets from a UK domiciled individual to a non-dom could shift them outside of UK taxation.

Intentions - Not considering how long you intend to live in the UK and if you will eventually require offshore funds for UK spending. Structuring prudently and as early as possible can give you flexibility if these intentions change.

Deemed Domicile - Are you coming up to 15 years residency in the UK? Now may be the time to take advantage of the remittance basis one last time and realise some of the gains on your portfolio. Also, if you are deemed domicile for income tax, inheritance tax will also be a consideration.

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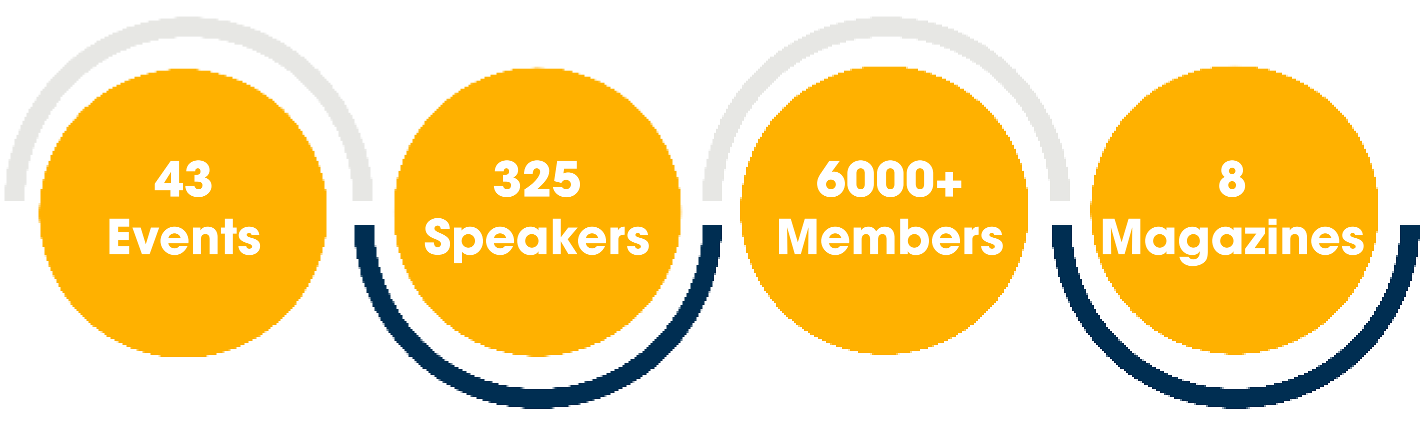


SDLT

BLACK AND WHITE, OR (50) SHADES OF GREY?

Authored by: Matthew Spencer (Partner) and Charlotte Jeanroy (Trainee Solicitor) at Kingsley Napley

I am often asked by friends, colleagues and clients for property tax advice. The UK has built up a wonderfully complicated set of tax rules governing land, requiring parties to be alert to several taxes and to structure around substantial tax inefficiencies. A single deal alone could see different aspects liable to each of five different VAT treatments. Life would be simpler if the law was always clear cut – black and white. Unfortunately, it rarely is. With HNW investments or landed estates in mind, the proper analysis of a few grey areas could result in potentially significant savings.

SDLT is a transaction tax paid by purchasers of chargeable land interests, implemented in 2003 to replace a stamp duty charge which was too often circumvented. There are different rates for residential and commercial land, with dramatic increases in residential SDLT rates over recent years.

Ten years ago, the top rate of SDLT was 5%. Today it is 17%.

It is becoming increasingly important to ensure you and your clients do not pay more than is legally required.

Is all the land residential?

SDLT rates for expensive residential land are materially higher than SDLT rates for expensive commercial land. Purchases of mixed land – land with both residential and commercial elements - attract the commercial rates resulting in material savings when applied to purchases of a large estate (a house with substantial grounds) if part of the land is commercial.

