



Association of Taxation Technicians

Examination

May 2007

PRINCIPLES OF LAW

ANSWERS
(without marking guide)

ATT LAW – MAY 2007

Answer 1

1.1 The guidelines issued to members of ATT are contained in two publications, the Professional Rules and Practice Guidelines 2002 and Professional Conduct in relation to Taxation issued April 2004

1.2 Regulated Activity includes:-

1. Dealing in investments including buying, selling, subscribing for or underwriting investments or offering or agreeing to do so either as principal or as agent
2. Arranging deals investments
3. Deposit taking
4. Safe keeping and administration of assets
5. Managing investments
6. Investment advice
7. Establishing collective investment schemes
8. Using computer based systems for giving investment instructions
9. Arranging or advising on regulated mortgage contracts
10. Advice on pensions including occupational pension schemes and stakeholder pension schemes

A person wishing to undertake regulated activities must be authorised by the Financial Services Authority or be a member of a Designated Professional Body ATT/CIOT are not DPB's. Authorisation by the FSA enables a person to carry out the full range of regulated activity membership of a DPB may only enable a person to carry out a more limited range of activities depending on the terms of exemption granted to that body

1.3 The principles include:-

1. The information to be contained in personal data must be obtained and processed fairly and lawfully
2. Personal data must only be held for specified purposes and must only be used for those purposes
3. Personal data held for a specified purpose must be adequate, relevant and not excessive in relation to that purpose
4. Personal data must be accurate and where necessary kept up to date and must not be kept for longer than is necessary
5. Data must be stored confidentially and securely and there must be systems in place to confirm what data is held about a person if asked and
6. An individual is entitled to be informed by any data user whether data is held in relation to that individual to access the data and to have that data corrected or erased

Answer 2

“From: T A Adviser
Any Street
Any Town

May 2007

To: Gloria G
Any Road
Any Village
Any County

Ref: A80/GG

Dear Gloria

Re: Setting up in Business

I refer to our recent meeting and write, as requested, to advise you about the factors you should take into account in setting up in business as a sole trader.

A sole trader is the simplest and most straightforward way to trade. There are very few formalities required to set up a business. All that is strictly necessary is to inform the Inland Revenue and the National

Insurance Contributions Office that you are self-employed. All businesses are obliged to keep accounts. However, there is no requirement for a sole trader to file accounts.

The business of a sole trader has no legal identity separate from that of the individual. A sole trader takes full responsibility for the business and is entitled to any profits outright. As a sole trader you are also directly responsible for any debts and losses of the business. It is important to remember that there is no limit to the liability of sole traders. All your personal assets, including your house (if you are a home owner), are at risk.

Employment Law

If you do choose to make and offer a job to a secretary/PA you will need to consider the obligations upon you as an employer. Employees are entitled to certain rights regarding pay, conditions of employment, and Health and Safety at work. Every employee must be provided with a statement that sets out the main terms and conditions of the employment. If you require any further information about the terms and conditions that need to be set out then please let me know.

As an employer you will have to take out employer's liability insurance which provides cover in the event of the employee being injured at work or causing injury or damage to someone else, for which you as the employer may be held liable.

As an employer you will also be responsible for ensuring that tax and national insurance contributions are deducted and accounted for under the PAYE system together with the employer's share of national insurance contributions. As an employer you will have to deal with statutory maternity pay statutory sick pay and student loan deductions. You may also be required to deal with statutory paternity pay and statutory adoption pay.

Business Premises

You may decide to work from home. If your home is mortgaged, the written consent of the Building Society or Bank to use the house for business purposes is required. Depending on the type of work to be carried out, it may also be necessary to obtain planning permission. The title deeds to the property should be checked for any restrictive covenants precluding the type of activity which is to be carried on and similarly the terms of any insurance policies should be checked carefully. In addition, business rates may be payable.

Instead of working from home, you may decide to rent separate premises. The terms of any lease must be carefully checked by a solicitor or licensed conveyancer for details of rent, rent reviews and service charges together with restrictions on the uses to which the premises can be put. A tenant may be liable to pay rent under the terms of a lease for the whole term of the lease. Consequently, it will be important for you to take advice from a solicitor before entering into a lease.

Raising Finance

You might need to raise finance to get the business off the ground. In these circumstances, a carefully thought out business plan and cash flow forecast should be prepared before approaching any lender. Most lenders require some form of security such as a charge over personal or business property .

