PLB – 22/11/2013

THE JOYS OF BEING SELF EMPLOYED (BROKERS, ESTATE AGENTS, PROJECT MANAGERS, SELF-EMPLOYED BUILDERS ETC)

The massive employment income benefits in kind code does not apply to self employed persons.

Thus there are no particular provisions which apply to loans and the user of property.

Income Tax – General Rules

ITTOIA 2005 s.5 states that income tax is charged on the profits of a trade, profession or vocation.

The person liable for the tax is the person receiving or entitled to the profits. See ITTOIA 2005 s.8.

ITTOIA 2005 s.25 states that the profits of a trade must be calculated in accordance with generally accepted accounting practice subject to any adjustments required or authorised by law in calculating profits for income tax purposes.

Different considerations my apply to VAT.

Outright payment

If an outright payment is made by a customer to a self employed service provider such as a self-employed builder or project manager or estate agent or surveyor the recipient will be receiving profit. The receipt is part of the profit of the trade or profession and income tax at up to 45% may be payable in the case of an individual .

Benefits in Kind

There is no elaborate code, as there is under the employment legislation, dealing with benefits in kind for self employed persons. One falls back on to basic principles.

If a benefit in kind is received there can only be an income tax charge to the extent that the same can be converted into monies whether in the year of receipt or in a later year.

Thus if the client gives his estate agent a non-convertible holiday voucher that is not taxable.

Viscount Simon in *Gold Coast Selection Trust, Ltd v Humphrey* 30 TC 209 at 240 stated:-

> "In cases such as this, when a trader in the course of his trade receives a new and valuable asset, not being money, as a result of a sale or exchange, that asset for the purpose of computing the annual profits or gains arising or accruing to him from the trade should be valued as at the end of the accounting period in which it was received, even though it is neither realised nor realisable until later. The fact that it cannot be realised at once may reduce its present value, but that is no reason for treating it, for the purposes of income tax, as though it had no value until it could be realised."

If the asset cannot be realised in a cash form then nothing can be brought into charge to tax.

In *Tennant v Smith* 3 TC 158 an employee could use premises but he could not dispose of the same or sub-let the same so there was no charge to tax under general principles.

Lord MacNaghten at 171 put the position succinctly thus:-

> "But a person is chargeable to Income Tax under Schedule D as well as under Schedule E, not on what saves his pocket, but on what goes into his pocket. And the benefit which the Appellant derives from having a rent free house provided for him by the bank brings in nothing which can be reckoned up as a receipt, or properly described as income."

On page 172 the judge said the position may be different if the employee could have let the property but that was not the case.

One additional point to make with regards to that case is at page 161 where Lord Watson stated:-

> "I do not think it matters much which Schedule you take, Schedule D charges "profits and gains" and these words mean something tangible in the shape of money or money's worth which comes into a man, not merely some expenditure which he is saved from incurring by holding a particular office". (my underlining)

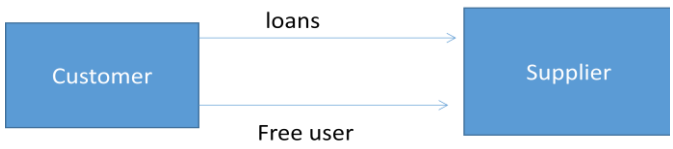
It seems therefore on the authority of those two cases that if the taxpayer lived in a house owned by the Trust and he could not sub-let the house or dispose of the same or convert his rights into cash then there would be no tax charge.

Different rules apply of course if the individual was found to be an employee of X.

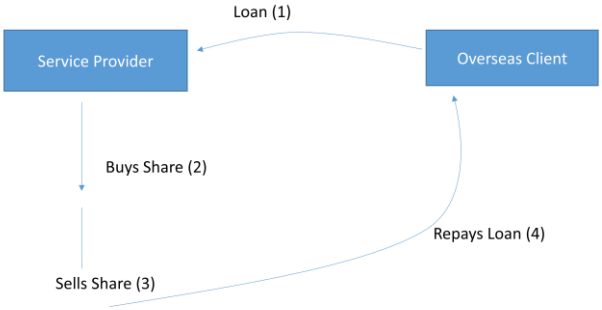
Also **note** different rules apply if the uses of the accommodation or other benefits in kind are taken in lieu of a commission or a commission could have been taken instead (*Heaton v Bell* 46 TC 211).

With regards to HMRC and the free use of houses, they state in BIM 35025 thus:-

> "You should remember that for schedule D case I, unless specifically brought into charge by statute, income must be in the form of money or money's worth. This follows from the approach to income tax adopted by the House of Lords in Tenant v Smith (1892) (3 TC 159). A bank required its agent to live at the bank house which included residential accommodation. The House of Lords decided that the value of the house was not part of the agent's income. The House of Lords took this view because the value of the house was not money or money's worth in the agent's hands and could not be turned into money".



A client could lend monies to his self-employed who could buy shares and the shares can be sold making a capital gain and the loan repaid.



Session 10: Idea 2 14

PATRICK C SOARES

FIELD COURT TAX CHAMBERS

THOMSON REUTERS
Tax editor of Sweet & Maxwell's Property Law Bulletin