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Personal tax

Loan account was employment income (Lecture P1471 – 16.31 minutes)

Summary - £4,500,000 left on a loan account following incorporation should have been taxed as income rather than a gain eligible for entrepreneurs' relief.

This case concerned Rupert Grint, the actor who played Ron Weasley in the Harry Potter films.

Based on advice from Clay & Associates LLP, he was advised to incorporate a company with the LLP confirming in writing:

> "The motivation for incorporating Rupert's business is that as a self-employed person he is currently subject to income tax at 50% plus NIC at 2% on nearly all his earnings, particularly the bonuses and residuals that will continue to flow from the Harry Potter films. We can shelter this income from a 52% tax rate by operating the business through a limited company. Income received by the company will only be subject to Corporation Tax at a maximum rate of 26%."

Consequently, Clay 10 Limited was incorporated. Rupert Grint was the sole shareholder and his father, who managed his son's affairs, was the company's sole director. Rupert Grint's acting services were provided through the company.

Rupert Grint had rights, under contracts with third parties, to be paid in respect of films in which he had already acted, as well as the prospect of generating earnings in the future. These rights, as well as records and goodwill, were transferred to Clay 10 Limited on 13 October 2011 with consideration left on a loan account for Rupert Grint's benefit and comprised:

- £4,086,814 as consideration for income from Harry Potter contracts accruing to Rupert Grint as a result of his acting services, which were still to be paid; and

- £4,500,000 as consideration for contractual rights and goodwill relating to likely residuals and bonuses to be paid over the next six years

For the tax year 2011/12 Rupert Grint reported the £4,086,814 as income, while the £4,500,000 was reported as a capital gain, eligible for entrepreneurs' relief. Rupert Grint withdrew sums from Clay 10 Limited over the following years on the basis they were a repayment of the £4,500,000 loan.

In January 2014, HMRC opened an enquiry into his 2011/12 tax return, issuing a closure notice in July 2019 stating that his tax return had been amended by treating the capital amount of £4,500,000 as income arising under s 778 ITA 2007." Credit was given for the capital gains tax already paid.

Rupert Grint appealed.

Decision

The First Tier Tribunal highlighted that s.773 ITA 2007 provides an overview of the relevant provisions in this case and sets out a condition for their application as follows:

> “773 Overview of Chapter
>
> (1) This Chapter imposes a charge to income tax—
>
> a) on individuals to whom income is treated as arising under section 778 (income arising where capital amount other than derivative property or right obtained), and
> b) on individuals to whom income is treated as arising under section 779 (income arising where derivative property or right obtained).
>
> (2) Income is treated as arising under those sections only if—
>
> a) transactions are effected or arrangements made to exploit the earning capacity of an individual in an occupation, and
> b) *the main object or one of the main objects of the transactions or arrangements is the avoidance or reduction of liability to income tax*.”

The First Tier Tribunal emphasised point (2)(b) which was Rupert Grint’s main argument. He claimed that as “avoidance or reduction of income tax was not one of the main objects of the transfer of rights and goodwill to Clay”, the test was not met.

The First Tier Tribunal accepted that one of the reasons for incorporation may well have been to provide limited liability protection. Further, it is possible that incorporation may have provided some administrative convenience.

However, the Tribunal were convinced that these were the main reasons for incorporation. The First tier Tribunal found that the main objects of the arrangements was to ensure that Rupert Grint would not be subject to income tax, as clearly stated by the advisers. The judge stated that one of the main objects in implementing these arrangements was to ensure that Rupert Grint would not be subject to income tax on £4,500,000 relating to his receipts from his work as an actor and any related matters.

The Tribunal concluded that the £4,500,000 sum “derived substantially the whole of its value from the activities” of Rupert Grint and was taxable as income.

Mr Rupert Grint v HMRC (TC09337)

Failing to deduct and pay PAYE (Lecture P1471 – 16.31 minutes)

Summary – The taxpayer did not know that the company had wilfully failed to pay income tax and primary NIC contributions on sums paid to him.

Carbon Managed Services Limited provided support services to a legal company, CPL Group Limited. Both companies were owned by Flourish Holdings Ltd.

Michael Burne was the majority shareholder and director of Carbon Managed Services Limited and CEO of the parent company.

Carbon Managed Services Limited and its parent company were placed into administration on 12 December 2019, with the former put into compulsory liquidation on 30 January 2020.

On 5 March 2021, a compliance check was opened and as part of that work information was requested relating to Michael Burne’s PAYE tax and primary class 1 NIC for the period 6 April 2019 to 5 April 2020.

HMRC concluded Michael Burne had been paid an income from his employer shortly before going into administration but no tax or NIC had been deducted from the payments that he received. HMRC believed that Michael Burne knew about this failure to operate PAYE correctly.

On 1 March 2022, a Direction was made, under Regulation 72(5) Condition B of PAYE Regulations 2003, that the company was not liable to pay the outstanding PAYE amounts in respect of the tax year 2019/20. This Direction meant that Michael Burne became liable to pay the amounts due and HMRC sought to collect the amounts payable.

Following a review, the income tax payable was amended slightly but the unpaid NIC was upheld.

Michael Burne appealed to the First Tier Tribunal.

The main issue to determine was whether there was a wilful failure by Michael Burne to make deductions of PAYE tax and pay NIC from payments received by him from the company for the tax year 2019/20 and whether he knew this.

Decision

Michael Burne was able to produce evidence that, on the balance of probability, showed that he had acted on the advice of others, was not aware of an underpayment and did not knowingly accept payments with the knowledge that the PAYE process had not been followed.

The First Tier Tribunal noted that the company has a good history of meeting its PAYE obligations under RTI and Michael Burn:

- had no advanced knowledge that his company was going to be placed in creditors’ administration on 12 December 2019;
- once in creditors’ administration, Michael Burn had no standing in the company, or authority to act as a director to direct or control what the company did; such actions rested with the lender’s appointed administrator.
- consequently, the RTI return processed on 19 December 2019 could not have been processed or authorised by Michael Burn, in anticipation of the company being placed in administration.

The appeal was allowed.

Michael Burne v HMRC (TC09326)

Employee acting as a tax agent (Lecture P1471 – 16.31 minutes)

Summary – Undeclared income discovered as part of a criminal investigation should have been reported as income arising as a result of the taxpayer acting as a tax agent for clients.

Issac Frempong claimed that he had always been taxable as an employee through the PAYE system. From 2010/11, he claimed employment related expenses through Self Assessment, submitting his 2010/11 Self Assessment return on 30 May 2011. On 27 January 2012, HMRC opened an enquiry into that tax return. On 12 June 2012, he submitted his Self Assessment return for 2011/12 and on 28 June 2012, HMRC opened an enquiry into that tax return.

In July 2014, HMRC commenced a criminal investigation and the enquiries were put on hold. When interviewed, he provided a pre-prepared statement, in which:

- He denied the allegations that he was a tax agent;
- He stated he had assisted a number of friends and family to use his computer to complete their tax returns, because they did not own a computer;
- He admitted that he assisted these people in completing the relevant forms to claim mileage expenses based on what they told him;
- He stated he believed the claims were legitimate;
- He stated he did not deliberately assist anyone to give false information to HMRC and he did not charge any fee for his assistance; and
- He did not act dishonestly and believed the information that he provided was correct.

In 2016, HMRC issued closure notices, making adjustments to the relevant tax returns, disallowing the employment expenses claimed.

Although the criminal investigation was later closed, evidence gathered during that investigation led HMRC to discover numerous bank deposits totalling in excess of £300,000, a list of individual Self Assessment logins and a spreadsheet detailing payments made by 'clients'.

HMRC issued discovery assessments covering four tax years for the income that had not been declared and Isaac Frempong appealed, disputing the 'Other Income' figures included in the assessments.

