Tolley®CPD

January 2022

CONTENTS

Personal tax

Overnight expense appeal allowed in part

Summary – An appeal to reclaim overpaid income tax and national insurance in connection with drivers' overnight expense allowances was struck out for income tax but dismissed for National Insurance.

A problem arose because the taxpayer made errors in its payroll software procedures. When setting up the wages for its drivers, it did not correctly establish the overnight allowances under a tax free status. All the drivers received their correct pay in line with the net pay arrangements but the mistake resulted in the taxpayer overpaying PAYE tax and National Insurance by grossing up the salary of each driver.

The taxpayer claimed the overpaid tax and National Insurance for the years 2010/11 to 2016/17 by means of a letter dated 13 March 2019. HMRC refused and the taxpayer appealed to the First-tier Tribunal.

HMRC applied to the tribunal to have the appeal struck out, on the grounds there was no appealable decision and, in any event, there was no prospect of success. This was because the taxpayer had not sought a dispensation for the overnight tax-free allowance, there was no evidence to show employees had necessarily incurred expenses as a result of a night spent away, the taxpayer had no system to check the drivers spent the allowance, and the allowance was paid to drivers every week of the year, including holiday periods.

HMRC said the allowance was taxable and was correctly added to gross pay.

The taxpayer said HMRC had since added further grounds for striking out and this was 'procedurally unfair'. The new grounds were that no valid overpayment relief claim had been made; if the 13 March 2019 letter was to be taken as a valid claim, it was out of time for the years 2013-14 and earlier; the overnight expenses were a round sum allowance and subject to tax and National Insurance; and if income tax been overpaid, only the employee was entitled to reclaim it.

Decision

The First Tier Tribunal agreed with HMRC that the 13 March 2019 letter was not a valid claim for an income tax repayment under Sch.1A TMA 1970, because it neither gave the grounds of appeal nor contained a declaration of correctness. Further, it was clear that HMRC had not accepted it as a valid claim because it subsequently wrote to the taxpayer referring to the Sch.1A requirements.

The tribunal did not accept that there was unfairness to the taxpayer in the tribunal hearing the arguments put forward by HMRC because they were based on evidence which had already been quoted extensively.

The judge concluded, therefore, that the tribunal had no jurisdiction over the appeal relating to HMRC's refusal to repay income tax and struck out that part of the proceedings.

However, on National Insurance, the taxpayer's letter claiming repayment of overpaid contributions did meet the conditions of reg 52 of the Social Security (Contributions) Regulations SI 2001/1004 and HMRC's response that the application could not be made was, in effect, a decision under s.8(1) Transfer Act 1999. The taxpayer's email in response was therefore a valid notice of appeal. The judge declined to strike the appeal in this respect.

On the prospect of the appeal succeeding, the tribunal said HMRC had not produced adequate evidence to justify striking out the appeal. It directed HMRC to send a statement of case to the taxpayer and the tribunal.

Fieldmuir Ltd trading as Centurion Freight Services (TC8309)

Adapted from the case summary in Taxation (18 November 2021)

Tax planning arrangement fails

Summary – The taxpayer was chargeable to tax on the dividend paid as he received it and was entitled to receive it as principal beneficiary of the trust.

Mark Dunsby was the sole shareholder and director of M Ltd.

In 2013, he and the company implemented a tax planning arrangement using generic documents provided by the scheme promoter. Under the scheme, M Ltd created a new class of S shares and issued one S share to a non-resident individual, Fiona Gower. She created a trust in Jersey in which she retained an interest but in which Mark Dunsby had an immediate right to most of the income of the trust for an initial period.

During that period M Ltd declared a dividend of £200,000 in respect of the S share and Mark Dunsby received £195,000. He disclosed the scheme in his tax return but did not include the income from the dividend received as under the settlements legislation, it was Fiona Gower's income.

HMRC concluded Mark Dunsby was liable to tax on the dividend and on appeal, the First Tier Tribunal agreed.

Mark Dunsby appealed.

Decision

The Upper Tribunal had to consider three issues – distribution, the settlements legislation and the transfer of assets abroad regime.

On distribution, disagreeing with the First Tier Tribunal, the tribunal concluded that s.385 ITTOIA did not require the taxable person to hold the shares on which it is made. All that was required was that they were the person to whom the distribution was made or treated as made, or the person entitled to the distribution. The judges said:

> 'The overarching purpose is to ensure that a shareholder who either does receive, or is entitled to receive, a distribution from a UK resident company is subject to income tax on that distribution.'

