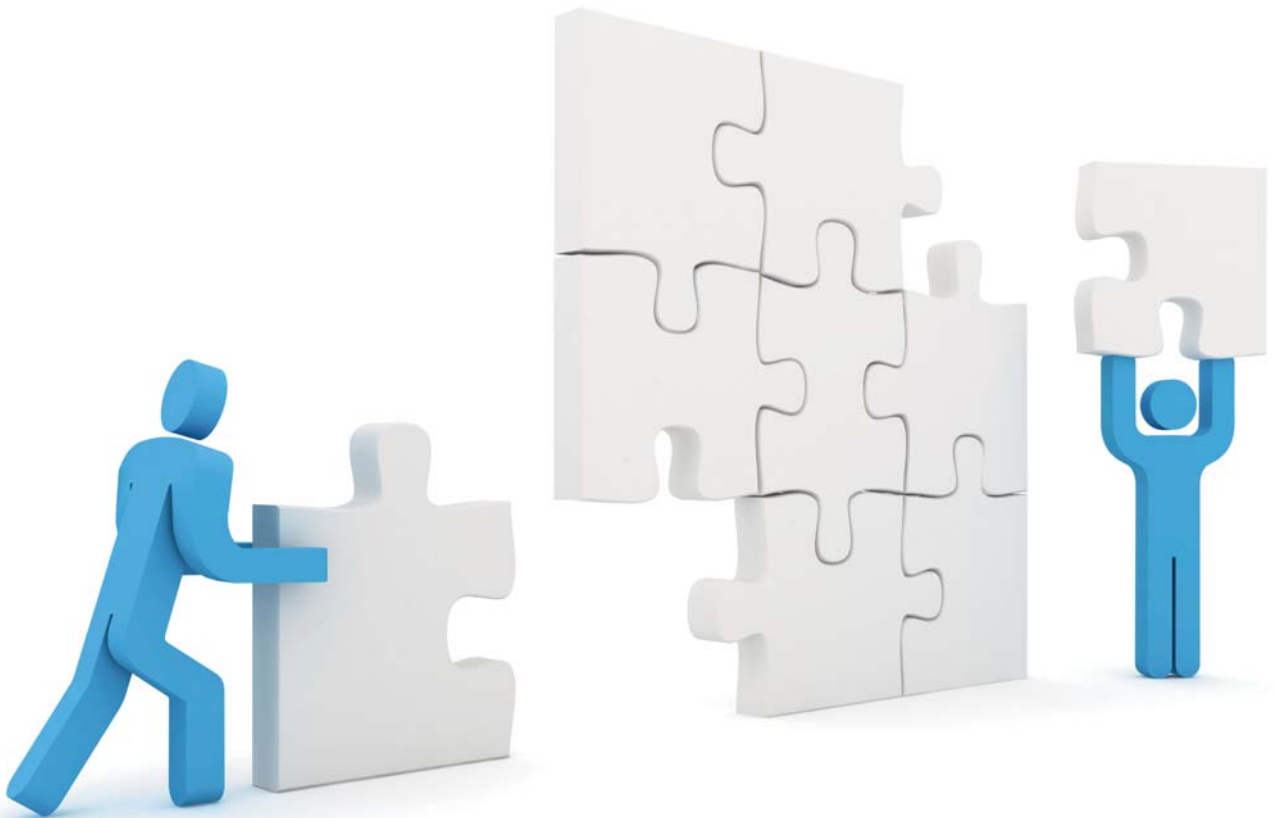


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UK200Group specialist panels and forum comprises of skilled technical advisers who work independently or as part of a multi-disciplinary business team to achieve the best possible solution for members and their clients. Each adviser brings experience from the different disciplines of business strategy, corporate finance, insolvency & business recovery, forensic accounting & dispute resolution and taxation.

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Partial exemption simplification measures

As the 2011 partial exemption year ends with annual adjustments due to 31st March, 30th April or 31st May, this is an opportune time to refresh our memories on some of the simplification measures.

In year provisional recovery rate

Introduced in April 2009, the in year provisional recovery rate removes the requirement for partly exempt (PE) businesses to carry out quarterly PE calculations. Instead they can apply the rate derived from the previous year's annual adjustment calculation as a provisional rate, until the following year's annual adjustment is carried out. This reduces the burden of PE calculations and provides a cashflow advantage for businesses which don't benefit from seasonal fluctuations because, for example, they are unable to spread their expenditure and incur high levels of input tax in the same period as substantial exempt income.