Decision

With a university degree in finance and accountancy, the First Tier Tribunal found that Isaac Frempong would have been well aware that when filing his own tax returns that he had significant bank account deposits, which were not being declared for tax. The Tribunal stated that these were not "trivial amounts" described by the taxpayer as "thank you" gestures for the occasional assistance that he claimed that he given to family and friends.

The First Tier Tribunal found that Isaac Frempong was "operating a sophisticated and large operation as a tax agent or tax adviser to numerous individuals, and that he was providing his services for a fee or commission."

This was supported by material seized from the taxpayer's premises including:

- more than 150 individual SA online user identity numbers, almost all with associated passwords;
- web logs obtained from seized devices showing he had registered at least 85 individual users for self-assessment online services, accessed the accounts for at least 105 individual users, and submitted at least 161 income tax returns or claims for repayment of income tax for various taxpayers;
- a spreadsheet listing the names of some 86 individuals under to a column headed "client", and another column headed "commission" and the sums due.

The First Tier Tribunal found that Isaac Frempong had acted deliberately to mislead HMRC by not declaring the income and the appeal was dismissed.

Isaac Aboagye Frempong vs HMRC [2024] TC09347

Accountant's 'Compensation' (Lecture P1471 – 16.31 minutes)

Summary – The contingent advisory fee was found to be employment income that was liable to income tax and NICs.

Mr Mellor qualified as a Chartered Accountant in 1997 and immediately went to work for Mr Wall, who was the owner and director of Opal Group, which included a company called Opal Property Group Ltd.

By 2013, Mr Mellor was a director of all companies in the Opal Group, including Opal Property Group Ltd but he was not a shareholder.

The company had entered into an 'Interest Rate Hedging Product' which, in 2013, resulted in Opal Property Group Ltd going into administration. Within days, Mr Mellor incorporated Equity Advisory Limited and became director of that company. The company's single share was owned by Juvanesco Ltd, a company owned jointly by Mr Mellor and his wife.

Opal Property Group Ltd claimed against the bank for mis-selling the hedging product, with Mr Wall owning the interest and rights to that claim.

In 2017, Mr Wall and Equity Advisory Limited entered into an agreement relating to that claim. whereby the company, Equity Advisory Limited would act as consultant in return for a "contingent advisory fee' payable for both preparing and presenting the claim against the bank. This fee was to be calculated as a percentage of the net proceeds ultimately received at the outcome of the claim. Mr Mellor would undertake the actual work involved. Separately, Equity Advisory Limited and Mr Mellor signed an agreement, effectively transferring the advisory fee to Mr Mellor. Mr Mellor had not told Mr Wall about this and had not shown him a copy.

In September 2017, with the settlement finally agreed between Mr Wall and the bank, the contingent advisory fee of £4,367,496 was paid to Mr Mellor.

Mr Mellor reported this sum on his Self Assessment return as a capital payment, exempt from taxation and included a 26-page white space disclosure that included the rationale for treating it as non-taxable. He argued that the real reason for the payment was that it reflected his lost career resulting from the administration, as he was now professionally unemployable. The sum received was a capital sum, exempt from taxation under s.51(2) TCGA 1992 as this was a sum "obtained by way of compensation or damages for any wrong or injury suffered by an individual in his person or in his profession or vocation".

HMRC disagreed, arguing that the payment was not linked in any way to the wrongdoing by the bank but rather, it was employment income. HMRC sought to recover PAYE (£1,954,387) and NICs (£693,747) from Equity Advisory Limited. Further, Mr Mellor was personally liable for income tax of £1,960,708.

Equity Advisory Limited and Mr Mellor appealed.

Decision

The First Tier Tribunal stated that if a payment is chargeable to income tax, then it is not capital. Consequently, the appropriate starting point was whether the payment was chargeable to income tax or not. This involved consideration of its source.

The Tribunal found that the payment was made by Mr Wall pursuant to the provisions of the Consultancy Agreement. Equity Advisory Limited, and not Mr Mellor in his personal capacity, was providing the services to Mr Wall under that agreement. The Tribunal stated that "This remains the position even though, as is clear, Equity Advisory Limited was providing its services to Mr Wall through the human agency of Mr Mellor." In the First Tier Tribunal's view, looked at in the round, the payment source was Mr Mellor's employment with Equity Advisory Limited. The payment was Mr Mellor's remuneration for his services to Equity Advisory Limited; or "as a reward to Mr Mellor for his services as a director of Equity Advisory Limited."

The Tribunal went on to say that:

> "For the sake of completeness, we simply note that if Mr Mellor's position ….was that the payment was to "compensate"[him] 'for the destruction of his career', that this seems to be an acceptance that the Payment would have fallen within the provisions of ITEPA sections 401-406 (which deal with payments on termination of employment)"

Consequently, the payment to Mr Mellor was a:

- payment "from" his employment with Equity Advisory Limited for income purposes;
- remuneration or profit "derived from" an employment for NICs purposes.

The appeal was dismissed.

Equity Advisory Limited and Craig Allan Mellor v HMRC (TC09334)

Capital taxes

Late sale of commercial property (Lecture P1472 – 10.36 minutes)

Summary – Having failed to negotiate a Time to Pay Arrangement with HMRC, the taxpayer did not have a reasonable excuse for paying his tax two months late

In 2021/22, Darren Wragg sold shares in in Tiles Porcelain Limited and reported the gain in the same year. The share sale agreement stated that the proceeds could only be paid to Darren Wragg once the company had sold a commercial property, which due to compete on 31 January 2023. Unfortunately, due to various difficulties, completion was delayed until mid-March 2023, at which point Daniel Wragg settled the tax liability for 2021/22.

HMRC had been made aware of the reason for the delay but advised that this would not prevent interest or penalties applying. HMRC advised that Darren Wragg should consider entering into a Time-to-Pay arrangement, but his agent did not do this. In fact, on more than one occasion, Darren Wragg's agent was advised to contact HMRC's Debt Management department.

In March 2023, HMRC issued a penalty assessment calculated as 5% of the tax liability which remained unpaid.

Darren Wragg appealed, arguing that he had a reasonable excuse, and that as soon as he received the proceeds, he settled the tax owed without any unreasonable delay. He believed that he was "being punished for a problem which was beyond his control."

Decision

The First Tier Tribunal found that the terms of sale of Tiles Porcelain Limited were entirely within Darren Wragg's control. He could have declined to sell his shares on terms that left him without the funds to pay the relevant tax.

Where a taxpayer is aware that they might not have received the relevant funds to be able to settle their tax liability, a well-advised taxpayer would either seek to secure appropriate funding to meet the liability or to make suitable arrangements with HMRC. No evidence was provided to support either of these actions. Indeed, despite being advised to consider agreeing a Time to Pay arrangement, the taxpayer and his agent failed to do so.

The Tribunal stated that:

> "If Mr Wragg (or his agent) had put forward a payment plan under which the tax would be paid over a number of instalments, this may well have been accepted by HMRC and provided Mr Wragg with sufficient time for him to obtain the funds. Even if HMRC had rejected a suggested arrangement, this could nonetheless form the basis of a reasonable excuse."

Darren Wragg did not have a reasonable excuse and the appeal was dismissed.

Darren Wragg v HMRC (TC09350)

BPR and furnished offices (Lecture P1472 – 10.36 minutes)

Summary – The income generated from providing serviced furnished offices was found to be income derived from the making or holding of investments. Consequently, Business Property Relief (BPR) was not available.

When Keith Denis Lewis Beresford died on 18 September 2018, he owned shares in Fiveteam Limited, which in turn owned the entire issued share capital of Ninecourt Limited.

The main capital asset of Ninecourt Limited was a six-floor property in central London. The property was acquired some time ago and until 2008 had been occupied by another business operated by Keith Beresford, with some floors being let on commercial leases. As tenants left, the decision was made to rent the office space out as serviced furnished offices.