Closing the business down

You may decide to close your business down. You can do so at any time but in addition to any tax implications which may arise, further liabilities might be incurred, for which you should budget. These include:-

1. Making any redundancy payments to staff.
2. Paying rent for the premises until they can be assigned.
3. Giving notice under supply agreements for example photocopier and other equipment hire.

I trust the above is of assistance but if you require any further information in relation to the above then please do not hesitate to contact me.

Kind regards.

Yours sincerely,

A A Adviser”

Answer 3

Clauses in a Will would normally include the following:-

- (a) Revocation of all former Wills and Codicils. This to ensure that only the last Will and any Codicils are proved.
- (b) Burial or cremation and use of organs. Instructions can be included in the Will, although this is not essential and such instructions may be included by way of a donor card or in letter of wishes.
- (c) Appointment of Executors and Trustees. A mixture of relatives and professional may be particularly appropriate.
- (d) Guardians of minor children. This is particularly important

where the spouse has predeceased. Such guardians stand “in loco parentis”, namely they take on the duties of a parent. The consent to the proposed guardian should be obtained before executing the Will.

- (e) Specific gifts. Particular reference should be made to business and agricultural property, personal chattels and contents of the home, jewellery and heirlooms . Commonly such a clause envisages that the testator list items in an informal letter of which is addressed to the Executors.
- (f) Specific bequests of freehold or leasehold properties. Particular reference should be made to the matrimonial home and whether to any gift is outright and absolute by way of life interest or other trusts . Instructions should be obtained from the testator as whether gifts are free of IHT or subject to IHT.
- (g) Pecuniary legacies. It may be desirable to cover the nil rate band for IHT purposes. Such legacies are often included for relatives, friends and charities.
- (h) Shares in companies. A testator may wish to give these specifically, particularly where they are family company shares. Where someone, such as a child of the testator, is involved in the business, the testator may wish to give that person an option to acquire the shares at a specific value, for example, market value . The purchase price maybe payable by instalments.
- (i) Mini discretionary trusts of the nil rate band. If everything was left to the surviving spouse, the two Estates will be “bunched” into one which may cause unnecessary IHT to be paid. A Will should therefore ensure that the available nil rate band is used. A simple form of discretionary trust may achieve this. The beneficiaries normally include the Widower, children and grandchildren. The testator usually needs with the will a letter of wishes as to the suggested distribution of income and capital. The Trustees and Executors do not have to follow the letter of wishes.
- (j) Residue of the Estate. The residue can be distributed absolutely to a surviving spouse or by way of life interest with a remainder over or to other parties, or into another Trust.
- (k) Administrative provisions. Trustees and Executors will need to be given full powers of investment , powers to appropriate assets and allocate specific assets rather than having to sell them , extended powers as to income and capital under the Taxes Act 1925, Section 31 and 32 , extended powers to appoint an advance income and capital to beneficiaries under the Trustee Act 1925 . The power of professional Trustees and Executors to charge, power to carry on business or transfer business into a company , power to

insure , power to overturn equitable rules as to apportionment of income , power to advance capital to the beneficiaries such as life tenants , exclusion of provisions in the Trusts of land and appointment of Trustees Act 1996 , for example the need to obtain beneficiaries' consent and the beneficiaries' power to remove or appoint Trustees .

Answer to Question 4

Address for Harmony Ltd

Address of sender

Date

Dear David, Trevor and Peter,

Harmony Limited

It was good to meet you. I will answer your questions in turn.

Company Secretary

In addition to having directors, a company must have a company secretary. Essentially, the company secretary is the chief administrative officer of the company, and therefore has a fairly significant role in the day-to-day operation of the company.

A company secretary may also be a director of the company, but not the company's only director. The company's auditor may not be the company secretary, and this prohibition extends to any partner in a firm which acts as the company's auditors.

The Companies Act 1985 does not specifically define the duties of a company secretary, but these usually include convening meetings (at the request of the board), taking minutes, filing documents at Companies House, and keeping the company's statutory books up to date. The company secretary also has authority to bind the company in its day-to-day administration, for example, by making contracts. The secretary is said to have ostensible or apparent authority.

The specific tasks which must be attended to by the company secretary on behalf of the company are as follows;

Statutory registers - A company is required by law to maintain various records, called the statutory registers. The principal statutory registers are those setting out details of the company's members, debenture holders, charges (such as mortgages), directors and secretary. The company must also maintain a register of directors' interests in shares and debentures in the company. The company secretary is responsible for maintaining these registers.