If a business is below de minimis when the annual adjustment is calculated, it can continue to use the in year provisional recovery rate but will use the rate which resulted from the most recent annual adjustment calculation.

Annual de minimis test

Complementing the in year provisional recovery rate is the annual de minimis test which was introduced in April 2010. This allows a business which is below de minimis when calculating its annual adjustment to assume itself to be fully taxable until the next annual adjustment. No quarterly calculations are required and, if the next annual adjustment is above de minimis, the business can adopt the in year provisional recovery rate for the following year if it chooses.

Early annual adjustment

Since April 2009, PE businesses have had the option to declare their annual adjustment in the period in which it is calculated or in the subsequent period. Remember that an annual adjustment is not a correction and should be included in the VAT return as an adjustment to Box 4 input tax claimed.

One word of caution though. If you use an annual adjustment to incorporate a correction to an error which has not previously been disclosed, the adjustment in total will be treated as an undisclosed error adjustment and be potentially liable to penalties.

Partial exemption is a complex topic and there are many more aspects to consider. This article is limited to a sample of the

simplification measures. Any changes should be considered in light of all of the circumstances and the full Partial Exemption rules.

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Tax avoidance – what's it all about?

It's now over 30 years since the House of Lords heard the case of *W T Ramsay v CIR*. And still the "Ramsay doctrine" keeps raising its head in the law courts: most recently in the *Tower MCashback* case (judgement delivered 11 May 2011). So how do the courts now approach tax avoidance?

At one time we thought that the "Ramsay doctrine" allowed HMRC to ignore circular transactions. Then for a few years we thought it was all about "inserted steps" with no commercial purpose. But for at least a dozen years we have known that it was really all about statutory construction with much wider application than mere tax law: indeed, one of the most memorable comments wasn't made in a tax case at all but in the contract law case of *Reed Rains Prudential*: if tax schemes do not work "the reason is simply that upon the true construction of the statute, the transaction which was designed to avoid the charge to tax actually comes within it. It is not that the statute has a penumbral spirit which strikes down devices or stratagems designed to avoid its terms or exploit its loopholes."

So we come to *MCashback*. This was all about what expenditure if any had been incurred on buying software a large part of which had been financed with non-recourse loans the proceeds of which were substantially put on deposit as security. The Supreme Court found that this was a question of fact. And the fact was that the borrowed money was not in any meaningful spent on software but "went into a loop to enable the LLP to indulge in a tax avoidance scheme". Capital allowances were restricted accordingly.

The principle - that *Ramsay* is a canon of statutory interpretation - isn't novel. But the way it was applied in *MCashback* must surely give some pause for thought about other tax schemes which purport to deliver "geared" tax relief - for example, tax relief for a greater trading loss than the amount which the claimant is ever likely to have to finance from his own resources. Interesting times.

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Selling a business

With the economy slowly crawling out of recession corporate activity is on the increase and there is a large pile of un-invested cash, which investors are becoming increasingly anxious to invest. So owners may well start to think about a sale, and a villa in some far flung sunny location, again.

Getting the most out of a sale

- **Plan early.** Too many businesses are sold too late and are merely distress sales. It can take a surprisingly long time to make a sale, and the longer there is to plan a sale the more chance there is to complete a successful transaction at the highest possible price.
- **Consider tax.** The timing and structure of the sale could have significant tax consequences so take proper taxation advice.
- **Select the right advisers.** You will obviously need a lawyer but you should also engage a corporate finance specialist to arrange the sale. Ensure your advisers specialise in business sales and choose advisers you'll feel comfortable working with.
- **Groom first.** Just as a car or house is cleaned before being put up for sale, so a business needs appropriate grooming.
- Make sure your key employees, suppliers and customers have been properly locked-in and, if necessary, incentivised.
- Settle all outstanding tax and legal issues.
- Consider separation issues, when selling one company within a group, or a division of a business.
- **Consider undertaking sell-side due diligence.** This will enable you to anticipate buyers' concerns and demands, and will ultimately lead to a position of strength when the negotiation starts.
- **Marketing for sale:** Plan carefully to identify potential buyers, how to find them and approach them. An ill thought out marketing approach can lead to the wrong buyer and ultimately to you not receiving as much as you could.

And most importantly:

- Continue to properly manage your business whilst trying to sell it. It is all too easy to take your eye off the ball with the distractions of sale, and then if the sale doesn't complete the company may have lost significant value and appeal.

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The power of financial due diligence

A recent case that I was involved in reminded me of the power of financial due diligence. It concerned a potential merger of two service businesses. Discussions between the principals on both sides were amicable and questions were asked about the need for, let alone the depth of, financial due diligence.