The total internal floor area was approximately 32,000 square feet. Since circa 2010 four out of six floors (amounting to approximately 21,000 square feet) of the property had been used for the purposes of providing serviced office facilities through the agency of Orega. The remainder of the property had been used for the purposes of commercial lettings, to tenants for shops and offices.

The income from the end clients was in the form of two separate fees:

- Facility fee: This entitled the client to use the office space and have additional standard services supplied. These included a premises receptionist, telephone answering service, heating, lighting and electrical power, cleaning, use of kitchen, sanitary facilities and photocopying areas.

- Contract services fee: This was charged by reference to specific additional services which included the provision of IT, couriers, meeting rooms and maintenance or reinstatement of offices.

Keith Beresford's executor claimed BPR on shares owned in Fiveteam Limited, arguing that they were "relevant business property".

More specifically, he claimed that Fiveteam Limited's business consisted wholly or mainly of being the holding company of a company called Ninecourt Limited whose business did not fall within s.105(3) IHTA 1984.

HMRC disagreed, stating that Ninecourt Limited's business did fall within s.105(3) IHTA 1984 The freehold property in central London meant that the business derived its income from the exploitation of land, which was 'the making or holding of investments'.

HMRC believed that the services provided were 'the minimum requirements for the use of an office and would be provided by any commercial landlord' or were incidental to the use of the office space. BPR was denied.

On appeal, both parties agreed that whether BPR was available would be largely found by considering the activities performed by Ninecourt Limited in relation to the 'facility fees'. The contract service fees, being trading income, were not significant to the final decision.

Decision

The First Tier Tribunal stated that the following were not relevant to their decision:

- The reason for the original purchase of the building;
- The motivation for carrying on a particular business, nor whether the people carrying it on considered it to be trading or otherwise.
- The circumstances in which Ninecourt Limited started to look at providing serviced offices.
- Anything that happened after the date of death.

The First Tier Tribunal stated that their starting point was that the owning and holding of land in order to obtain an income from it is generally to be characterised as an investment activity.

From this, the First Tier Tribunal moved on to consider whether the nature of the activities that were carried out changed how the property should be viewed:

- concluding that what was being provided was "physical space in a building with some desirable additional services";
- acknowledging that there was a significant premium paid for the serviced offices compared to the occupants of the two, commercially let floors. This would be to some degree down to the services provided but also to reflect that a smaller space than an entire floor was being rented, and that the notice period was considerably shorter

The frequency of the transactions was not enough to point to the activity being a trade; this was nothing like a hotel business.

The First Tier Tribunal concluded that the facility fee was income derived from the 'making or holding of investments' and the appeal was dismissed.

The Executors of Keith Denis Lewis Beresford (Deceased) v HMRC (TC09333)

Two annexe cases (Lecture P1472 – 10.36 minutes)

Benjamin Packman and Miranda Wood v HMRC (TC09335)

In September 2021, Benjamin Packman and Miranda Wood bought a property, which they claimed comprised two separate dwellings at completion, a main house and an annexe qualifying for multiple dwellings relief.

The annexe:

- was a separate building, approximately 20 metres from the main house, that could be accessed through a covered passageway or through the main house;

- had a bedroom, living area, full kitchen, shower and toilet facilities;

- had a separate boiler with its own controls, a separate fuse box and internal water stop cock;

- did not its own mailing address or land registry title but was separately rated for council tax.

During the period of purchase it had a sitting, rent paying tenant who was unconnected to the occupants of the main house. The exchange of contracts was delayed until the tenant had vacated the annexe.

HMRC refused the claim on the basis that the property was a single dwelling at completion, and no relief was available. Benjamin Packman and Miranda Wood appealed.

The First Tier Tribunal concluded that the annexe was entirely suitable as a dwelling as a property that met basic domestic living needs to eat, sleep and attend to personal and hygiene needs, "with a degree of privacy, self-sufficiency and security consistent with the concept of a single dwelling." Having to walk through the garden to reach the annex, did not impinge unacceptably on privacy from the house. The fact that the annexe could not be sold separately did not make it any less suitable as a dwelling for people generally. Indeed, during the purchase process, the annexe was actually rented out to an unconnected person.

The First Tier Tribunal concluded by saying:

> "Standing back, having conducted the multi-factorial assessment objectively and at the time of completion we are satisfied that the Annexe is a dwelling within the meaning of the FA. It meets the basic domestic needs of occupiers generally with an appropriate degree of privacy and security".

The appeal was allowed.

Thomas Yeomans v HMRC (TC09336)

On 31 March 2022 Thomas Yeoman and his wife jointly purchased a residential property in Kent for £895,000. The property was a detached, extended dormer style bungalow with front and rear gardens and neighbours either side. Overall, the impression from the front of the property was of a single house with two wings, each with separate and similar doors.

The door on the left gave access to the main accommodation referred to as "the Main House", with an open plan living area, dining area and kitchen, utility room and toilet on the ground floor and three bedrooms, an ensuite shower room and bathroom on the first floor.

The door on the right gave access to the living room of an annexe that consisted of a living room, bathroom, bedroom and kitchen.

There was no interconnecting door between the main house and the annexe. They were listed separately for council tax purposes and had separate heating systems, although both boilers and fuse boxes were in the annexe.

The couple initially filed their SDLT return without Multiple Dwellings Relief but later, amended their return, reclaiming £10,000.

HMRC opened an enquiry and later issued a closure notice rejecting the Multiple Dwellings Relief claim. Thomas Yeoman appealed.

The First Tier Tribunal opened their 'discussion' by stating:

> "In our view nearly all the features of the Property point towards there being separate dwellings"

The First Tier Tribunal rejected HMRC's argument that one of the tests for Multiple Dwellings Relief was whether a third party would buy one property separately from the other. There was nothing in the Upper Tribunal case of Fiander and another v CRC [2021] STC 1482 to support this requirement.

The First Tier Tribunal stated that the test to be applied was whether the property could be considered suitable for use as a dwelling, with a degree of permanence, by providing facilities for basic domestic living needs. Those needs included the need to sleep and to attend to personal and hygiene needs, all of which were satisfied.

The only real factor that pointed against the annexe being a separate dwelling was the access to the boiler and fuse box. However, the First tier Tribunal found that whilst this might be an issue for purchasers, it did not prevent the properties from being let on a short-term basis, with provision for access to the fuse box and boiler.

Applying the multi-factorial test in Fiander, and taking into account all the features described, the First Tier Tribunal found that the main house and the annexe were suitable for use as single dwellings. The taxpayer was entitled to multiple dwellings relief and the appeal was allowed.

Abolition of multiple dwellings relief

Although multiple dwellings relief has now been abolished for SDLT purposes, these cases are still of interest. It is still applicable in Scotland and Wales as a relief. In addition, there are situations involving the higher rate for purchase of multiple dwellings and the ability to pay non-residential rates where six or more dwellings are purchased, where the correct identification of multiple dwellings is important to the overall duty payable.

Administration

Ten years too late (Lecture P1471 – 16.31 minutes)

Summary – The taxpayer's appeal was submitted ten years too late and was rejected for being out of time.

Believing that Paul Needham had not declared property income, HMRC issued notice to file letters and paper Self Assessment returns covering 2005/06 to 2009/10, which he claimed he never received.

As these returns were not filed, HMRC issued determinations that were not paid and so on 11 November 2011, HMRC issued the late payment surcharges, which he also claims he never received.

In April 2012, HMRC had also issued him with a notice to file a self-assessment tax return for 2011/12, which he filed, but not until 19 October 2019. Having been filed late, HMRC issued late filing, six-month, daily and 12-month penalties. When Paul Needham and his accountant tried to engage with HMRC to establish why the return notices had been issued, they claim HMRC failed to provide an explanation.

Finally, in August 2023, Paul Needham appealed against the late filing penalties, determinations, surcharges, and interest, totalling just under £12,000.

The appeal was obviously late and so this case concerned whether the First Tier Tribunal would allow the appeal out of time.

