Key points

- HMRC calculations still get TSR wrong in a number of cases
- Further challenges are heading to the Tribunal
- The current HMRC calculator has a couple of coding errors that can give the wrong result for 2020-21 cases
- The FA 2020 changes to beneficial ordering of allowances are being applied retrospectively to reduce TSR in 2019-20 and earlier years
- The FA 2020 beneficial ordering rule is being wrongly interpreted in the HMRC calculator
- HMRC are rejecting overpayment relief claims by insisting that the "practice generally prevailing" rule applies until 18 April 2019
- Agents are at risk of PI claims if they do not advise affected clients to submit claims or appeals

HMRC calculations still get TSR wrong in a number of cases

As far as I can tell every single tax return software provider and every single financial service organisation (eg Old Mutual, Royal London etc) simply use the HMRC calculator for calculating top slicing relief. It may be that one or two of the large firms of accountants have developed their own calculators, but they certainly don't publicise any differences.

Challenges to the HMRC methodology have come from two sources: individual taxpayers (like Neville Silver see *Marina Silver v HMRC TC07103*); and me (having identified the issues when developing the Absolute Topslicer Tool)

Further challenges are heading to the Tribunal

An appeal (which I am supporting) has been made (TC/2020/04234) involving a difference in the calculation of TSR in the year of death (2017-18) of £44,000. On 1 March 2021 HMRC Solicitors Office made an application to extend the deadline for submitting their statement of case from 14 March to 15 May 2021 to give them time to review their TSR policy. The grounds for seeking this extension were stated to be:

> *"The case has been referred to policy for full advice on the top slicing relief and beneficial order. Due to the nature of this enquiry the policy adviser has stated that a full response will take some time."*

This case involves three specific issues where in my view the HMRC policy is wrong:

- Availability of the personal savings allowance in calculating tax on the annual equivalent (slice);
- Retrospective application of the FA 2020 beneficial ordering rule;
- HMRC's practice of applying s25(2) ITA 2007 to minimise the tax liability after rather than before deducting any notional tax credit on chargeable event gains.

I am also hoping that there will be a further case involving overpayment relief claims – agents should make sure that overpayment relief claims for 2017-18 are submitted to HMRC by 5 April 2022.

The current HMRC calculator has a couple of coding errors that can give the wrong result for 2020-21 cases

I have identified three coding errors in the HMRC calculation of TSR (and notified HMRC of these – if I am right they will have to list them as exclusion cases requiring paper returns).

Savings rate band not applied

An example is non-savings income £5,000 and a UK chargeable event gain of £1,400,000 after 25 years.

The HMRC calculator makes the TSR £281,250 whereas I make it £306,250. The taxpayer is overcharged by £25,000.

Gift aid - allowances not correctly calculated in calculating tax on the full gain

An example is non-savings income £17,500; UK chargeable event gain £100,000 after 25 years; net gift aid donation £12,000.

The HMRC calculator makes the TSR £13,650 whereas I make it £15,150. The taxpayer is overcharged by £1,500.

Gift aid - allowances not correctly calculated in calculating tax on the slice

An example is non-savings income £125,000; UK chargeable event gain £1,000,000 after 25 years; net gift aid donation £100,000.

The HMRC calculator makes the TSR £45,625 whereas I make it £30,000. The taxpayer is undercharged by £15,625. (I'm just as keen for this error to be corrected – I just want HMRC to calculate the right figure in all cases.)

The FA 2020 changes to beneficial ordering of allowances are being applied retrospectively to reduce TSR in 2019-20 and earlier years

FA 2020 inserted new s535(8) ITTOIA 2005 for chargeable event gains occurring on or after 11 March 2020. This directs that in the TSR calculations allowances and reliefs are allocated to other income before being allocated to the chargeable event gain or slice.

In many cases this will reduce the amount of TSR.

However HMRC are applying this new rule to any calculations whether before or after 11 March 2020.

This is one of the issues before the Tribunal in the case referred to above.

The FA 2020 beneficial ordering rule is being wrongly interpreted in the HMRC calculator

New s535(8) reads:

"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.]"

HMRC interpret s535(8) by allocating reliefs and allowances in a prescribed order of:

- Non-savings income; then
- Savings income; then
- Dividends; then
- Chargeable event gains.

I maintain that s535(8) should be interpreted by allocating reliefs and allowances first to:

- Non-savings income, savings income and dividends (however you like); and then
- Chargeable event gains.

An example is non-savings income £50,000; interest £500; UK chargeable event gain £25,000 after 25 years.

The HMRC calculator makes the TSR £0 whereas I make it £5,000. The taxpayer is overcharged by £5,000.

HMRC are rejecting overpayment relief claims by insisting that the "practice generally prevailing" rule applies until 18 April 2019

HMRC can refuse an overpayment relief claim on the grounds that the tax was calculated in accordance with "practice generally prevailing" (PGP) at the time.

HMRC are on record as stating their view that their old method of calculating TSR constituted PGP until the date on which the *Silver* judgment was published – 18 April 2019.

My own view is that HMRC's old method ceased to be PGP from a considerably earlier date. My own records show:

> 9 August 2017 – I emailed HMRC at a senior level stating that I disagreed with the HMRC calculation of TSR;
>
> 28 September 2017 – Taxation magazine published my first article setting out the correct method of calculation;
>
> 12 July 2018 - I had a three hour meeting at HMRC headquarters (Benton Park View) attended by the four most senior HMRC officers involved in his issue.

In any event the Courts may well find that HMRC's method of calculating TSR has failed to meet the criteria for PGP laid down in *HMRC v Household Estate Agents Ltd [2008] STC 2045*. Henderson J considered the effect of similar wording in paragraphs 45 schedule 18 FA 1998. In relation to the meaning of "practice generally prevailing" he said this at [58]:

"Without attempting to give an exhaustive definition, it seems to me that a practice may be so described only if it is relatively long established, *readily ascertainable by interested parties*, and accepted by HMRC and taxpayers' advisers alike."

In *Boyer Alan Investment Services Ltd v HMRC [2012] UK FTT 558*, Judge Berner gave further consideration to the elements identified by Henderson J in *Household Estate Agents*. He said:

"(1) to be ascertainable required that the practice was not inchoate and that it be sufficiently precise and devoid of uncertainty in its application [34];

(2) although a published statement of practice was the paradigm of an ascertainable practice, it was possible for a practice to be ascertainable if settled, defined and agreed

between, or communicated between, taxpayers or otherwise sufficiently identified to the outside world [35];

(3) a published practice was likely to be capable of being regarded as having become generally prevailing over a shorter period than one merely established in practice [36];

(4) an internal practice of HMRC would not be generally prevailing until it could be identified with reasonable clarity and precision by taxpayers [37];

(5) that quality of clarity and precision must be present in the understanding of HMRC and taxpayers alike [38];

(6) in order for the practice to be "generally" prevailing it must have been adopted by HMRC and generally, but not universally, by the taxpayer community [38];

(7) the practice would not be settled if it was not applied in a consistent manner."

I reckon that HMRC's miscalculation of topslicing relief fails to meet criteria (1) to (5), arguably fails to meet (6) and probably just about meets criterion (7).

Agents are at risk of PI claims if they do not advise affected clients to submit claims or appeals

Sooner or later an aggrieved client who has lost out on tens of thousands of pounds (perhaps because their accountant did not advise that an amendment, appeal or overpayment relief claim should have been made) will make a negligence claim.