In this case, Mark Dunsby did receive the dividend; he was also entitled to receive it as principal beneficiary of the trust; and he was therefore chargeable to tax on it. His appeal was dismissed on this point. However, the tribunal also considered the remaining issues.

On the settlement point, the judges agreed with the lower tribunal. It concluded Mark Dunsby was the settlor for the purposes of the settlements legislation in s.619 ITTOIA et seq. He was therefore subject to an income tax charge on all of the income arising under the settlement.

Finally, on the transfer of assets abroad issue, the tribunal said the correct interpretation of s.721 ITA condition B was to ask whether income would be chargeable to income tax if it had belonged to Mark Dunsby and had been received by him in the UK, i.e. ignoring the effect of the transfer to another person. The tribunal said, on this basis, although Fiona Gower was regarded as the settlor for the purposes of the settlements legislation, Mark Dunsby was taxable.

The tribunal decided that, as the First Tier Tribunal had made an error of law on the distribution issue, it would remake the decision.

Mark Dunsby's appeal was dismissed.

Mark Dunsby v HMRC [2021] UKUT 0289 (TCC)

Adapted from the case summary in Taxation (2nd December 2021)

Child benefit no longer available

Summary – As the taxpayer was no longer UK resident, she was not entitled to receive child benefit from the UK.

The appeal concerned Wendy Carrington, who emigrated to Spain from the UK with her husband and son. She received child benefit and a disability living allowance for the son.

She informed the Department for Work and Pensions (DWP) that the family was moving to Spain but did not notify HMRC separately – perhaps because she assumed the DWP administered both benefits or that one department would notify the other. But this was not the case. Indeed the judge in the First-tier Tribunal (Social Entitlement Chamber) noted that regrettably:

> 'there is no joined up communication between various government departments with the obligation being upon the recipient of benefit to notify the appropriate department of any change'.

The result was that she continued to receive child benefit until HMRC became aware the taxpayer had moved abroad and no longer qualified for the payments. It considered that because the taxpayer was no longer resident in the UK, she did not qualify for child benefit and said she should repay the sums received.

The First-tier Tribunal (Social Entitlement Chamber) dismissed her appeal but the Upper Tribunal overturned that decision. It decided EU law meant she could continue to receive child benefit irrespective of her location in the EU.

HMRC appealed to the Court of Appeal.

Decision

The Court of Appeal ruled that to receive child benefit both the child and the recipient must be resident in the UK.

Sickness benefits and family benefits were dealt with by separate rules under EU law. EU law protected entitlement to the care component of the disability living allowance but not to child benefit.

As she was no longer UK resident, Wendy Carrington was not entitled to child benefit.

HMRC's appeal was allowed.

Wendy Carrington v HMRC EWCA Civ 1724

Adapted from the case summary in Taxation (9 December 2021)

Capital tax

Validity of discovery assessment

Summary – A discovery assessment for SDLT was valid as, based on the facts, the taxpayers had not made an adequate disclosure in their SDLT return.

In 2009 Victoria Carter and Peter Kennedy had participated in a tax avoidance scheme designed to take advantage of the rules applying to sub-sales of property in s.45 FA 2003 in which the consideration declared on the SDLT return was artificially reduced.

The pair filed a stamp duty land tax return within the statutory time-limit meaning that HMRC had until 22 March 2010 to open an enquiry into the return. The return showed consideration of £130,763 and SDLT payable as nil.

HMRC did not open an enquiry but, instead made a discovery assessment on 6 September 2011 for £32,640 in relation to the property purchase on the basis that the consideration was £816,000.

Victoria Carter and Peter Kennedy appealed that assessment. This was joined with other appeals raising similar issues.

The First Tier Tribunal concluded:

> "it was not reasonable to expect an HMRC officer at the relevant time (on 22 March 2010) to be aware of the insufficiency in the return to an extent that would justify him or her making an additional assessment. This was a relatively complex case. An adequate disclosure must clearly alert the hypothetical officer to the insufficiency."