With a large estate, you might think part of the land is clearly not residential – perhaps there are meadows, stables or woodland? There is no clear test for whether land is either commercial or residential and HMRC take a narrow view. HMRC has clarified, as a result of industry consultation, that land has to be excluded from the use of the owner to be commercial. For instance, via a farm tenancy or grazing licence.

Given the SDLT saving possible, HMRC do not accept this easily. A residential site including a public footpath is insufficient to qualify a sale for the commercial SDLT rates for example. There has, however, been a recent taxpayer tribunal win on this subject. In October 2022 Gary Withers successfully appealed HMRC's closure notice, almost halving his SDLT bill, saving £98,000. The property in question included 39 acres of gardens, fields and woodlands. Alone this would not qualify for the commercial rates as HMRC would see the land as for the enjoyment of the dwelling. However, large parts of the land were subject to a grazing licence and rewilding scheme. Whilst HMRC argued the land was still part of the grounds of the dwelling, noting the nominal income, the tribunal found in Mr Withers' favour.

Careful analysis of the land being bought might lead to a substantial saving - it is a case of weighing different factors as opposed to following a precise test.

Multiple dwellings relief (MDR): offers more than is immediately apparent

Many might be familiar with the premise of MDR. If the property being acquired includes more than one dwelling, the SDLT is calculated on the price divided by the number of dwellings (subject to meeting the 1% de minimis) then multiplying the answer by the number of dwellings. As SDLT is calculated in bands this allows the lower-rate bands to be applied multiple times, generating potentially material savings. This can benefit larger acquisitions, often there might be a "main house" along with separate (and typically smaller) "granny flats" or annexes. There are a number of rules to be wary of here, including ensuring each dwelling has its own privacy. Accommodation on the top floor of a large dwelling for a nanny, for example, will rarely qualify as separate.

There are already a material number of articles on this, along with businesses whose sole trade is to retrospectively seek out this claim. Less well known is the added efficiency where a property comprising both commercial land and multiple dwellings is acquired. The rules prevent the 3% SDLT surcharge applying to those multiple dwellings, even where the purchaser is a company.

Example

A client purchases a tower block as an investment, comprising 20 flats above two commercial ground floor units. The price is £5,000,000. That is apportioned £300,000 to the commercial units and £4,700,000 to the flats.

There are multiple ways SDLT can be calculated here:

1. As the property is "mixed", it is acceptable to use the commercial rates of SDLT. That would result in £239,500 SDLT, considerably better than the residential rates which could attract a liability more than double this. Often a buyer might think this is the only or best result.

2. MDR in respect of the residential elements can be claimed with commercial SDLT rates applying on the remainder. In this case, the calculation would be:

Residential:

Average price per dwelling (£4,700,000/20): £235,000

Total SDLT per dwelling* (1% SDLT (as de minimis applies) x £235,000: £2,350

Total - Combined total SDLT on dwellings (£2,350 x 20): £47,000

*excluding any 3% surcharge which may apply

Commercial:

Total SDLT (commercial rate) due on purchase price: £239,500

Total - Apportionment to commercial element ((300,000 x £5,000,000) x £239,500) £14,370

Total SDLT Liability: £61,730

If the 3% SDLT surcharge applied, the total SDLT due would be £155,370. When the 3% surcharge was introduced, HMRC's manuals stated it always applied in these scenarios, but they rewrote their guidance after a successful challenge.

It is questionable whether the current law was ever intended to allow the £61,370 result, but at present, this method is explicitly accepted by HMRC (see SDLTM09740). And HMRC can provide clearance to remove any risk.

Additional grey elements here include deciding if the commercial element is "negligible", or if the purchase comprises a single "transaction".

Apportionment of consideration

Sometimes the purchase is of more than just land and buildings, it might include curtains, carpets, white goods, paintings, furniture etc (known as "chattels"). These can be excluded from the amount subjected to SDLT. An estate could have a material amount of such chattels, some less obvious than others. Determining what is a "chattel" can be difficult in borderline cases, but a careful assessment can save material amounts of SDLT.