Statutory returns - The company secretary is responsible for filing with Companies House information such as changes in directors and secretary, details of share capital and allotment of shares. The secretary is also responsible for submitting the company's annual return. The annual return is a form which must be sent back to Companies House each year and contains details of, for example, share capital, shareholders and directors. This ensures that information held at Companies House is reasonably up to date and that anyone who makes a company search finds reasonably up-to-date information.

Other filing requirements - A copy of a special, extraordinary or elective resolution must be filed with Companies House within 15 days of being passed. This, of course, includes changes to the Memorandum and Articles of Association, when a printed copy of the changes document should accompany the copy resolution.

A company secretary owes fiduciary duties to the company similar to those owed by a director.

Meetings

There must be an annual general meeting (AGM) every year and not more than 15 months must elapse between each AGM, although the members of a private company may waive this requirement by elective resolution. Additional general meetings known as extraordinary general meetings (EGMs) can be called as and when they are needed.

The Companies Act 1985 sets out the business which must be conducted at the AGM, but other business such as resolutions to change the Articles of Association or adopt an employee share scheme can also be dealt with. If the company cannot wait until its next AGM, an EGM is called to consider and pass resolutions.

Business is transacted at a meeting of the company by ordinary resolution, unless the law requires an extraordinary, special or elective resolution.

Proper notice of a general meeting must be given to shareholders, directors and auditors. The length of notice required depends on the type of meeting and the resolutions to be proposed. At least 21 clear days' notice must be given of an AGM, regardless of the resolutions to be discussed. At least 14 clear days' notice must be given of an EGM, unless a resolution requiring 21 clear days' notice is to be discussed, in which case 21 clear days' notice must be given. All periods exclude the day of posting and the day of the meeting; so for example a notice of an AGM on 23 March must be sent by 1 March.

Every member of the company is entitled to notice of a general meeting, unless the Articles provide otherwise. Some classes of shares do not have voting rights, and it would be normal to specify that such members do not have the right to attend meetings, although they must nevertheless be given notice of them, unless the Articles provide otherwise.

The auditors are entitled to attend any general meeting of the company and to receive such notices relating to the meeting as a member is entitled to receive.

In practice small companies may rely on the short notice provisions which enable a meeting to be called almost immediately. Short notice of an AGM is permissible if all the members attend the meeting and all agree to short notice. In the case of an EGM, a majority in number of shareholders holding between them 95% of the voting rights may agree to hold the meeting on short notice. This percentage may be reduced to not less than 90% by an elective resolution.

The notice of the meeting must specify the date, time and place of the meeting and give sufficient information about the business to be discussed to enable members to decide whether or not to attend. The full text of some resolutions, for example special resolutions, must be set out. The notice must also advise members that they can appoint proxies to attend and vote in their place.

I hope this helps you, please do not hesitate to contact me with any queries.

Yours sincerely,

Answer to Question 5

(a) Assignment

Assignment - rights/benefits;

A person entitled to the benefit of a contract may assign it to a third party, who is then entitled to sue the other party to the contract.

For example, if A and B make a contract under which A supplies goods to B for £500, then A's right to receive the £500 may be assigned to C, who then has the right to sue B for the money. This is the assignment of a debt. Most contractual rights can be assigned, unless otherwise agreed.

Special rules apply to the assignment of a debt. The assignment must be in writing and written notice of it must be given to the debtor. If these conditions are satisfied, then the assignee can sue in its own name to enforce payment of the debt, and its receipt discharges the debtor from its liability to the original creditor. Where these conditions are not wholly satisfied, the assignee must sue in the name of the original creditor, to whom in law the debt is still due.

Assignment - duties and obligations/burden;

In general, a party to a contract cannot, without the consent of the other party, transfer the duties and obligations of the contract to some third party. The other party would be disadvantaged if the person against whom it had rights could be changed without its consent. However, a party can assign the benefit of the contract without the burden. The assignor, however, remains liable to the original contracting party if the assignee is in breach of contract.

Alternatively, a party can arrange to have its obligations discharged by someone else as a subcontractor, unless otherwise agreed, or the obligations require personal performance. Where the obligation is subcontracted the original party remains liable for the defaults of the subcontractor.