The Tribunal continued:

> "such a disclosure would have required a fuller disclosure of the facts and, given the state of the law at the time, a fuller explanation of the views, which were being taken on the application of s45 FA 2003 and s75A FA 2003 in the context of those facts. The information made available to HMRC may have been sufficient to prompt the hypothetical officer to raise an enquiry, but it did not clearly alert the officer to the insufficiency and so did [not] meet the requirements for an adequate disclosure at that time."

Decision

The Upper Tribunal were not required to consider the validity of the scheme but rather, whether the discovery assessment was a valid assessment

The Upper Tribunal concluded that what was disclosed was not enough to show a hypothetical HMRC officer that tax had been underpaid. The disclosure failed to detail the steps involved in the scheme, failed to mention the transaction employed a pre-planned tax avoidance scheme and failed to explain why section 75A should not be applied to tax the total amount of the payments made under the contract. The First Tier Tribunal had been right to conclude that an adequate 'disclosure would have required a fuller disclosure of the facts and, given the state of the law at the time, a fuller explanation of the view, which were being taken on the application of s45FA 2003 and s75A FA 2003 in the context of those facts.'

In reaching their decision, the Upper Tribunal dismissed a new argument not previously heard by The First Tier Tribunal. The taxpayers argued that the existence of an HMRC technical news publication detailing a similar scheme, meant that a hypothetical officer should have been able to identify the scheme from their disclosure. The Tribunal stated that it would have been unfair to HMRC to admit this new evidence on appeal.

Victoria Carter & Peter Kennedy v HMRC [2021] UKUT 0300 (TCC)

Administration

Late appeal refused

Summary – Waiting between 551 and 1338 days to appeal was a "serious and significant" delay that ultimately resulted in no appeal being granted despite the possibility that the taxpayer could be made bankrupt.

In February 2013, HMRC requested Self Assessment returns from Shane De Silva for the tax years 2009/10, 2010/11 and 2011/12. In the same month, Mr De Silva appointed ADHI Accountants to assist him in completion of the returns. HMRC did not receive any of these returns.

His tax return for 2012/13 was submitted on 1 November 2013 but was rejected as various pages were missing. Two weeks later, HMRC issued assessment notices for the tax years ending April 2005 to April 2012.

Mr De Silva argued that he did not owe the sums referred to and told HMRC to take him to court. Having commenced court proceeds in the County Court in August 2016, the judge ordered that blank Self Assessment returns for the tax years 2005 to 2012 should be provided to Mr Silva which were subsequently sent to him by HMRC. A month later, Self Assessment returns provided by Mr De Silva were rejected by HMRC.

HMRC obtained judgment in the County Court against Mr De Silva which was later set aside so that Mr De Silva could seek to make an appeal to the First-Tier Tribunal. On 6 February 2018, an appeal was submitted but HMRC objected to this application to make a late appeal.

The First Tier Tribunal recorded that:

> "it is not in dispute between the parties that the delay was anything other than serious and significant with the intention to appeal being notified to HMRC from 551 to 1338 days late."

Based on the calculation submitted by Shane De Silva's accountants at the hearing, the Tribunal concluded that Mr De Silva's business was generating income at a consistent level over a number of years and that "the merits of the appeal succeeding at first blush are dim." The Tribunal found that Mr De Silva had not given a sufficiently good reason for a serious and significant delay in making his appeal.

Shane De Silva appealed to the Upper Tribunal arguing that the First Tier Tribunal had not engaged with his case that there was no overall income tax liability He argued that the First Tier Tribunal had given inadequate reasons for its decision.

Decision

The Upper Tribunal considered whether in refusing the appeal, the First Tier Tribunal had correctly applied the approach in *W Martland v CRC* [2018] UKUT 178 (TCC). The Upper Tribunal concluded that the First Tier Tribunal's decision had contained errors of law as it had failed to provide adequate reasons for the conclusions that it reached.

However, in remaking the decision, the Upper Tribunal stated that they must consider the Martland process by:

- Establishing the length of the delay and the reasons advanced that delay;
- Evaluating all the case circumstances, carrying out a balancing exercise taking account the length of the delay, the merits of the reasons given and the prejudice which would be caused to the parties by the grant or refusal of permission are assessed;
- taking into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected.