HOW THE IRS SHARES TAXPAYER INFO WITH OTHER GOVERNMENTS

Authored by: Alicea Castellanos (CEO) – Global Taxes

The Internal Revenue Service is ready, willing and able to help authorities worldwide with tax enforcement – especially with the sharing of taxpayers' information.

In Zhang v. United States , taxpayers recently appealed a decision from the U.S. District Court for the Northern District of California that denied their petition against an IRS summons for information. The summons was at the request of the Canadian tax authority; the U.S. and Canada have a bilateral tax treaty.

The Ninth Circuit Court sided with the IRS, saying the agency can seek information for a foreign government if the request satisfies accepted guidelines.

The appellants in the case didn't dispute that the IRS satisfied its burden (as set by the precedent 1964 case U.S. v. Powell) by establishing a prima facie case of good faith. Instead, they argued, the district court should have considered evidence of Canada's bad faith relevant to whether issuing the summons would constitute an abuse of the court's process.

> ***"We have recently considered and rejected nearly identical arguments," the Circuit Court replied. "We do so again today."***

How and why sharing info happens

Nations share tax information primarily in three ways:

- **Automatic exchanges (e.g., BEPS Action 5 OECD minimum standard and the FACTA) are routine and usually associated with standardized financial/bank transactions.**
- **Spontaneous exchanges, when one country alerts another about a potential tax issue (usually facilitated by bilateral tax treaties); and**
- **Targeted requests, typically initiated by one country to seek information in an investigation of a resident or citizen (as in Zhang).**

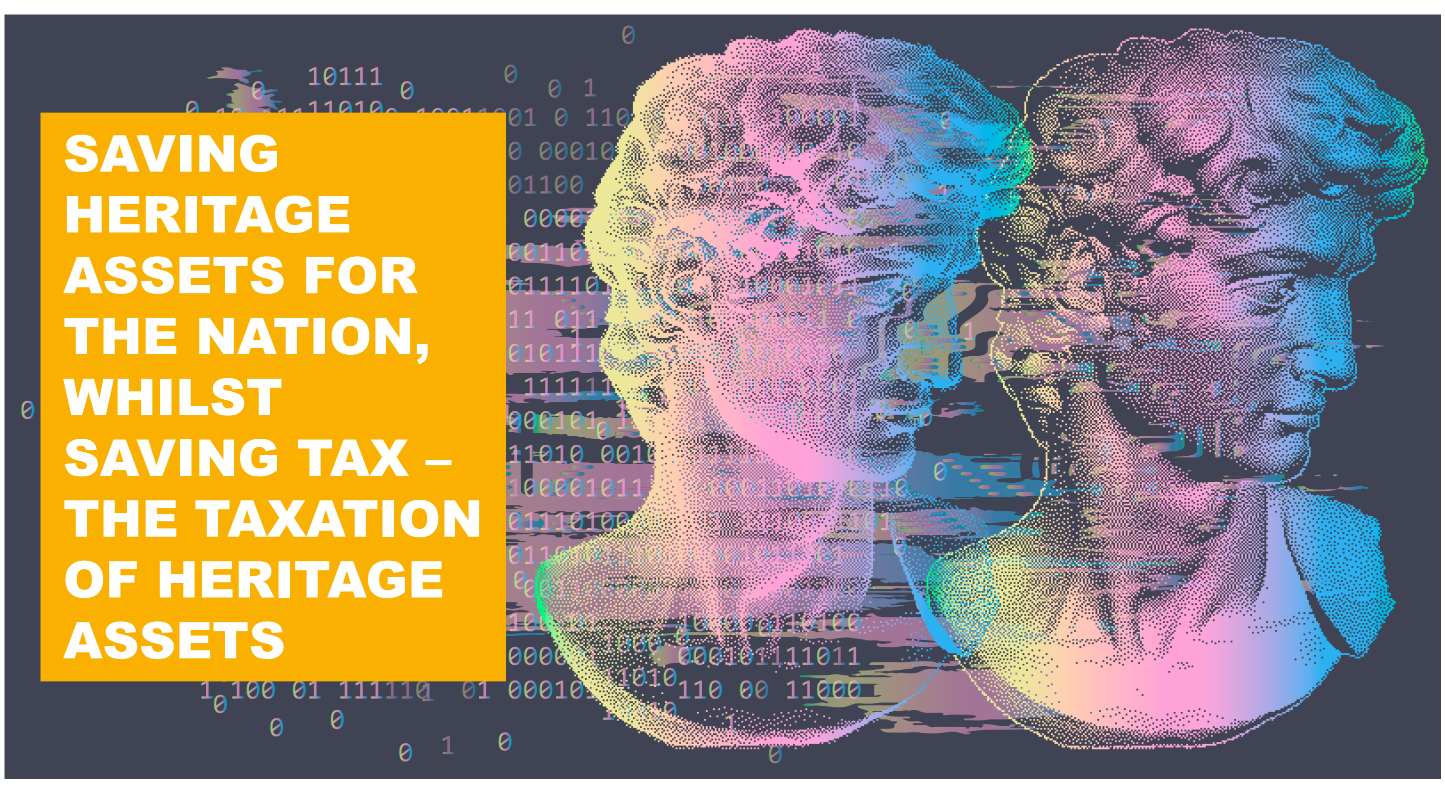
If a U.S. taxpayer fails to comply with the IRS request for information made by the foreign government, the IRS can use administrative summons power to enforce the summons in court (also in Zhang).