Assignment by operation of law/involuntary;

In circumstances such as the death or bankruptcy of a party to the contract, the law automatically transfers his rights and duties to his personal representative or trustee in bankruptcy, that is, the transfer is by operation of law.

(b) Variation

A contract may be varied by agreement between the parties. It cannot be varied unilaterally unless one of the parties has reserved such a right in the original contract. Essentially, the parties draw up a new contract to vary features of the old contract. The new contract must therefore satisfy all the essential requirements of a contract.

(c) Performance

A contract imposes obligations on the parties, from which they may be discharged in various ways. When a party has done what is required of it under the contract, it obviously no longer has any obligations under the contract. The general rule is that a contract is discharged by performance only when both parties have complied fully and exactly with the terms of the contract. This rule is, however, subject to a number of exceptions.

Severable or divisible contracts;

A contract may be divided into parts, for example, a consignment of goods to be delivered and paid for by instalments.

Substantial performance;

A party which has substantially performed its contractual obligations in the manner stipulated may, depending on the circumstances, be able to recover the agreed price, less a deduction in respect of duties not properly executed.

Acceptance of partial performance;

Where a party accepts the benefit conferred on it by the other party's partial performance of the contract, the other may be able to recover a reasonable price. For example, a seller may agree to deliver 40 bottles of a specified wine to a buyer. If only 20 bottles are tendered, the buyer may refuse to accept delivery, but a buyer who accepts the 20 bottles must pay a reasonable price for them.

(d) Termination

The parties may terminate the contract by agreement or by condition subsequent. A condition subsequent is a term in the original contract providing for discharge. Thus a contract may provide that it shall be terminated on the happening of some event, for example, a contract of employment is usually terminable by notice given by one party to another.

Answer 6

6. (a)

(i) and (ii) Constructive trust . A constructive trust arises where it would be wrong for the holder of property to keep the benefit. In order to satisfy the demands of justice and good conscience the owner is made accountable to some other beneficiary or person.

(i) The owner of a residence must recognise the right of a husband/wife or partner to remain in occupation.

(ii) Persons in a fiduciary position, for example company directors, must account for any profit they obtain from their position.

(iii) and (iv) Resulting trust . A resulting trust arises in a variety of situations, when the legal title to the property has been transferred to others but the beneficial interest reverts to the settlor or, if he/she is dead, to their estate.

(iii) Where an intended trust fails for any reason, the property reverts back or returns to the settlor who provided it. This happens where all the beneficiaries of a discretionary trust die, although it would be common and good practice for the trust deed to specify what is to happen to the trust property in such circumstances.

(iv) A resulting trust may arise where a trust has been set up but there is money left over after the purpose has been achieved.

(b) Employee trusts.

These are sometimes referred to as ESOPs (employee share ownership plans) or ESOTs (employee share ownership trusts). An employee trust is a form of express private trust.

There are two broad categories of employee trust: those that are set up under statutory schemes and those that are not. Non-statutory trusts are normally established as discretionary trusts. These trusts are sometimes referred to as “common law” ESOPs or ESOTs.

The definition of beneficiaries will normally be limited to employees, former employees and their immediate relatives. This is for two reasons.

If the definition of the beneficiaries is framed in this way the trust will satisfy the requirements of IHTA 1984, s86. This offers an exemption from the normal inheritance tax regime for discretionary trusts (for example, the 10-year charge).

Similarly, Companies Act 1985, s743 defines an “employees’ share scheme” by reference to the class of employee beneficiaries , and a trust which satisfies the definitions attracts exemptions from the rules against financial assistance and certain provisions of the Financial Services and Markets Act 2000.

A “common law” ESOP or ESOT may simply be set up with a cash fund to pay discretionary benefits to the beneficiaries. Alternatively, or in addition, it may acquire shares to be given or sold to the beneficiaries in which case some kind of employee share scheme must be set up . An employee trust can be set up alongside an unapproved employee share scheme or any one of the HMRC approved schemes.

Alternatively, the trust itself may be set up under one of the HMRC approved schemes. So for example there is the approved employee share ownership trust, which is referred to above as the statutory ESOP or ESOT. Such a trust is commonly referred to as a QUEST (Qualifying Employee Share Trust) on the basis that it qualifies under the statutory rules. Approved status brings with it certain tax reliefs. A trust established in this way has some of the features of other trusts, but must adhere to the specific statutory requirements set out in the respective statutes.