The Tribunal stated that the taxpayer faced an up-hill struggle to satisfy them that it should grant permission for the appeal due to the:

- length of the delay; and
- lack of merit in the reasons given for this delay

He argued that he was likely to be made bankrupt if he was not allowed to appeal. The Tribunal accepted that this one factor to consider. Although this was a significant prejudice for him, in principle it was no different from others appealing against large assessments. Further, had he lodged his appeal in good time when the assessments were first issued, he would have avoided this prejudice. Balancing all of the relevant factors, the Tribunal concluded that he had failed, for no good reason, to respond to the HMRC's assessments. The period of delay of between 551 and 1338 days was "serious and significant". This extreme delay in lodging his appeal was the deciding factor.

The Tribunal noted that despite the taxpayer arguing that they had a strong case:

> "If any appellant with a reasonably strong case could routinely ignore the statutory time limit for bringing an appeal on the basis that he or she could always bring a late appeal, the whole purpose of the statutory time limits would be nullified, and every late appeal application in such circumstances would become, by default, a hearing of the substantive appeal."

The tribunal dismissed the appeal and permission for his late appeals was not granted.

Shane De Silva v HMRC [2021] UKUT 0275 (TCC)

No access to Self Assessment on government gateway

Summary – With no access to file his Self Assessment tax return until November 2020, the six-month later filing penalty was upheld.

On 24 October 2019, having become aware that Matthew Tipper's annual income exceeded £100,000, HMRC had sent a notice to file a Self Assessment tax return for 2018/19. That notice had not been returned undelivered to HMRC, and Matthew Tipper had not stated that he did not receive it.

As the notice was issued outside the normal cycle, the filing deadline was 31 January 2020 for both an electronic return and a paper return. Mr Tipper filed the return late, online on 1 December 2020.

HMRC issued two penalty notices:

1. £100 late filing penalty (February 2020) that had not been appealed; and

2. a six month late filling penalty of £300 (November 2020).

Matthew Tipper argued that he had been sent a notice to complete an "online self-assessment review" in March 2020 for the 2018/19 tax year. He completed an online form at that time but in November 2020, he received the six month late filling penalty of £300 for failure to file a Self Assessment return. He believed that he had completed his return in March and so the £300 penalty was issued in error and he appealed.

Decision

The First tier Tribunal referred to the transcript of Matthew Tipper's telephone call with HMRC in which he stated that he "did not remember going into a government gateway account, he had just filled out a form online."

It was not clear what form Matthew Tipper had completed in March 2020, but the Tribunal found that it was not reasonable for Matthew Tipper to believe that he had filed a tax return with HMRC at this time as, although he had a government gateway account, he had not added Self Assessment to the services available to him until November 2020.

Further, there was no evidence from Mr Tipper that whatever he had completed in March 2020 could be reasonably thought to have been an online tax return. He did not, for example, indicate that he had tried to use third party tax return software.

The First Tier Tribunal found that Matthew Tipper did not have a reasonable excuse for the late filing of his tax return and confirmed that there were no special circumstances meriting a reduction in the penalty. Consequently, the appeal was dismissed and the penalty upheld.

Matthew Tipper v HMRC (TC08302)

Deadlines

1 January 2022

- Corporation tax for periods ended 31 March 2021 for SMEs not paying instalments.

7 January 2022

- VAT returns and electronic payment for 30 November 2021 quarter.

14 January 2022

- Forms CT61 and tax paid for the quarter ended 31 December 2021.
- Quarterly corporation tax instalment for large companies depending on year end.

19 January 2022

- PAYE, NIC, CIS and student loan liabilities for month to 5 Jan. 2022 if not electronic.
- File monthly CIS return.
- PAYE liability for quarter ended 5 January 2022 if average liability < £1,500.

21 January 2022

- Submit supplementary intrastat declarations for December 2021
    - arrivals only for a GB business;
    - arrivals and despatch for a Northern Ireland business.

22 January 2022

- PAYE, NIC, CIS and student loan liabilities to have cleared into HMRC bank account.

31 January 2022

- Electronic filing date for 2020/21 personal, partnership and trust SA tax returns.
- Balance of 2020/21 SA liabilities first instalment of 2021/22 SA liabilities.
- 2019/20 SA tax returns to be amended.
- Election to opt out of pre-owned assets charge first arising in 2020/21.
- Companies House should have received accounts of:
    - private companies with 30 April 2021 year ends;
    - public limited companies with 31 July 2021 year ends.
- Corporation tax returns for companies with periods ended 31 January 2021.

News

Additional support for businesses impacted by Omicron

The Chancellor has announced a number of additional support measures.