Exchanges of this information occur under such international agreements as: bilateral tax treaties; Tax Information Exchange Agreements (TIEAs); multilateral treaties and agreements to which the U.S. is a party, such as the OECD/Council of Europe Convention on Mutual Administrative Assistance in Tax Matters, among others; intergovernmental agreements under FATCA; U.S. territory tax implementation or coordination agreements between the U.S. and its territories of American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, Puerto Rico and the U.S. Virgin Islands; and mutual legal assistance treaties.

The United States and five of its treaty partners assist each other in the collection of taxes covered by their respective tax treaties (the Mutual Collection Assistance Program: Canada, France, Denmark, Sweden and The Netherlands. Info exchanged can include names, addresses, ID numbers, types and amounts of tax and any other information necessary for tax collection.

Taxpayers with international holdings need to realize that information flows through borders more freely than ever today.

Your tax specialist needs to be able to handle these and many other complex cross-border issues of wealth, income and tax enforcement or the consequences could be severe. If we can help, please let us know.

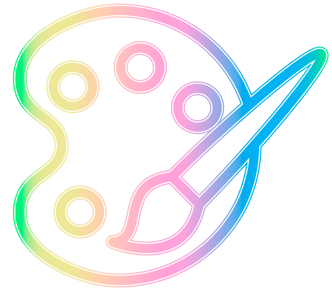


SAVING HERITAGE ASSETS FOR THE NATION, WHILST SAVING TAX – THE TAXATION OF HERITAGE ASSETS

Authored by: Rebecca Meade (Senior Associate) - Forsters

The Arts Council recently published its 'Cultural Gifts Scheme & Acceptance in Lieu Annual Report' for 2021/22 that details fifty varied and remarkable objects of cultural significance, worth £57m, that have been 'saved for the nation' for the public to enjoy. They included the Judith Kerr archive and a letter from Jane Austen, both of which were the subject of the acceptance in lieu ("AIL") scheme.

AIL enables taxpayers – usually executors or trustees – to give certain types of assets to qualifying public institutions (e.g. museums and art galleries) in payment of inheritance tax ("IHT"). In principle, AIL means that everyone wins: taxpayers can discharge their IHT liability without needing to sell assets, the Government secures valuable and culturally significant assets for the nation, and the public benefits through being able to access those items.