Decision

The First Tier Tribunal considered each of the three points established in Martland v HMRC (2018) UKT178 and concluded that:

1. An appeal ten years after the penalties were issued was a long time;

2. Although Paul Needham claimed that the reason for the delay was because HMRC had failed to provide him with the explanations that he needed, this was not a valid reason for submitting the appeal ten years later.

3. On the balance of probabilities, despite HMRC's lack of assistance, it was likely that Paul Needham was aware of his right to appeal for some time before he actually appealed.

The appeal against surcharges and late penalties was dismissed. Further, as there is no right of appeal or other statutory provision against interest and determinations, the First Tier Tribunal had no jurisdiction to hear and determine these issues, this part of the appeal was struck out.

Paul Needham v HMRC (TC09342)

Information notice (Lecture P1471 – 16.31 minutes)

Summary – Information and documents requested by HMRC were reasonably required in order to check the taxpayer's tax position.

HMRC were, and are still, concerned that Mary Simpkins had entered into arrangements with Olympus Consulting Ltd, her employer, to avoid income tax on her earnings.

In February 2023, HMRC wrote to her requesting information and documentation relating to her employment arrangements, but she failed to supply the information requested.

Consequently, HMRC formerly requested the information by issuing an information notice. The information requested included details of the terms of employment and how earnings were to be paid, payments received in connection with the employment, intermediaries through which she provided services, contracts, and copies of payslips and bank statements.

Mary Simpkins challenged the notice, arguing that:

- documents for the current tax year should not be requested as that year was not subject to an enquiry;
- the documents were not reasonably required particularly regarding the current tax year and as there was no "sensible or reasonable possibility of HMRC imposing any liability to pay tax";
- some documents should be obtained from her employer;

Decision

The First Tier Tribunal stated that:

> "It is the Appellant who is liable for the payment of income tax and class 1 national insurance contributions on any sums she earns from her employment. Such tax is usually collected by way of deductions made by an employee's employer under Pay As You Earn, the employer paying over the tax deducted to HMRC. However, the primary liability to account for and pay the correct amount of income tax rests with the Appellant."

Consequently, under schedule 36 FA 2008, if Mary Simpkins' employment arrangements resulted in an underpayment of income tax in any year "past, present or future" HMRC are entitled to "check" that "tax position". The Tribunal stated that it did not matter whether there was an open enquiry or that the information and documents were requested for a current tax year.

Having carefully considered each item of information and documentation requested, the First Tier Tribunal concluded that they were reasonably required in order to check whether Mary Simpkins had received payments on which no tax had been deducted, and whether tax should have been so deducted. The information required was not unduly onerous to produce as all of the documents requested were of a type that should have been retained and/or could have been requested from her employer. The items were all within her possession or power.

Finally, the Tribunal considered whether a third-party notice to her employer should have been issued for some of the information. The Tribunal stated that whilst the deductions made from employment income were made by the employer and, in accordance with Sch. 36, HMRC were also entitled to check her employer's tax position in this regard, that did not negate the fact that HMRC were also entitled to check the Mary Simpkins' tax position. Accordingly, the information notice was found to be appropriate.

Mary Simpkins v HMRC (TC09320)

Deadlines

1 January 2025

- Corporation tax for periods to 31 March 2024 (SMEs not paying by instalments)

7 January 2025

- VAT returns and payment for 30 November 2024 quarter (electronic payment)

14 January 2025

- Forms CT61 and tax paid for the quarter ended 31 December 2024
- Quarterly corporation tax instalment (large companies depending on accounting year)

19 January 2025

- PAYE, NIC, CIS and SLN due for month to 5 January 2025 (non-electronic payment)
- File monthly CIS return
- PAYE for quarter ended 5 January 2025 if average monthly liability is less than £1,500

21 January 2025

- Supplementary intrastat declarations for December 2024
  - arrivals only for a GB business
  - arrivals and dispatch for a Northern Ireland business

22 January 2025

- PAYE, NIC, CIS and student loan liabilities (electronic payment)

31 January 2025

- Electronic filing for 2023/24 personal, partnership and trust SATRs
- Balance of 2023/24 SA liabilities and first instalment of 2024/25 SA liabilities
- 2022/23 SATRs to be amended
- 'Vulnerable person election' by trustees where effective date is during 2022/23
- TCGA 1992, s 169Q election to disapply s 127 for reorganisations in 2022/23
- Opt out of pre-owned assets charge if this would first arise during 2023/24
- Companies House should have received accounts of:
  - private companies with 30 April 2024 year ends

- public limited companies with 31 July 2024 year ends

News

Scottish Budget 2025 to 2026

The Scottish Budget sets out the Scottish Government's proposed spending and tax plans for 2025 to 2026, as presented to the Scottish Parliament on 4 December 2024.

Income Tax

The table below summarises the income rates and bands confirmed by the Scottish Government:

Band	Income Range	Rate
Starter rate	£12,571* - £15,397	19%
Basic rate	£15,398 - £27,491	20%
Intermediate rate	£27,492 - £43,662	21%
Higher rate	£43,663 - £75,000	42%
Advanced rate	£75,001 - £125,140	45%
Top rate**	Above £125,140	48%

The starter rate and basic rate bands are increasing to £15,397 (previously £14,876) and £27,491 (previously £26,561) respectively. The Scottish Government has promised to continue to amend these thresholds by at least inflation for the duration of the parliament. The other bands are unchanged.

Land and Buildings Transaction Tax

The Additional Dwelling Supplement will increase from 6% to 8% from 5 December 2024 but will not apply to transactions for which legal missives have been signed before this date.

https://www.gov.scot/publications/scottish-budget-2025-2026/pages/3/

Welsh Budget 2025/26

On 10 December 2024, the draft Welsh Budget 2025/26 included the Welsh Government's proposed spending and tax plans for 2025 to 2026.

Welsh rates of income tax

The Welsh rates of income tax will remain unchanged at 10% so Welsh income taxpayers will continue to pay the same income rates as people in England and Northern Ireland.

Land Transaction Tax

The higher residential rates applying to purchases of additional residential properties will increase by 1%.

Multiple Dwellings Relief (MDR) will be reviewed to ensure such claims will not be allowed where the Subsidiary Dwelling Exemption (SDE) is applied, so taxpayers subject to the SDE would pay the main residential rates on the total consideration, without the benefit of MDR.

The draft Budget will be scrutinised by Members of the Senedd, with the Final Budget for 2025-26 being published on 25 February 2025.

https://www.gov.wales/sites/default/files/publications/2024-12/2025-2026-draft-budget-narrative.pdf

Spring forecast

On 16 December 2024, the Chancellor confirmed that the Office for Budget Responsibility (OBR) has been commissioned for an Economic and Fiscal Forecast which will be published on 26 March 2025.

This is in line with the Budget Responsibility and National Audit Act 2011 which requires the OBR to produce two forecasts each financial year. This will be accompanied by a statement to Parliament from the Chancellor.

The Chancellor remains committed to one major fiscal event a year to give families and businesses stability and certainty on upcoming tax and spending changes and, in turn, to support the government's growth mission.

https://www.gov.uk/government/news/chancellor-commissions-spring-forecast-on-26-march-2025

State aid investigations closed

The EC announced that it has closed three State aid investigations into transfer pricing tax rulings granted by Luxembourg to Fiat and Amazon, and by the Netherlands to Starbucks.

In 2015 and 2017, the Commission found that Luxembourg granted selective tax advantages to Fiat and Amazon, and the Netherlands to Starbucks, in breach of EU State aid rules.

In each case, the Commission found that a tax ruling issued by the respective national tax authority artificially lowered the tax paid by each company and therefore granted them a selective advantage over other companies.

The Commission's original decisions in all three cases were ultimately annulled by the EU courts and therefore the respective in-depth investigations remained open.

