

Here we go again

In April 2019 the First-tier Tribunal ruled against HMRC in *Marina Silver*. In March 2020 HMRC withdrew their appeal (and paid the taxpayer's costs in full). On 11 March 2020 draft clauses for Finance Bill 2020 were published that included two changes to the rules for calculating top slicing relief on chargeable event gains. The first change effectively reflects the FTT judgment (but with an important caveat – see “Even more bad news” below) and the second change (sensibly) imposes a specific rule for the ordering of allowances and reliefs in the top slicing relief calculations. Each of these changes applies to chargeable event gains occurring on or after 11 March 2020.

First – the good news

HMRC have decided to apply the FB 2020 changes retrospectively to 6 April 2018. This means that taxpayers in a similar situation to Mrs Silver will not have to argue their cases any further. HMRC have sent me Q&As that say:

“in practice we will allow reduced personal allowances to be recalculated, where relevant, to all gains arising in 2019/20.”

The text later declares:

“Customers reporting gains in their 2019/20 self-assessments will have the correct level of relief calculated manually for them.”

and

“Customers who have reported gains in their 2018/19 self-assessments will have TSR corrected by a SA auto-recovery process.”

Now the bad news

While applauding HMRC's agreement to apply the *Silver* judgment from 6 April 2018 I have to highlight the extraordinary way in which the department is now seeking to apply the second of the two FB 2020 changes retrospectively. The relevant Finance Bill clause states:

“For the purposes of the calculations mentioned in subsection (1):

(a) section 25(2) of ITA 2007 (deductions of reliefs and allowances in most beneficial way for taxpayer) does not apply, and

(b) reliefs and allowances are available for deduction from an amount that, for the purposes of those calculations, is the highest part of the individual's total income for the tax year only so far as they cannot be deducted from other amounts.”

This change can have a significant effect on the calculation of top slicing relief as illustrated in Example 1. To apply it retrospectively to 6 April 2018 as HMRC are clearly now doing is counter to both the letter of the law and the presumption against retrospective taxation.

My advice to the taxpayer in Example 1 is to appeal HMRC's calculation to the First-tier Tribunal.

A bit more good news?

I have twice now seen correspondence from the senior HMRC officer dealing with these cases that states:

“HMRC will no longer seek to pursue any open enquiries, where the sole point in dispute is the interaction of reduced personal allowances and the calculation of TSR.”

In other words if your case involves 2017-18 or earlier tax years and you have been arguing the point with HMRC they will now accept the reinstatement of the allowances in the TSR calculations.

And a bit more bad news

The HMRC letters go on to say:

“Please note that this alteration is only in relation to cases currently open. The publication of the Tribunal decision on 18 April 2019 and HMRC’s subsequent withdrawal on 24 March 2020 does not provide taxpayers with a reasonable excuse for submitting a late appeal.”

In other words HMRC will not entertain claims for 2017-18 and earlier years where the self assessments have already become final.

But as I set out in my article I would certainly submit overpayment relief claims or claims under ESC B41.

Even more bad news

The *Silver* judgment must, in my view, apply just as much to the personal savings allowance (and for that matter restricted losses) as to the personal allowance itself. The Finance Bill 2020 change reflects the *Silver* methodology in respect of the personal allowance but specifically not in respect of any other allowances or reliefs:

“... in determining the amount of the individual’s personal allowance under section 35 of ITA 2007 (*but not the amount of any other relief or allowance*), it is assumed that the gain from the chargeable event is equal to the amount of the annual equivalent ...”.

Fair enough – for events occurring on or after 11 March 2020.

But it is clear to me that HMRC are applying this approach to earlier chargeable event gains – another example of an unlawful retrospective application of the law.

My advice to the taxpayer in Example 2 is to appeal HMRC’s calculation to the First-tier Tribunal.

But will it all be ok for 2020-21?

Sadly not. The HMRC calculator will deal with the calculation of the personal allowance, the personal savings allowance and other reliefs correctly but from what I have seen so far it will apply a stricter rule for allocating allowances and reliefs than the Finance Bill 2020 clause provides. This I because HMRC are interpreting the clause quoted above as though its reads with the addition of the italicised text below:

“For the purposes of the calculations mentioned in subsection (1):

(a) section 25(2) of ITA 2007 (deductions of reliefs and allowances in most beneficial way for taxpayer) does not apply, and

(b) reliefs and allowances are available for deduction from an amount that, for the purposes of those calculations, is the highest part of the individual’s total income for the tax year only so far as they cannot be deducted from other amounts *and those reliefs and allowances must be deducted against non-savings income before being deducted from savings income.*”

My advice to the taxpayer in Example 3 – well I think you can guess by now.