AIL is available where individuals own what are known as a 'national heritage assets'. As the Arts Council's 2021/22 report illustrates, national heritage assets are not limited to Old Masters or great houses. They can include land, buildings, a book or manuscript, or scientific object (or a collection), or anything else considered pre-eminent for its national, scientific, historic or artistic interest.

An asset is considered 'pre-eminent' if:

1. It has an 'especially' close association with our history and national life;
2. It is of especial artistic or art-historical interest;
3. It is of especial importance for the study of a particular form of art, learning or history; or
4. It has an especially close association with a particular historical setting.

To encourage taxpayers to take advantage of AIL (instead of selling assets and paying IHT with the proceeds) the Government gives taxpayers a financial inducement, called a 'douceur', which is 25% of the tax payable (or 10% for land).

The way in which the scheme operates is best demonstrated with an example. Say, executors hold a 'pre-eminent' painting worth £1m. In that case, £400k of IHT (at 40%) is due on it. If the executors had chosen to sell the painting on the open market and use the proceeds to pay the IHT, they would have been left with £600k. However, under AIL, the executors secure an extra tax credit of £100k, meaning that they receive a total credit of £700k to set against the IHT on the rest of estate. Ultimately, the beneficiaries will therefore get an extra £100k.

National heritage assets must be offered for AIL within two years of the relevant taxable event (typically a death). A suitable asset must be identified first, the value of the asset is then determined, and then an application is made to the Arts Council's

AIL panel who decide if the asset is pre-eminent and if they agree the value the taxpayer has given for it.

Following the panel's recommendation, the final decision is made by the Secretary of State for Digital, Culture, Media and Sport. If accepted, the asset is allocated to a public institution.

AIL is not the only relief available for national heritage assets:

- **Private treaty sale:** This is like an AIL, except the asset is sold to a public institution that then pays the taxpayer an amount calculated on the same basis. The price is negotiated between the taxpayer and institution. Using the example above, the executors would receive £700k of cash. This route is useful when the tax credit from an AIL would exceed the total IHT, because you do not get 'change' from an AIL. A private treaty sale ensures that any excess remains with the taxpayer as cash proceeds.
- **Conditional exemption:** Owners can defer IHT on national heritage assets indefinitely, provided they undertake with HMRC to keep the assets in the UK, preserve them, and allow 'reasonable public access'. Often grand homes are open to the public because there has been a taxable event in the family's past; rather than paying IHT then, items would have been put on public display.

What is 'reasonable public access' must be agreed with HMRC and will depend on the type of asset. It could involve lending an object to a museum or gallery or, if an asset remains in situ (or is not moveable) in a large building that can accommodate many visitors, anything up to 156 days' access might be deemed appropriate.

The exemption is 'conditional' because a breach of the undertakings (usually a sale) results in withdrawal of the exemption and the deferred IHT falling due. If assets pass on death, or as a gift, new owners can renew the undertakings to avoid loss of the exemption.