The Statutory Sick Pay Rebate Scheme will be reintroduced, with the Government covering the cost of Statutory Sick Pay for Covid-related absences of up to 2 weeks per employee for small and medium-sized employers across the UK. Firms will be eligible for the scheme from 21 December 2021 and will be able to make claims retrospectively from mid-January.

Businesses in the hospitality and leisure sectors in England will be eligible for one-off grants of up to £6,000 per premises.

More than £100 million will be made available for local authorities to support other businesses at their discretion.

£30 million will be made available through the Culture Recovery Fund, enabling more cultural organisations in England to apply for support up to March 2022.

As part of the support announced, the devolved administrations will receive around £155 million through the Barnett formula comprising around:

- £80 million for the Scottish Government;
- £50 million for the Welsh Government; and
- £25 million for the Northern Ireland Executive.

Sums paid to informants

The following was reported in Taxation last month:

> "HMRC paid informants £400,000 for tip-offs about tax fraud in the year to 31 March 2021, according to RPC.
>
> The City law firm says it is likely that a proportion of the money paid to informants would have been for information relating to abuse of Covid support schemes, including the furlough scheme. The dedicated hotline set up by HMRC to enable people to report suspected abuse of the furlough scheme had received more than 28,000 reports by the end of June 2021.
>
> The size of payment to an informant is decided case by case; however, it is often based on the amount of money HMRC expects to recover as a result of the information.
>
> Many investigations into furlough fraud will have been triggered by information provided by disgruntled or former employees seeking to punish bosses they feel have wronged them."

Taxation (2 December 2021)

Contractors working through umbrella companies to check payslips

Typically, umbrella companies employ temporary agency or contractor workers on behalf of an employment agency, with the agency providing the workers' services to their clients.

Concerned about tax avoidance schemes, HMRC has published new guidance that explains that receiving more money in a bank account than shown on the payslip could be a sign of tax avoidance and that workers should use HMRC's online calculators to check how much tax and National Insurance they should expect to pay.

The guidance also provides payslip examples showing different amounts of net pay. The guidance states that if any pay is described as non-taxable, the umbrella company could be involving the worker in a tax avoidance scheme. If a worker is asked to sign an annuity, loan or other agreement involving a non-taxable element of pay, especially if this involves someone other than their employer, it could be a tax avoidance scheme.

The guidance explains the risks of using disguised remuneration schemes, and details how to report any tax avoidance arrangements made by an umbrella company.

https://www.gov.uk/guidance/check-your-payslip-if-you-work-through-an-umbrella-company

Business Taxation

R&D expenditure not subsidised by clients

Summary - the company was not prevented from claiming relief for research and development (R&D) costs under the scheme for SMEs. Specifically, the First Tier Tribunal rejected HMRC's argument that the expenditure was subsidised by the company's clients.

Quinn was a construction company which operated across a number of sectors including commercial, residential, education and heritage. It tendered for work and for each project for which it was successful entered into a fixed price contract, based on standard industry terms.

In the course of various projects the company incurred R&D expenditure. For example, in renovating a 17th century listed mansion, it devised methods for replacing load-bearing timber joists with steel supports and adapted a micro-pile system to allow a lift to be installed. It claimed relief for the expenditure under the SME scheme but HMRC refused the claims. It was estimated that tax of at least £800,000 was at stake.

Decision

The only issue for the First Tier Tribunal was whether relief was prohibited as a result of the expenditure being 'otherwise met directly or indirectly by a person other than the taxpayer' (CTA 2009 s 1138(1)(c)).

HMRC argued that the expenditure was met by Quinn's clients. Quinn incurred the expenditure in the course of providing services to clients in respect of which it was entitled to payment and was in due course paid. It followed that the clients indirectly met the expenditure by paying the company for its services.

The First Tier Tribunal held that s 1138(1)(c) was not intended to apply in the absence of a clear link between the price paid by the client and the expenditure on R&D. In the overall context of the scheme, s 1138(1)(c) was intended as a sweep up provision to capture cases not within s 1183(1)(a) or (b) dealing with state aid and grants or subsidies. Expenditure would be 'otherwise met' in a similar sense to that in which expenditure may be 'met' by a state aid or a grant or subsidy. In this case, there was no such clear link between the price paid by the clients and the R&D expenditure, so that s 1138(1)(c) did not apply.