Example 1

2019-20

Employment/pension income £50,000

Gross interest £7,500

Dividends £25,000

UK chargeable event gain over 20 years £150,000

HMRC calculation:

| | |
|----------------------|-----------------------------|
| Tax on total income | £87,100 |
| Top slicing relief | £4,125 (see workings below) |
| Notional tax on gain | <u>£30,000</u> |
| Tax payable | <u>£52,975</u> |

My calculation:

| | |
|----------------------|------------------------------|
| Tax on total income | £87,100 |
| Top slicing relief | £34,125 (see workings below) |
| Notional tax on gain | <u>£30,000</u> |
| Tax payable | <u>£22,975</u> |

Taxpayer overcharged by £30,000.

NB I agree that the HMRC calculation for this example would be correct for 2020-21.

Example 2

2019-20

Employment/pension income £115,000

UK chargeable event gain over 20 years £200,000

HMRC calculation:

| | |
|----------------------|-----------------------------|
| Tax on total income | £126,750 |
| Top slicing relief | £8,250 (see workings below) |
| Notional tax on gain | <u>£40,000</u> |
| Tax payable | <u>£78,500</u> |

My calculation:

| | |
|----------------------|------------------------------|
| Tax on total income | £126,750 |
| Top slicing relief | £12,250 (see workings below) |
| Notional tax on gain | <u>£40,000</u> |
| Tax payable | <u>£74,500</u> |

Taxpayer overcharged by £4,000.

NB I agree that the HMRC calculation for this example would be correct for 2020-21.

Example 3

2020-21

Employment/pension income £40,000

Gross interest £3,000

Dividends £12,000

UK chargeable event gain over 20 years £40,000

HMRC calculation:

| | |
|----------------------|---------------------------|
| Tax on total income | £23,900 |
| Top slicing relief | £nil (see workings below) |
| Notional tax on gain | <u>£8,000</u> |
| Tax payable | <u>£15,900</u> |

My calculation:

| | |
|----------------------|-----------------------------|
| Tax on total income | £23,900 |
| Top slicing relief | £4,000 (see workings below) |
| Notional tax on gain | <u>£8,000</u> |
| Tax payable | <u>£11,900</u> |

Taxpayer overcharged by £4,000.

Example 1 – how I would do it

| rUK | 2019-20 | Client name | UTR | The Taxpert TopSlicer checker v4.3 | | | | Summary | Taxpert | Taxpertalt |
|--|---------|--|-----|------------------------------------|--|--|--------|-----------------------|---------|------------|
| Top slicing relief per s535 ITTOIA 2005 | | s535(3) total liability on CEG (highest part assumptions) | | TL | | | 64,125 | Tax liability | 87,100 | 87,100 |
| less: s535(3) basic rate liability on CEG less allocated allowances | | s535(1)(a) | | BRL | | | 30,000 | TSR | 34,125 | |
| | | | | | | | 34,125 | Notional BR Liability | 30,000 | |
| | | s536(1) Step 2 liability on slice (highest part assumptions) | | | | | 0 | | 22,975 | |
| less: s536(1) Step 2 basic rate liability on slice less allocated allowances | | | | | | | 0 | | | |
| | | s536(1) Step 3 multiply by number of slices: s535(1)(b) relieved liability | | | | | 0 | | | |
| Top slicing relief | | | | | | | 34,125 | | | |