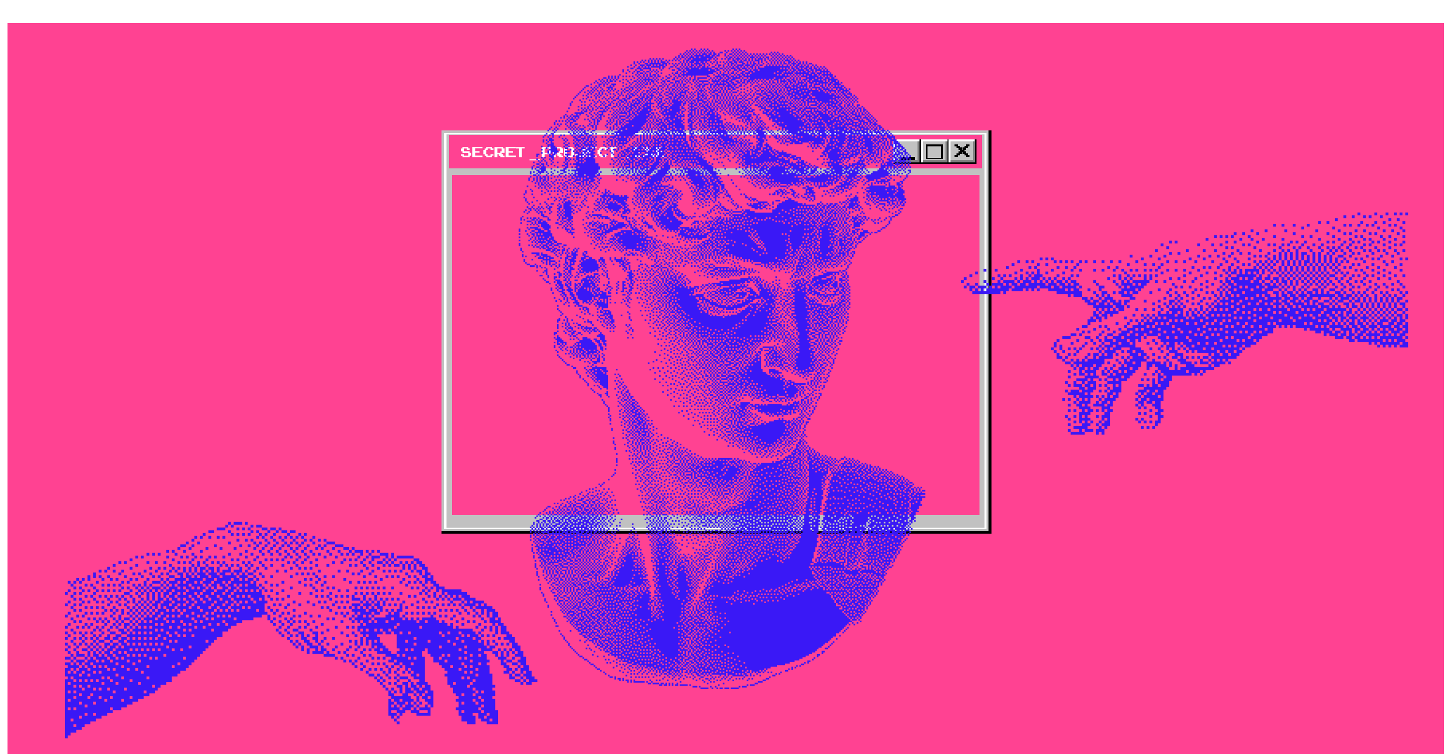
- **Cultural gifts scheme:** Introduced in 2013 to encourage taxpayers to give national heritage assets to public institutions during their lifetimes. A proportion of the value of the asset donated to the nation is given as a tax credit, e.g. if you were to give away a £100k asset, £30k could be deducted from your income tax or capital gains tax bill.

What next?

As different art forms develop it may be that new types of asset qualify as national heritage assets. Following the surge of investment in digital art and non-fungible tokens (which saw the digital artist Beeple sell a non-fungible token of his work for a record-breaking $69m in 2021), discussion could even turn to whether such works might qualify.

In recent years a spotlight has also been shone on the connection between national heritage assets and their links with slavery, or objects originating from previous British colonies. This has already permeated into charity law through the new Charities Act 2022 and could begin to influence the availability of tax reliefs for national heritage assets.

As such, any individuals or trustees holding such assets would be wise to investigate the history of the assets they hold, paying attention to links with slavery or previous British colonies. Any potential issues could then be flagged and considered before a taxable event arises.



KEY DEVELOPMENTS THIS YEAR – AND NEXT

Authored by: Alicea Castellanos (CEO) – Global Taxes

Beneficial ownership transparency

The U.S. Treasury's Financial Crimes Enforcement Network (FinCEN) issued a final rule[1] establishing a beneficial ownership information reporting requirement pursuant to the bipartisan Corporate Transparency Act. The rule, Jan. 1, 2024, requires most corporations, limited liability companies, and other entities created in or registered to do business in the U.S. to report information about their beneficial owners – the individuals who ultimately own or control the company – to FinCEN. Reporting companies created or registered before Jan. 1, 2024, will have until Jan. 1, 2025, to file their initial reports. Reporting companies created or registered after Jan. 1, 2024, will have 30 days to file initial reports.