Considering the guidance of the EU Courts, the Commission has now adopted three final decisions closing its in-depth investigations and confirming that, when granting their respective tax rulings, Luxembourg and the Netherlands did not give these Fiat, Amazon and Starbucks selective tax advantages contrary to EU State aid rules.

https://ec.europa.eu/commission/presscorner/detail/en/ip_24_6105

Business taxes

Unallowable purpose rule (Lecture B1471 – 19.57 minutes)

Summary - Corporation tax deductions for loan interest were denied on the basis that the taxpayer company was party to the loan for an unallowable purpose.

Syngenta Holdings Limited acquired the entire issued share capital of its sister company, Syngenta Ltd from its immediate parent company, Syngenta Alpha BV, issuing shares and paying cash for its acquisition.

The US$950 million cash element of the consideration was funded by a loan, set at the maximum level the group thought HMRC would permit, with the lender being a Dutch group treasury company.

HMRC argued that those designing the arrangements understood the predominant reason was to obtain non-trading loan relationship debits under the loan relationship rules, which Syngenta Holdings Limited surrendered to UK group companies to reduce their corporation tax liabilities.

Decision

The First Tier Tribunal considered why the group entered into the arrangements as a whole, by reference to abundant relevant contemporaneous documentary evidence, as well as witness evidence (but explicitly keeping in mind 'the fallibility of human memory' in assessing the latter).

The First Tier Tribunal concluded that, for the group, the arrangements did achieve a single holding company structure in the UK and allowed a dividend to be paid by the parent company through the creation of distributable profits. However, this was not the main purpose of the arrangements. Rather, the First Tier Tribunal found that the tax considerations were why the group implemented the arrangements.

The First Tier Tribunal went on to consider why Syngenta Holdings Limited entered into the arrangements, finding that its directors were willing to play their part to support the group purpose of achieving the tax saving, provided that the purchase of Syngenta Ltd was not a '*bad*' investment (i.e. one that could potentially trigger an insolvency event for the taxpayer). Syngenta Holdings Limited's directors understood Syngenta Holdings Limited's role in achieving that group purpose was to obtain the non-trading loan relationship debits by incurring interest on the loan.

Finally, the First Tier Tribunal turned to the purpose of Syngenta Holdings Limited's directors entering into the loan. It concluded that the company acquisition and the loan were offered to the company as a package, meaning the use Syngenta Holdings Limited made of the funds was less informative than it might otherwise be. Although the loan was used to purchase Syngenta Limited, the directors' purpose was not to buy a good investment, but to play their part in the wider arrangements.

The First Tier Tribunal held Syngenta Holdings Limited's *o*nly purpose in being party to the loan was to secure an interest deduction. That was a tax avoidance main purpose and none of the debits could be brought into account because they were all properly attributable to that unallowable purpose.

Syngenta Holdings Limited v HMRC (TC09346)

Adapted from the case summary in Tax Journal (15 November 2024)

Advanced pricing agreement (Lecture B1471 – 19.57 minutes)

Summary - As the five-year term to which the Advance Pricing Agreement related had expired, the Diverted Profits Tax notices had been correctly issued.

The three companies in this case provided services (including services in respect of software, new product and content development and data hosting) to a Swiss-based group entity which centrally held valuable intellectual property assets.

The Diverted Profits Tax notices charged the companies to tax for the 2018 accounting period by reference to a 'relevant alternative provision' (RAP) which utilised a 'profit-split' methodology (effectively apportioning the annual profits of the Swiss entity for the 2018 accounting period and profits accruing from the disposal of the relevant IP assets in the 2018 accounting period by reference to the claimants' respective contributions to such via the provision of the services). The total Diverted Profits Tax was in excess of £167 million.

The claimants contended that HMRC had acted inconsistently, and therefore acted unlawfully in public law terms. The claim was based on the assertion that the charge to tax contained in the Diverted Profits Tax notices, relating to the 2018 accounting period, was inconsistent with an advance pricing agreement, which the claimants had agreed with HMRC in 2013. This covered the provision of the relevant services (and which used an arm's length provision calculated by reference to a 'cost-plus' methodology) and had a contractual expiry date of 31 December 2014.

Decision

Before the Upper Tribunal, the claimants had sought an order quashing the Diverted Profits Tax notices to the extent they conflicted with the advance pricing agreement. They argued that the 2018 accounting period was one to which the advance pricing agreement 'related' for the purposes of s.220 TIOPA 2010 because services provided before 2014 and taxed on the basis of the advance pricing agreement were sought to be taxed again on a different basis. HMRC had accepted that the profits for the 2018 accounting period were in part referrable to the services provided in the period for which the advance pricing agreement had effect. HMRC were therefore bound, on a public law basis, to apply the cost-plus methodology in the advance pricing agreement to those profits.

The Upper Tribunal rejected these arguments and dismissed the claim.

The Court of Appeal dismissed the claimants' appeal, finding that in the context of corporation tax, which is an annual tax, the chargeable periods to which the advance pricing agreement related were those included in its specified term.

Neither party to the advance pricing agreement could reasonably have contemplated that the advance pricing agreement should have a continuing effect on HMRC's approach to transfer pricing for accounting periods from 2015 onwards.

The Court of Appeal also rejected the claimants' argument that the terms of the advance pricing agreement were expressed in terms of transactions, so that they had 'vested or accrued contractual rights' to have them price on a cost-plus basis. There was nothing in the language of the advance pricing agreement to support the idea that the agreed treatment should 'enjoy a potentially indefinite afterlife in future accounting periods once the term of the advance pricing agreement had come to an end'.

R (on the application of Refinitiv Ltd and other companies) v HMRC [2024] EWCA Civ 1412

Adapted from the case summary in Tax Journal (22 November 2024)

Data centres in an enterprise zone (Lecture B1471 – 19.57 minutes)

Summary – The two LLPs were not entitled to 100% enterprise zone allowances in respect of the construction of two data centres.

Two SPVs were formed to develop land in an enterprise zone. One (the developer) held a lease of part of the site, and the other (the contractor) was to carry out the building works. The day before the ten-year period for the enterprise zone expired, they entered a 'golden contract' with the intention of enabling allowances to be claimed on buildings constructed in the following ten years while retaining flexibility on the type of development. The contract therefore allowed for a choice of different developments ('works options'), each linked to a specific part of the overall site. No work had to be done under the contract unless and until the developer issued a notice to proceed for one of the work options.

Subsequently, under the terms of a 'change order', a data centre (which was not within the scope of the existing works order options) was constructed. Following the assignment of the lease held by the developer to the two LLPs, two further data centres were constructed under further change orders and the LLPs claimed enterprise zone allowances.

For the claim for allowances to succeed, the data centres had to have been built under the golden contract (s.298 CAA 2001):

- HMRC argued that this was not the case;
- the taxpayers argued that the change orders providing for the later data centres gave effect to works option 1 in the golden contract either by variation or on exercise of the developer's unilateral rights to change under clause 12 of the contract.

The Court of Appeal found for HMRC, and the taxpayers appealed to the Supreme Court.

Decision

The first issue for the Supreme Court was whether s.298 CAA 2001 enabled expenditure incurred by reason of a variation after the end of the first ten-year period to qualify for allowances.

This required the court to ask whether, by the end of the ten-year period, a contractual relationship existed under which the relevant expenditure had either been agreed in terms or which arose from building work which the developer had at that time a contractual right to require or change. On a realistic assessment of the dealings of the parties, there was not, on the tenth anniversary, a contractual commitment to incur the expenditure on the data centres in terms or anything like it.

The second issue was whether the expenditure on the data centres was triggered by the exercise of the developer's unilateral change rights under clause 12. Here, the taxpayers' argument fell 'at the first hurdle'. There was an express limit on the changes which could be made under clause 12. It allowed only for changes to the design, quality and quantities of what would remain substantially the same building as envisaged in works option 1 (i.e. an industrial unit for the manufacture of eight-inch board). The right to require a change did not extend to choosing some completely different type of building on a different site.