So it was with some shock that, after only one week's fieldwork, we reported back some serious issues to our clients, as follows:

- A significant six figure overprovision for accrued income compared with non-financial records maintained by the other target.
- A further six figure impact from aligning the target's accounting policies to the more conservative policies followed by our client. Another six figure amount was recognised that our clients would have taken later and matched to end-of-contract expenses.
- There was a VAT over-accrual, but more significantly the target was struggling with a PAYE payment plan agreed with HM Revenue & Customs in the previous year. Payments in both 2009/10 and 2010/11 had been missed due to cash flow problems.
- Certain costs, incurred prior to the management accounts period end, had not been accrued for, leading to a five figure adjustment to results in the current period.

When combined with issues that were already well understood from prior negotiations (i.e. a six figure directors' loan due for repayment and the potential claw back of income under certain contracts), the clients decided they were unwilling to proceed with the transaction.

The target already had significant third party loans that would have to be paid back in the short to medium term (i.e. the next three years) and learning that post merger there were likely to be significant cash calls to cover further unpaid bills (e.g. the missed PAYE payments) was too much to accept.

The principals of both merger partners parted amicably, but it was a ringing endorsement from our clients when they said: *"Now we know why you do due diligence"*. So never underestimate the importance of due diligence even when it appears that everything that could be disclosed in negotiations has been.

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Death of the Expert Witness

I recently attended a training course run by the Expert Witness Institute, one of the two main bodies in the UK which represents expert witnesses. The general feeling from those present at the course was that the recent Supreme Court decision in the case of Jones v. Kaney, could see a significant reduction in the number of individuals who will be willing to undertake expert witness work in the future. The course tutor indicated that the thoughts of those attending the course were similar to those attending similar courses over the previous few weeks.

Not all forensic accountants get to act as an expert witness, but many will do so over the course of their career. The vast majority of my forensic work involves me acting as an expert witness, often as a Court appointed single joint expert (SJE), where in effect the expert is appointed by both parties but is responsible to the Court and is there to assist the Court in coming to a decision. Experts come in all shapes and sizes and from many different backgrounds, professions, trades etc. So why has Jones v. Kaney caused such a stir?

The case involved an expert (Sue Kaney – the defendant in this instance) who had acted as an expert for Paul Jones (the claimant), after he was involved in a road traffic accident. Kaney prepared a report on Jones' behalf in respect of his claim advising that in her opinion he was suffering from post-traumatic stress disorder as a result of the accident. The defendant to Jones' claim appointed their own expert who came up with a different opinion as to the nature and extent of Jones' "injuries". As is fairly normal practice in situations where experts disagree, a meeting of the experts was ordered.

The idea of such a meeting is for the experts to decide upon which areas they can agree and on which they don't and why they don't. This is so that any resulting Court hearing does not have to waste time considering areas where both parties' experts are actually in agreement with one another. Following the discussions between the experts, a joint statement is normally prepared dealing with the above matters.

In this instance, the joint statement which was prepared suggested that Kaney had in effect changed her opinion.

Kaney in fact confirmed that she had, for some reason, failed to read the joint statement the other expert had prepared and simply signed it. As a result, Jones' claim settled for a far lower amount than would otherwise have been the case. Jones therefore decided to bring a negligence claim against Kaney. Up until that point, it was believed that experts were immune from suit when acting in that capacity and merely owed a duty to the Court and not the relevant parties to the case in which they were acting as expert. Jones' claim was initially dismissed, with Kaney making a plea of witness immunity in accordance with the decision in an earlier case of Stanton v. Callaghan. Jones decided to appeal this decision.

The Supreme Court was requested to consider whether public policy continued to justify providing immunity from liability in negligence to an expert witness performing their duties in that capacity. By a 5-2 majority they came down in Jones' favour and thus swept aside the immunity for breach of duty that expert witnesses had enjoyed in relation to their participation in legal proceedings, thus overturning the decision in the Stanton case.

The participants at the training course I attended covered a number of varying professions. There was however a distinct split when the question was posed regarding a potential drop in the number of persons willing to act as an expert witness following the decision in Jones v. Kaney. The participants who came from professions where liability was an everyday occurrence in their normal work such as medics, surveyors and accountants, did not believe the decision would have a dramatic effect on the numbers from their profession who would be willing to undertake expert witness work going forward. The views from other professions was however very different and the suggestion was that many experts would now withdraw from the work as the prospect of an action being brought would simply frighten them away. What was interesting to me as an accountant was the feedback that many of those involved in expert witness work from less structured professions saw the work as a nice little earner following retirement or as a supplement to their day to day work, which wasn't taken that seriously. That in itself suggests to me that such individuals have never experienced the joys of



being cross examined in Court by a well prepared barrister just looking for a weakness, or they might have a slightly different view of the work.