FTC regs

New final foreign tax credit (FTC) regulations[2] were set at the end of 2021 and published early this year in the Federal Register. Effective beginning with the 2022 tax year, these regs can potentially make foreign income taxes that were creditable become non-creditable for U.S. purposes.

The regs (subsequently corrected here and here) address, among other issues, foreign income tax and a tax in lieu of an income tax; disallowance of a credit or deduction for foreign income taxes with respect to dividends eligible for a Sec. 245A deduction; the allocation and apportionment of interest expense, foreign income tax expense and certain deductions of life insurance companies; foreign branch category income; and when foreign taxes accrue and can be claimed as a credit.

Strengthened crypto enforcement

The federal Inflation Reduction Act (IRA), passed in August, pumped $80 billion to the Internal Revenue Service over the next 10 years, more than half of that money for intensified enforcement, including of cryptocurrency transactions.

Also this year, a federal court gave the IRS authorization for a John Doe summons on a Los Angeles-based crypto dealer for information about U.S. taxpayers who conducted at least $20,000 in crypto transactions between 2016 and 2021.

New schedules

IRS Schedule K2[3] and Schedule K3[4] kicked in for the 2021 tax year for foreign transaction information formerly reported on Form 1065, Schedule K. The K2 reports items of international tax relevance for certain businesses. Schedule K3 breaks down an individual's share of global income, credits and deductions. These forms both introduced in 2020 and later revised, aim to make federal income tax liability more transparent for partners and shareholders who share ownership in companies.

1 https://www.federalregister.gov/public-inspection/2022-21020/beneficial-ownership-information-reporting-requirements

2 https://public-inspection.federalregister.gov/2021-27887.pdf

3 https://www.irs.gov/pub/irs-pdf/f1065sk2.pdf

4 https://www.irs.gov/pub/irs-pdf/f1065sk3.pdf

FBAR penalties

This fall, the U.S. Supreme Court plans to hear Bittner v. U.S[5], a case that presents a conflict over statues under the Bank Secrecy Act (BSA). At issue will be whether a "violation" under the BSA is the failure to file an annual FBAR no matter the number of foreign accounts or whether there is a separate violation for each account not properly reported.

Offshore loophole slammed

Investigation by the U.S. Senate Finance Committee uncovered that the "shell bank" loophole in the Foreign Account Tax Compliance Act (FATCA) allows banks offshore to accept funds from U.S. persons without reporting them to the IRS.

The loophole was exploited by the late billionaire Robert Brockman, who evaded taxes on more than $2 billion in income. (Brockman, 81, was indicted in a tax-evasion case before he died in August.) In the eight countries where entities linked to Brockman were established, there are more than 128,000 entities registered with the IRS as financial institutions under FATCA, said[6] Committee Chair Ron Wyden (D-OR).

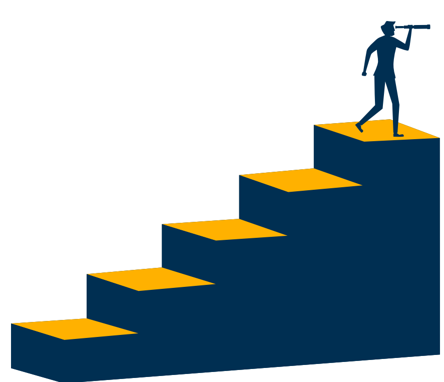
Wyden added that he's working on legislation to close this loophole.

Falling short

A provision in the Tax Cuts and Jobs Act of 2017 that was to raise hundreds of billions of dollars in taxes on deferred earnings from multinational companies and their shareholders is only bringing in less than a third of the projected revenue, according to a report[7] by the Treasury Inspector General for Tax Administration.