The Supreme Court therefore dismissed the appeal.

R (on the application of Cobalt Data Centre 2 LLP and another) v HMRC [2024] UKSC 40

Adapted from the case summary in Tax Journal (29 November 2024)

SDLT group relief **(Lecture B1471 – 19.57 minutes)**

Summary - SDLT group relief was not available on an intra-group transfer because that transfer formed part of arrangements of which one of the main purposes was the avoidance of a liability to corporation tax.

A group of companies was developing a site as residential property, which included a tower block. The group identified various commercial advantages to transferring that development (in the form of a 999-year lease) to a special purpose vehicle (The Tower One St George Wharf Ltd).

Following discussions with the group's tax advisers, this transfer was carried out in an indirect manner, with the relevant series of transactions carried out on the same day, seeking to achieve a tax-free 'step up' in the base cost of the lease for corporation tax purposes.

Following an enquiry by HMRC, it was accepted that the scheme did not achieve that corporation tax benefit.

HMRC denied the SDLT group relief that had been claimed on the transfer of the lease to the company, on the basis that the relief was not available because the transfer formed part of arrangements of which the main purpose, or one of the main purposes, was the avoidance to liability to corporation tax (FA 2003 Sch. 7 para 2(4A)). HMRC sought to collect the SDLT payable on the market value of the lease.

The First Tier Tribunal dismissed the company’s appeal against that assessment, finding that the transfer formed part of arrangements which had a main purpose of achieving a corporation tax advantage, even if that tax advantage was ultimately not achieved.

In reaching its decision, the First Tier Tribunal had made the following key findings of fact:

- the group wanted to transfer the lease to the company for genuine commercial reasons, and the process leading to the series of transactions had not originally been initiated out of a motive to avoid tax;
- if the group had never been made aware of the possible corporation tax advantage that could be obtained, the group would likely have transferred the lease directly to the company in order to achieve its original purposes;
- once the group received the advice about the corporation tax advantage that could be obtained, it attached considerable importance to ensuring that the significant tax benefit was obtained; and
- the group would not have transferred the lease to the company solely for the corporation tax advantage.

Decision

Before the Upper Tribunal, The Tower One St George Wharf Ltd argued that the First Tier Tribunal had made several errors in law in concluding that it was not entitled to SDLT group relief.

Two of the alleged key errors were as follows:

1. As the arrangements did not in fact achieve their aim of producing a tax-free step up, they should not be regarded as having had a main purpose of avoiding tax;
2. It could not be said that the purpose of the arrangements was the avoidance of tax where the avoidance in question was contingent on there being a future sale.

Referencing the guidance provided by Falk LJ in the recent Court of Appeal decision in *BlackRock* throughout, the Upper Tribunal concluded that the First Tier Tribunal had made no errors in its analysis of the law or in its conclusions.

As to the first submission, the Upper Tribunal concluded that para 2(4A) applied where the relevant purpose existed, and the effect of the arrangements – namely, whether or not any tax was ultimately avoided – was irrelevant. The statute referred to purpose and this was tested at the time of the land transaction for which group relief was claimed. The Upper Tribunal did not agree with the appellant that there was a natural reading of para 2(4A) that meant that arrangements which did not have the effect of avoiding tax were not captured. The fact that arrangements ultimately failed to achieve their purpose did not retrospectively negate the fact they had that purpose.

As to the second submission, there was nothing in the language of para 2(4A) to indicate that a purpose of avoiding a liability to tax which would, or might, arise in the future was not caught. Furthermore, the Upper Tribunal did not agree that the intended avoidance in this case only arose in the future. While the cash benefit of the step up would only arise on a future disposal, the avoidance of tax – namely, an increase in base cost without any company being liable for corporation tax on that 'gain' – formed part of the arrangements and was not a result of future or contingent events.

A second ground of appeal concerned the deemed market value rule in FA 2003 s 53. After analysing the legislative provision, the Upper Tribunal concluded that the First Tier Tribunal had not erred in law in concluding that the exception to that rule in FA 2003 s 54(4)(b) did not apply.

The Tower One St George Wharf Ltd v HMRC [2024] UKUT 373 (TCC)

Adapted from the case summary in Tax Journal (29 November 2024)

Spotlight 67

Spotlight 67 highlights that:

- Managed Service Company providers design and sell schemes that enable individuals to work through intermediary entities (personal service companies, partnerships, or composite companies) for end clients, seeking to encourage and enable disguised employment
- Managed Service Company rules ensure a level playing field between users of these schemes compared with workers and businesses who are paying the correct amount of income tax and NICs.

For a company to be a Managed Service Company, four conditions must be met:

1. the intermediary company provides the worker’s services to an end client;
2. the worker receives at least 50% of the money that was received by the intermediary company in exchange for the services of the worker to the end client;
3. the payments received by the worker are more than they would have received if all the payments were treated as employment income;
4. a person who carries on a business of promoting or facilitating the use of companies to provide the services of individuals is <u>involved</u> with the company.

A Managed Service Company Provider is classed as ‘involved with the company’ if they do any one of the following:

1. Benefit financially on an ongoing basis from the provision of the services of the individual;
2. Influence or control the provision of those services;
3. Influence or control the way payments to the individual (or associates of the individual) are made;
4. Influence or control the company’s finances or any of its activities;
5. Give or promote an undertaking to make good any tax loss.

The Spotlight:

- gives examples of each type of involvement;
- highlights common signs that indicate that a Managed Service Company product is being provided;
- identifies how a Managed Service Company Provider might interact with an individual.

https://www.gov.uk/guidance/managed-service-companies-spotlight-67

New UK Pillar 2 guidance

Paying top-up taxes

HMRC have issued new guidance on paying UK Pillar 2 top-up taxes that covers payment deadlines and details required in order to make payments.

Payments must be made no later than:

- 30 June 2026, if the first accounting period the group is required to report Pillar Two top-up Taxes ends on or before 31 December 2024;
- 18 months after the last day of the group's accounting period, if the first accounting period the group is required to report Pillar Two top-up taxes ends after 31 December 2024; and
- the later of 30 June 2026 and 15 months after the last day of the group's accounting period for all other periods.

If the deadline is on a weekend or bank holiday, the payment must reach HMRC by the end of the previous working day.

Changing filing member

HMRC has also published details of the online service to use when replacing the filing member for an existing Pillar 2 top-up taxes account.

The key points are:

- Only the new proposed filing member can use this service to replace the existing filing member;
- The new filing member must be either the ultimate parent entity or another nominated group company.
- As filing member, the new entity takes over legal obligations for Pillar 2 compliance, including submitting returns, ensuring account accuracy, and acting as HMRC's primary contact;

- To replace the filing member, the new entity must provide the group's Pillar 2 top-up taxes ID, registration date, contact details, and company registration number (if a UK company).

https://www.gov.uk/guidance/pay-pillar-2-top-up-taxes-domestic-top-up-tax-and-multinational-top-up-tax

https://www.gov.uk/guidance/replace-the-filing-member-for-a-pillar-2-top-up-taxes-account

VAT and other indirect taxes

Output tax on caravan sales (Lecture B1475 – 23.57 minutes)

Summary – The taxpayer could apply a new apportionment method retrospectively as the difference between the old and the new method was substantial.

Abbeyford Caravan Company (Scotland) Limited sells caravans together with its removable contents whereby the supply of the:

- caravan was either:
  - reduced rated (Sch 7A Group 12 VATA 1994),or
  - zero rated (Sch 8 Group 9 VATA 1994)
- removable contents were standard rated

Historically, the company had apportioned the total price paid based on the relative costs of the two elements adopted by the manufacturer (the 'cost ratio method').

Where a caravan is bought for £10,000, with the manufacturer stating that £1,800 is attributable to the removable contents, 18% would be used as the cost ratio percentage.