| Tax calculation ignoring top slicing relief | | (1) | | | | | | | HMRC (1) | |
|---|-----------------|------------------------------|---------------|----------------|---------------|----------------|-----------------|----------------|-----------------|----------------|
| 2019-20 | | PA and reliefs | SRB | PSA | DTA | BRB | HRB | ARB | Total | Tax |
| Income details | | | | | | | | | | |
| Employment income | 50,000 | 0 | 5,000 | 0 | 0 | 37,500 | 12,500 | 0 | 50,000 | 12,500 |
| Self employment income | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Other non-savings income | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Gross interest | 7,500 | 0 | 0 | 0 | 0 | 0 | 7,500 | 0 | 7,500 | 3,000 |
| Non-UK chargeable event gains | 0 | 7,500 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Dividends | 25,000 | 0 | 0 | 0 | 2,000 | 0 | 25,000 | 0 | 25,000 | 7,475 |
| UK chargeable event gains | 150,000 | 0 | 0 | 0 | 0 | 0 | 67,500 | 82,500 | 150,000 | 64,125 |
| Total | £232,500 | £0 | £5,000 | £0 | £2,000 | £37,500 | £112,500 | £82,500 | £232,500 | £87,100 |
| | | Total reliefs | £0 | DTA allocation | 2,000 | 0 | 2,000 | 0 | 7,500 | 3,000 |
| Gross gift aid and pension cont | £0 | Adjusted net income | £0 | Other reliefs | £0 | Maximum PSA | £0 | restricted to | £0 | |
| Adjusted net income | £232,500 | Adjusted net income for HICB | £232,500 | HICB charge | £0 | | | | | |

| Tax calculation (highest part assumption) ignoring top slicing relief | | (1) | | | | | | | (1) | |
|---|-----------------|------------------------------|---------------|----------------|---------------|----------------|-----------------|----------------|-----------------|----------------|
| 2019-20 | | PA and reliefs | SRB | PSA | DTA | BRB | HRB | ARB | Total | Tax |
| Income details | | | | | | | | | | |
| Employment income | 50,000 | 0 | 5,000 | 0 | 0 | 37,500 | 12,500 | 0 | 50,000 | 12,500 |
| Self employment income | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Other non-savings income | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Gross interest | 7,500 | 0 | 0 | 0 | 0 | 0 | 7,500 | 0 | 7,500 | 3,000 |
| Dividends | 25,000 | 0 | 0 | 0 | 2,000 | 0 | 25,000 | 0 | 25,000 | 7,475 |
| Total chargeable event gains | 150,000 | 0 | 0 | 0 | 0 | 0 | 67,500 | 82,500 | 150,000 | 64,125 |
| Total | £232,500 | £0 | £5,000 | £0 | £2,000 | £37,500 | £112,500 | £82,500 | £232,500 | £87,100 |
| | | Total reliefs | £0 | DTA allocation | 2,000 | 0 | 2,000 | 0 | | |
| Gross gift aid and pension cont | £0 | Adjusted net income | £0 | Other reliefs | £0 | Maximum PSA | £0 | restricted to | £0 | |
| Adjusted net income | £232,500 | Adjusted net income for HICB | £232,500 | HICB charge | £0 | | | | | |

| Tax calculation (highest part assumption) restricting gain to one slice | | (2) | | | | | | | | |
|---|----------------|------------------------------|---------------|----------------|---------------|----------------|----------------|---------------|----------------|----------------|
| 2019-20 | | PA and reliefs | SRB | PSA | DTA | BRB | HRB | ARB | Total | Tax |
| Income details | | | | | | | | | | |
| Employment income | 50,000 | 5,000 | 5,000 | 0 | 0 | 37,500 | 7,500 | 0 | 50,000 | 10,500 |
| Self employment income | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Other non-savings income | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Gross interest | 7,500 | 0 | 0 | 0 | 0 | 0 | 7,000 | 0 | 7,500 | 2,800 |
| Dividends | 25,000 | 0 | 0 | 0 | 2,000 | 0 | 25,000 | 0 | 25,000 | 7,475 |
| Total slice chargeable event gains | 7,500 | 7,500 | 0 | 0 | 0 | 0 | 0 | 0 | 7,500 | 0 |
| Total | £90,000 | £12,500 | £5,000 | £500 | £2,000 | £37,500 | £39,500 | £0 | £90,000 | £20,775 |
| | | Total reliefs | £12,500 | DTA allocation | 2,000 | 0 | 2,000 | 0 | | |
| Gross gift aid and pension cont | £0 | Adjusted net income | £90,000 | Other reliefs | £0 | Maximum PSA | £500 | restricted to | £0 | |
| Adjusted net income | £90,000 | Adjusted net income for HICB | £90,000 | HICB charge | £0 | | | | | |