The repatriation tax provision (Sec. 965 of the Tax Code) aimed to generate $338.8 billion for the federal government for FY 2018 through 2027. Companies and their shareholders have only paid about $94 billion in taxes to the government on the taxes owed by foreign subsidiaries and their shareholders on the profits previously stockpiled abroad. Companies reported $251 billion in tax liability but $157 billion of that was deferred to be paid in instalments.

Before passage of the TCJA, taxpayers could defer their U.S. on certain foreign sourced net income by keeping the assets in a foreign jurisdiction. Section 965 removed that option and required taxpayers to pay this new tax on their previously untaxed post-1986 earnings and profits.



Ahead in 2023

Foreign currency delay

The IRS and the U.S. Treasury plan to defer for one year the effective date of final regulations pertaining to foreign currency used by multinational companies' business units abroad (Notice 2022-34[8]).

Crypto development

The U.S. has committed multiple agencies to a framework[9] for engagement with foreign counterparts regarding development of digital assets. President Biden's Executive Order earlier in 2022 also directs development of digital asset and central bank digital currencies technologies.

The Organization for Economic Cooperation and Development has a new global tax transparency framework to provide for the reporting and exchange of information with respect to crypto-assets. The framework aims for transparency in crypto-asset transactions through automatically exchanging information with the jurisdictions of residence of taxpayers annually. Entities or individuals that provide services effectuating exchange transactions in crypto-assets for will have to report under the framework.

Anti-laundering

U.S. lawmakers have introduced a bill[10] to expand anti-money laundering due diligence by finance pros. Authorities claim the "Establishing New Authorities for Businesses Laundering and Enabling Risks to Security (ENABLERS) Act" could combat money laundering and other crimes similar to the Pandora Papers.

Your tax specialist needs to be able to field these and many other questions in an ever-changing tax environment. If we can help, please let us know.

5 https://www.globaltaxes.com/blog.php?id=95
6 https://www.finance.senate.gov/chairmans-news/wyden-investigation-uncovers-major-loophole-in-offshore-account-reporting
7 https://www.treasury.gov/tigta/auditreports/2022reports/202234062fr.pdf
8 https://www.irs.gov/pub/irs-drop/n-22-34.pdf
9 https://home.treasury.gov/news/press-releases/jy0854
10 https://www.wicker.senate.gov/services/files/70F069DC-B6A3-4F64-9FD2-3AD683E6604B

PRIVATE CLIENT UPCOMING EVENTS

Date / Location	Event
MAR 21ST HALLAM CONFERENCE CENTRE, LONDON	LANDED ESTATES & FARM TAX CONFERENCE; THE 2ND EDITION
MAR 28TH LONDON	CONTENTIOUS PROBATE AND INHERITANCE CLAIMS - DEATH IN THE MODERN AGE
MAY 2023 LONDON	NON-DOM TAX CONFERENCE: AN ANNUAL REVIEW OF ALL THAT'S KEY FOR THOSE ADVISING NON-DOM CLIENTS
JUN 28TH LONDON	CRYPTO IN DISPUTES
JUL 2023 LONDON	CONTENTIOUS TRUSTS
31ST AUG – 1ST SEPT DOWNING COLLEGE, CAMBRIDGE	PRIVATE CLIENT SUMMER SCHOOL
SEP 2023 LONDON	TRANSATLANTIC TAX & ESTATE PLANNING
OCT 2023 JERSEY	THOUGHTLEADERS4 PRIVATE CLIENT: JERSEY
OCT 2023 GUERNSEY	THOUGHTLEADERS4 PRIVATE CLIENT: GUERNSEY
NOV 2023 DUBAI	PRIVATE CLIENT MIDDLE EAST
DEC 2023 LONDON	SPORT STARS, INFLUENCERS & ENTERTAINERS TAX CONFERENCE: THE DIGITAL AGE

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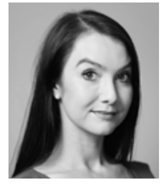

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