If the company sold the caravan and removable contents for £20,000, the sales invoice would show £3,600 as attributable to the removable contents with VAT charged on this figure at the standard rated of 20%.

In practice, manufacturers' invoices produced a 'cost ratio method' range of between 16% to 27%. However, not convinced that this approach was appropriate, the company undertook a detailed independent valuation, undertaken by an independent party who had over 40 years' experience in caravan park valuations. The result of this exercise was that the correct range for removable contents was in fact between 5% and 9% of the invoice value. This was because the removable contents had their own sales value, which did not increase significantly when supplied to the final customer. For example, a dishwasher worth £250 was still worth £250 (or less) when it was sold on and not £750 as declared in some cases with the old method.

Realising that the old method wrongly included all contents as removable, rather than just the removable contents within the meaning of the case law, the company submitted an Error Correction Notice claim for overpaid output VAT for the periods 06/18 to 03/22 of £150,000 under s.80 VATA 1994, which limits claims to four years.

HMRC did not dispute that the new approach produced a fairer, more accurate figure for output VAT on the supply of the removable contents and agreed that this new method could be used going forward so with effect from 1 April 2022. However, HMRC rejected the claim for past periods on the basis that there was no error. The company had used the method that had been agreed at the time.

The company argued that HMRC’s VAT Valuation Manual reference VATVAL04300 stated that a new method can be used retrospectively provided it achieves a more fair and accurate attribution of value. Simply being advantageous to the taxpayer was not enough. The manual states that the new method:

> “must provide convincing evidence that the previous method was unfair or, at the very least, that the end result achieved by the proposed new method produces a substantially more accurate attribution of values than the old method.”

Decision

As a result of this, by the time of the First Tier Tribunal hearing, HMRC accepted that the company did not need to show that there was an error in the old ‘cost-ratio method’ but rather that the new method produced a substantially more accurate attribution as compared to the old method.'

Both parties referred to the binding decision of the Supreme Court in the case of CRC v KE Entertainments Ltd [2020] STC 1402. There could only be one method that achieved 'fairness and equality' and that was the new method agreed with HMRC from April 2022.

Abbeyford Caravan Company (Scotland) Limited produced evidence showing that over the four-year period, by using the new rather than the old method, there would have been a VAT reduction from £296,907 to £150,458. The Tribunal stated that this was 'by any measure substantial'.

The appeal was allowed.

Abbeyford Caravan Company (Scotland) Limited v HMRC (TC09324)

Legitimate expectation **(Lecture B1475 – 23.57 minutes)**

Summary – Despite applying to be VAT registered on a voluntary basis from 1 October 2022, the company had a legitimate expectation that it did not need to start charging output VAT on its invoices until registration was notified by HMRC.

Treasures of Brazil Limited, incorporated in March 2022, sold jewellery and bags. By September 2022, the company’s director was concerned that the mandatory VAT registration threshold would be met in the near future and so instructed her accountant to apply for voluntary registration. The accountant requested an effective start date of 1 October 2022.

On 21 September 2022 the accountant received an email from HMRC stating that an identity check was needed and that the relevant documents should be sent to HMRC. The email went on to say that having received the documents, it would take about 30 days to complete the check and that the company should wait until the VAT registration was confirmed before charging customers for VAT. Consequently, the accountant informed the director that the company only needed to start collecting VAT once registration had been confirmed by HMRC.

The accountant regularly followed up the registration application throughout October and November 2022.

The company's VAT registration was finally confirmed by letter stating that registration was effective from 1 October 2022. The letter was dated 10 October but HMRC's systems indicated that it was actually not issued until 17 December 2022. The director claimed that the letter was not in fact received until 28 December 2022, the date from which the company started charging output VAT.

On 7 February 2023, Treasures of Brazil Limited submitted its VAT return for period 12/22, but did not account for VAT on outputs from 1 October 2022. Input tax was claimed of £4,502.02.

HMRC raised best judgment assessment seeking output VAT for the period and amending the input VAT figure slightly.

Decision

On appeal, the First Tier Tribunal found that:

- There was no explanation as to why it took almost three months to process the VAT registration;
- HMRC's e-mail included a clear, unambiguous instruction not to collect VAT or any sums 'for VAT' until notified of registration;
- Treasures of Brazil Limited had a legitimate expectation that it was not required to collect any VAT pending registration;
- The best judgment assessment was unfair as it effectively required the company to fund the VAT from its resources.

The tribunal suggested to HMRC that the wording of emails to taxpayers in a similar situation be revised in order to make the position absolutely clear.

Treasures of Brazil Limited v HMRC (TC09325)

Fraudulent input VAT claim (Lecture B1475 – 23.57 minutes)

Summary – Input VAT claims were rejected as the taxpayer knew or should have known that the transactions were connected to a fraudulent loss of VAT.

In 2018, Ms Harries had registered for VAT as a sole trader, trading under the name Glam Tan. When HMRC denied claims for input tax, she deregistered in August 2020.

With £825,000 loaned by the Welsh government, Alex Harries, formerly Laura Elizabeth Harries, set up and traded as Glam Tanning and Beauty, with the address on her VAT1 being her residential address. She became registered for VAT on 1 September 2020.

Marc Simpson was the sole director of Aware Limited, a construction company. Ms Harries knew the director from previous business ventures. She engaged him to carry out refurbishment and renovation work on her premises, paying Aware Limited substantial sums of money to do so (£516,000 on 15 December 2020, £491,493.84 on 28 April 2021, £321,507 on 31 May 2021 and £164,400 on 31 July 2021). Aware Limited failed to complete the work and Mr Simpson disappeared at the end of June 2021.

With the work completed by other builders, the salon finally opened in August 2021. However, experiencing serious cashflow difficulties, the business ceased trading.

Following its compliance work, HMRC stated the invoices from Aware Limited for periods 04/21, 05/21 and 07/21 were invalid as they did not include a valid VAT number. Further, the July 2021 invoice did not contain a breakdown of what was supplied or a valid invoice number. Ms Harries provided HMRC with a new invoice for period 07/21, but this was completely different in terms of font used, invoice number and description. Having looked also at records relating to Aware Limited, the input tax Ms Harries was claiming was different to the output tax declared by Aware Limited.

In a decision dated 1 November 2021 HMRC denied a claim for the deduction of £221,499 of input tax in respect of her 12/20, 04/21 and 05/21 VAT accounting periods. This was on the grounds that she knew or should have known that transactions that she had entered into during those accounting periods were connected to a fraudulent loss of VAT ("*Kittel* principle"). At the same time, HMRC issued a notice denying input tax recovery for the period 07/21 as it related to the falsified invoice. In February and March 2022, HMRC issued penalty notices for the period affected on the basis of deliberate concealed and behaviour.

Decision

On appeal, the First Tier Tribunal found in HMRC's favour. Ms Harries, Mr Simpson and Aware Limited were involved in fraudulent activity.

Ms Harries put forward an excuse which makes interesting reading. She claimed that having taken a step back from the business, Glam Tan was being run by her twin sister, with whom later she fell out with when she discovered that her sister had stolen and used her identity to acquire and expand the Glam Tan business for herself. She claimed that it was her twin who had registered the business for VAT and it was her sister, not her, that dealt with HMRC in relation to that VAT registration. She claimed that her twin "was able to do this because she knew 'everything about her' and, for personal reasons, wanted to ruin her life."

The Tribunal stated that it was possible that the it might have come to a different conclusion if either her twin or father had given evidence. However, they did not.

The appeal was dismissed.

Alex Harries t/a Glam Tanning and Beauty v HMRC (TC09316)

Unsuccessful reasonable care defence **(Lecture B1475 – 23.57 minutes)**

Summary – Although the taxpayer's late appeal was allowed, the company did not have a reasonable excuse for repeatedly paying their VAT late.

ABG Fibre Services Ltd installed telecommunications equipment.