If the result of Jones v. Kaney is that only those individuals who take the work seriously, undergo proper training and know for instance, the contents of the Civil Procedure Rules relating to experts, continue to do the work, then the decision in Jones v. Kaney is in my view to be welcomed. The problem as I see it is that the drop out in other professions could be such that there are few if any experts willing to do the work in the future and this could have an adverse effect on our legal system.

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Benefit from the upturn with Strategic Thinking

Sooner or later we are going to see an upturn in the Economy (I am sure that there are some green shoots somewhere) and businesses need to be ready to benefit. How far ahead is your strategic thinking and how often do you stress test your strategic plan? The successful business of the future will do it at least once in every 3 months.

Many business people are realising that rather like the speed of communications, business is now moving much more quickly than at the end of previous recessions and they realise that relying on an annual “away day” to discuss strategy, locking in the outcomes and driving that plan for the next 1 to 3 years is not enough.

To understand the evolution we need to look at the learning pyramid and the move from passive teaching methods to participatory teaching methods. Business owners are beginning to drop the attendance of countless lectures and seminars for more just in time learning, group discussion and workshops and teaching others.

In addition they are bringing in more regular strategy reviews, usually on a quarterly basis but also more frequently, so that they can take the appropriate action more quickly.

The use of an advisor, coach or mentor is also helping the Business owners as they strive to keep one step ahead of the competition and move forwards. Meeting on a more regular basis the Advisor needs to challenge the business owner, and it is important that the owner listens to the challenge and then make suggestions for refinement. These more frequent meetings allow for the business owner to pick up on the clever thinking and new learning coming from online training courses and other external stimuli and things learnt whilst implementing.

By adopting an approach of Plan, Implement, Learn, Accountability, Plan again etc a greater collaboration with advisors will arise and the planning process will become a process that seeks new opportunities.

Many accountants are able to carry out this style of work and in particular those that have been trained and licensed by MindShop. For more information please contact John Painter at jhp@crowtherbeard.com

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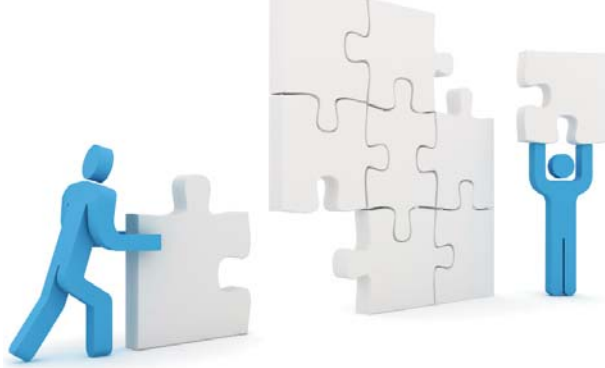
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The cost of bankruptcy

Recent years have seen significant changes to the rules and procedures for personal insolvency.

The Enterprise Act in 2004 reduced the time limit of bankruptcies from three years down to one. It also introduced a new system for realising the homes of bankrupts. A considerable increase in the number of bankruptcies followed. It was recognised that there are many people who need to go bankrupt; however they had no assets and a fairly low level of creditors. This led to the introduction of a new procedure for dealing with smaller debts - a "Debt Relief Order" (DRO)

There is a strict criteria which has to be satisfied to be eligible for a DRO; primarily that your debts are less than £15,000 and savings and assets are less than £300.

The DRO has a significantly lower fee at £90, compared to the cost of bankruptcy, which has just increased by 37% to £700.

As an Insolvency Practitioner, I advise many individuals and companies in financial difficulty. A regular misconception concerns the age and type of people going bankrupt, with the typical bankrupt assumed to be a student or someone looking for a way to avoid paying their debts. The reality is we have seen a considerable increase in people with credit card debt, or in difficulty following redundancy.

The problem we regularly encounter is that an individual may have debt of just over £15,000, and no assets. This excludes them from a DRO, and they are in limbo, unable to afford the £700 for their bankruptcy petition. Being in financial difficulty and taking the decision to ask for help is a huge step for a lot of people in what is possibly the most stressful period in their life. As a profession we have worked hard to reduce the stigma of bankruptcy, and many people we see accept it is the best option for them and the right thing to do, they are just unable to do so as they have no way of raising the fee.