Quinn (London) Ltd v HMRC (TC/2020/01846)

Adapted from the case summary in Tax Journal (26 November 2021)

New Guidance for claiming enhanced allowances in Freeport sites

Up until 30 September 2026, businesses operating in a designated Freeport tax site can claim:

- 100% capital allowances relief on qualifying plant and machinery incurred up to and including 30 September 2026;

- enhanced Structures and Buildings Allowance of 10%, compared to the 3% normal rate.

HMRC has published guidance that explains how businesses qualify for these reliefs, how much relief can be claimed as well as how to claim.

Further, the guidance explains when such relief will be withdrawn, and provides a number of practical examples.

https://www.gov.uk/guidance/check-if-you-can-claim-the-enhanced-capital-allowance-relief-in-freeport-tax-sites

https://www.gov.uk/guidance/check-if-you-can-claim-enhanced-structures-and-buildings-allowance-relief-in-freeport-tax-sites

VAT and indirect taxes

More than one DIY claim

Summary – With no clear evidence in legislation that only a single claim can be made, the taxpayers were entitled to make a second DIY claim on their building work.

Andrew Ellis and Jane Bromley bought a wooden three-bedroom bungalow. In 2013, planning permission allowed for the demolition of the bungalow, with the subsequent construction of a replacement four-bedroom dwelling on the site.

Having engaged builders to construct the external walls, roof and windows, Andrew Ellis spent a number of years constructing the rest of the new home at weekends and during holidays,. During this phase the couple lived in a mobile home on the site.

Once the bungalow had been demolished, no council tax was paid until, in 2015, the council visited the premises and undertook a revaluation of the property in its then unfinished state. At that time, there was no suggestion that the works were completed. There was still much internal and external work to be done to satisfy the planning permission and building regulation requirements.

In 2017, the couple made an interim claim for repayment of VAT under the DIY Builder scheme in respect of £5,182.87 which was repaid by HMRC. At this time, no claims had been made for the construction of the required garden walls, accessway to the property or kitchen and bathrooms.

In 2019, a second claim was made but this was rejected. HMRC stated that s.35 VATA 1994 provides that only a single claim for repayment of VAT by a DIY builder may be made under the VAT DIY Builder Scheme. They referred to the references to “a claim” and “the claim” in s.35 and the use of the possessive pronoun “his claim” in the regulation 201. HMRC also referred to the guidance notes which form part of the claim form VAT 431NB which state:

> “You can only make one claim and your claim must be made within three months of the building having been completed.” (See the side note to section 2 of the Notes at page [92] of the Bundle).
>
> “Remember you can only make one claim no later than three months after the construction work is completed”. (See Part B Point 14 on page 92 of the Bundle.)
>
> “Remember you can only send one claim and that claim must be submitted no later than three months after work of construction has been completed.” (See Part F of the Notes at page [95] of the Bundle.)

The couple appealed.

Decision

The First Tier Tribunal found that s.35 does permit more than one claim. On the plain reading of the legislation there is no express indication that only one claim may be made. The Tribunal stated:

> "Like many provisions, section 35 VATA is drafted in the singular. Drafting in the singular is an established technique to assist in clarity and to enable the proposal to be dealt with succinctly."

The Tribunal went on to state:

> "As there is no express indication to the contrary in section 35 VATA, section 6 Interpretation Act 1978 applies to confirm that the reference to "a claim" in section 35 VATA must be read as including "claims".

The First Tier Tribunal confirmed that the legislation states that a claim can be made up to three months after the completion of the building. There was no evidence of the new building having been completed in 2017 at the time of the first claim. The property's council tax re-banding did not mean that a building was legally complete. It merely meant that enough work had been done for it to become habitable.

The couple's appeal was allowed.

Andrew Ellis and Jane Bromley v HMRC (TC08277)

Flat rate errors

Summary – The company had not operated the flat rate scheme correctly when applying the correct percentage to the net rather than gross sales values. Further, it had incorrectly claimed input tax. The Tribunal confirmed that it only had the power to review the accuracy of the assessment, and not HMRC's conduct.

Swiss Dawn Consultants Limited was registered for VAT with effect from 5 August 2014. It operated using the Flat Rate Scheme trading as a 'Management Consultancy' using its appropriate percentage of 14% but reduced to 13% for its first year.