HMRC issued a surcharge liability notice on 14 August 2020 for the quarter to 06/20 as, although the return was submitted on time, the VAT was paid late.

The company continued to submit their VAT return on time each quarter but for each of the return periods 09/20, 12/20 and 03/21, paid the VAT late such that the surcharge was payable at 2%, 5% and 10% respectively.

The company appealed their position late. It had no issue as to the validity of the surcharge notices but argued that the company had a reasonable excuse for the late payments.

Decision

On the late appeal, the First tier Tribunal noted that there was a sequence of repeated further review applications by the company and review conclusions by HMRC and it stated:

> "It may be that the further reviews (fell) outside the statutory framework such that HMRC were not strictly correct to carry out such reviews (and that the time limit for making an appeal to the Tribunal began to run from 1 March 2022, or some other date). However, HMRC nonetheless carried out such further reviews."

It was clear that both parties were attempting to resolve the dispute up until a letter dated 25 September 2023. The company appealed to the Tribunal on 25 October 2023, ie promptly after the end of that correspondence. Accordingly, in all the circumstances of the case (and bearing in mind the approach suggested in *Martland v HMRC* [2018] UKUT 0178 (TCC)), the Tribunal granted permission for the late appeal to be heard.

On appeal, ABG Fibre Services Ltd stated that it had intended to use repayments of credits generated as a result of the Construction Industry Scheme to pay its VAT liabilities. However, HMRC were late repaying these credits, taking over 12 months to process the repayment claims. This had a serious impact on the company's cashflow. Had the company's claims been processed more quickly, the default surcharges would not have arisen.

Referring to Christine Perrin v Revenue and Customs Commissioners [2018] UKUT 0156 (TCC), the Tribunal stated that for an excuse to be considered reasonable, it must be objectively reasonable, taking into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found themself in at the relevant time or times. In summary, was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?

The First Tier Tribunal referred to *NSF* Utilities Ltd v HM Revenue and Customs [2018] TC06288 where Judge Gammie stated:

> "a taxpayer who believes that it is due a repayment of tax from the Respondents on one account, may think it galling that the Respondents can insist on payment of tax on another account by a particular date, and impose a penalty for the taxpayer's failure to do so, when the Respondents face no equivalent sanction. Nevertheless, this alone is plainly not enough to entitle the taxpayer to delay payment of VAT or to attempt to set off one amount against the other."

And further in the case:

> “a prudent taxpayer would have sought to take some steps to guard against the possibility that the VAT fell due before the repayment was received.”

Although the First Tier Tribunal sympathised with the company, its actions were not reasonable. It was common knowledge that HMRC take a long time to process CIS claims. That being the case, the company should have taken reasonable steps to avoid late payment. Indeed, it appeared that the company has now taken action by subsequently moving to gross payment status.

The Tribunal noted that in this appeal, it was not provided with evidence as to:

- the exact cash position of AFSL at the material times,
- what liabilities it had to meet other than VAT,
- what steps were taken to seek time to pay the VAT liability, or to defer payment of other liabilities in order to enable the VAT liability to be paid.

Further, the Tribunal stated the company could have sought gross payment status sooner, thereby avoiding the cash flow impact of CIS.

The company did not take reasonable steps to meet the liabilities and so did not have a reasonable excuse for the late payment. The appeal was dismissed and the surcharges upheld.

ABG Fibre Services Ltd v HMRC (TC09315)

Application for costs on complex case **(Lecture B1475 – 23.57 minutes)**

Summary – The company’s application for costs to be paid by HMRC was refused as HMRC had not acted unreasonably in bringing, defending or conducting the proceedings up to the point that HMRC withdrew from the hearing.

Generator Power Limited was a generator hire specialist that hired out generators, and also supplied red diesel fuel for the generators under a number of different plans as follows:

1. Customer provided their own fuel, returning the generator with a full tank.
2. The customer provided their own fuel for the duration of the hire, but either the generator tank and/or bulk fuel tank were not returned full.
3. The customer chose Generator Power Limited’s “fuel management” option, with the appellant providing the fuel throughout the hire period.
4. The customer provided their own fuel for the duration of the hire but required a one-off delivery at some point during the hire period.
5. Generator Power Limited supplied fuel only to customers for their own generators.

The issue to be determined was whether the contracts entered into were for two separate supplies of generator hire (standard rated) and fuel (reduced rated), or as HMRC contended, there was a single composite supply that was standard rated. Scenario 1 above was outside the scope of the appeal as it had not been included in the assessments raised by HMRC.

On 13 October 2021, the First Tier Tribunal notified the parties that the appeal had been allocated to the complex category. Such appeals are normally subject to a 'loser-pays' costs regime, where the losing party pays their own costs and those of the successful party.

However, the taxpayer can choose to opt out of this cost regime (Rule 10(1)(c)(ii) of the Rules) provided that they do so within 28 days of receiving the notification. Generator Power Limited opted out on 10 November 2021 so within the 28-day period allowed.

The case moved forward with HMRC accepting that the customers were not obliged to purchase fuel from Generator Power Limited, but on the company's own evidence more than 99% of their customers did so. Consequently, HMRC argued that on any objective view there was therefore a single supply of generators with a power source included to enable use of the supply.

Following the decision reached in the case *GAP Group Ltd v Revenue and Customs* [2023] UKFTT 970 (TC), where the First Tier Tribunal had found that the supply of plant hire with red diesel were separate supplies for VAT, Generator Power Limited filed and served a further witness statement. On the same date in January 2024, the company also made an application for the appeal to be reinstated within the costs regime, or alternatively, for costs to be paid under rule 10(1)(b) of the Rules. The company later withdrew their application to be reinstated within the costs regime and it was decided by the parties that any application for costs under Rule 10(1)(b) would be made after the Tribunal had given its decision on the appeal.

Decision

During the appeal, both the Tribunal and Generator Power Limited challenged HMRC's argument that customers had little choice but to buy red fuel from the company:

- The Tribunal asked "whether it was not the case there must be a network of red diesel sellers covering the entire country to supply farms that use red diesel, and that these suppliers are required to be registered with HMRC such that HMRC must know of their existence." If so, the Tribunal questioned whether the Appellant's customers would not have been able to obtain red diesel from any one of them.

- Counsel for the Appellant introduced new evidence during the appeal, in the form of printouts from the internet. These were said to show "the existence of a highly developed nationwide network of suppliers of diesel, red and white", and "pages and pages of people claiming to offer 24/7 service".

At this time, counsel for HMRC said that she was not in a position to cross-examine and needed time "to properly consider and review the evidence received" as this was all new evidence. The First Tier Tribunal granted HMRC 28 days to consider this evidence.

Having reviewed the new, late evidence, HMRC notified that it no longer wished to defend the appeal.

Moving to the application of costs, Rule 10 of the Rules provides:

(1) The Tribunal may only make an order in respect of costs (or, in Scotland, expenses)— ….

(b) if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings …

The taxpayer applied for a costs order against HMRC, arguing that HMRC should have realised much earlier that its defence would not succeed and that it therefore acted unreasonably in not withdrawing earlier.

The First Tier Tribunal summarised the case law on costs for unreasonable conduct and refused the application as the Tribunal was not convinced that HMRC's case ‘was bound to fail'.

The Tribunal (found) that:

1. “The reason for the withdrawal of HMRC from the appeal was that material new evidence was introduced at the hearing, which led HMRC to reconsider its position.

2. Having regard to that reason, the earliest time at which HMRC could have withdrawn was on the third day of the hearing, when the last of the additional evidence was presented.

3. It was reasonable for HMRC to take a further 28 days before deciding to withdraw from the appeal. The Tribunal had directed, after discussion with the parties at the hearing, that HMRC should be given 28 days after the hearing to decide whether it wished to cross-examine …..HMRC clearly needed and were entitled to time to consider the new evidence, and 28 days was a reasonable period.”

The application for a costs order was refused.

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