Statistics have shown an increase in DRO's with their reduced fee of £90. This increase is generating less revenue for the Insolvency Service and they are attempting to subsidise this shortfall by targeting individuals who wish to make themselves bankrupt.

The 37% rise in the cost of petitioning for bankruptcy is worrying as it is pricing many people out of bankruptcy when it is the most appropriate route for them. If the cost were to be reduced, it is likely that it would be a viable option for a greater number of people and actually increase the revenue generated for the Insolvency Service.

It is a concern that statistics published showing a reduction in the number of bankruptcies will not give a true reflection of the number of people in difficulty as many are unable to afford the increased cost

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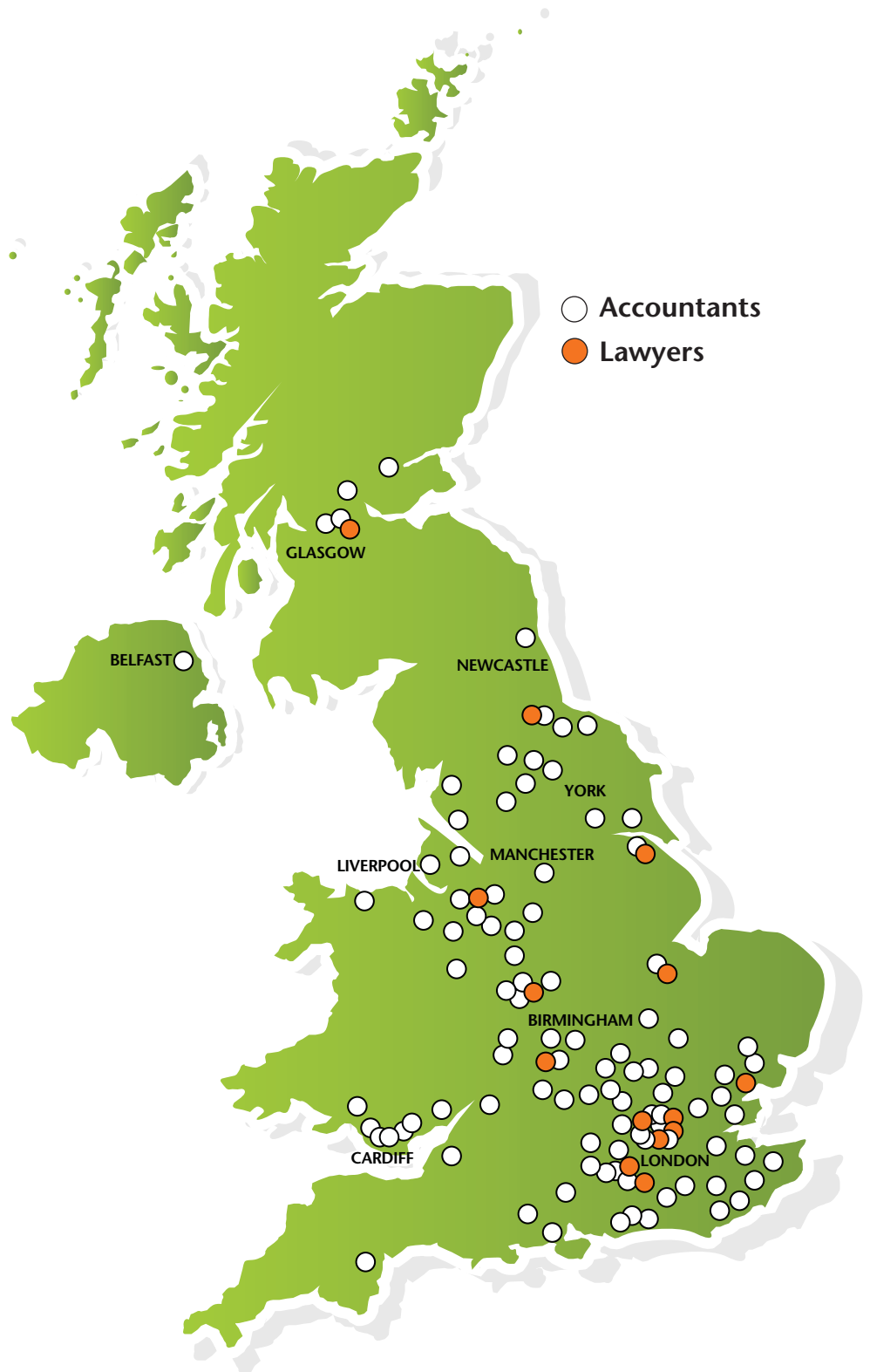
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