In December 2017 HMRC wrote to the taxpayer to begin a review into the company's VAT returns and in January 2018 wrote again, this time stating that, based on the information in its possession, it considered that there were errors in the Company's VAT returns. Following further correspondence it was concluded that the company had calculated the VAT due by applying the appropriate percentage to its net rather than gross turnover. Further, some input tax had been claimed on invoices that were not for capital expenditure goods. As a result, in December 2018 HMRC issued a VAT "best judgment" assessment, under s 73 VATA 1994, for £8,474.

Swiss Dawn Consultants Limited appealed to the First Tier Tribunal arguing that HMRC should have been 'more vigilant in checking the returns' and that HMRC's guidance was not clear. Further the company complained about the stress that had been caused by HMRC's enquiry

Decision

The First Tier Tribunal agreed with HMRC that the company had not operated the flat rate scheme correctly and that it incorrectly claimed input tax. There was a small adjustment to the assessment as the second input tax claim had already been corrected.

HMRC accepted that there had been less than perfect customer service during the process that had caused some stress, with the First Tier Tribunal commenting that HMRC was right to acknowledge its poor service but that the First tier Tribunal did not have the jurisdiction to consider that conduct.

Swiss Dawn Consultants Limited (T0C8311)

High Court decision on private hire car operators

Summary - The High Court has held that it was unlawful for a private hire vehicle operator to act as an agent between a driver and passenger, meaning that the operators themselves, rather than individual drivers, contract with passengers.

The Supreme Court decision in Uber v Aslam [2021] UKSC 5 previously found that drivers who worked through the operator's smartphone app were workers and so qualified for various rights. In that decision, Lord Leggatt also raised the prospect of the company being in contravention of transport law.

This point was taken forward in the High Court in United Trade Action Group Ltd, R (oao) v Transport for London (Rev1) [2021] EWHC 3290 (Admin) which held that, in order to operate lawfully:

> 'a licensed operator who accepts a booking from a passenger is required to enter as principal into a contractual obligation with the passenger to provide the journey which is the subject of the booking'.

Many operators adopt models under which the individual driver provides the services, and the operator takes a cut of the fee received by the drivers. Individual drivers are unlikely to breach the VAT registration threshold, and any standard-rate VAT on Uber's booking fees is likely to be accounted for under the reverse charge (with the relevant Uber company based in the US), resulting in transactions effectively being VAT-free.

The High Court decision means that the operator rather than the individual driver is supplying the services, which are likely to be standard-rated supplies for VAT purposes. In a filing to the US Securities and Exchange Commission in 2019, Uber disclosed that classification as a 'transportation provider' would expose it to VAT on gross bookings 'both retroactively and prospectively' – a bill which the Financial Times estimated could cost more than £1bn.

Adapted from the article in Tax Journal 10 December 2022

No need to prove supplies had taken place

Summary – The Upper Tribunal remade the First Tier Tribunal decision, reinstating the penalty based on the lower tribunal's conclusion that if the supplies had taken place – and both parties agreed they had – HMRC was entitled to the penalty.

Korum Wholesale Limited claimed input VAT incurred on purchases of 11 consignments of alcohol it had bought. The company claimed that it sold the alcohol to another company and declared output tax due on those supplies.

HMRC argued that the transactions were connected to the fraudulent evasion of VAT and that Korum Wholesale Limited knew this to be the case. It disallowed the input VAT claim. Further, the inaccuracies were deliberate and concealed with the result that a 100% penalty applied. This made the penalty recoverable from Laurence Donnelly in his capacity as a director of Korum Wholesale Limited.

The First Tier Tribunal found that Laurence Donnelly was in principle liable for a penalty, but the amount depended on whether the supplies had taken place. If they had not, the penalty would be nil because the overstated input tax claim would be cancelled by the overstated output tax – which was in HMRC's favour. The tribunal was not satisfied that the goods had been sold and allowed Laurence Donnelly*'s* appeal.

HMRC appealed to the Upper Tribunal arguing that the First Tier Tribunal had erred in considering whether the supplies had taken place when both parties agreed they had.

Decision

The Upper Tribunal agreed with HMRC.

There was no need to prove the supplies of alcohol had taken place because this was not in dispute.

HMRC's appeal was allowed.

HMRC v Laurence Donnelly [2021] UKUT 0296 (TCC)

Adapted from the case summary in Taxation (9 December 2021)