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Personal tax

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Summary – With the employee not included on the payroll, the company had to repay the Coronavirus Job Retention Scheme grant claimed in error.

Luca Delivery Limited made claims under the Coronavirus Job Retention Scheme (CJRS) for its director, his wife and an employee.

The employee had been working and paid by the company since December 2019, but she was not included on the RTI returns until June 2020.

One of the conditions for receipt of the CJRS grant was that the employee must have been included on the Real Time Information return which had been submitted to HMRC immediately preceding lockdown, so by 28 February 2020 or by 19 March 2020.

This not being the case, HMRC issued assessments to recover CJRS payments of £4,789.35 made to the employee for the period from 1 May 2020 to 31 October 2020.

The accountants had informed HMRC that it intended to correct the earlier RTI returns to include the employee from the date her employment began but this had not happened.

The company appealed arguing that their accountants, SJPR Accountants Ltd, had been responsible for running the company's payroll and had failed to add the employee when instructed.

Decision

The First Tier Tribunal found that the failure to include the employee on the payroll from December 2019 had been caused by the accountant's oversight.

However, on a strict interpretation of the legislation, the company had not included the employee in the appropriate RTI returns and the appeal was dismissed.

Even if the accountants had corrected the RTI returns, this would not have changed the CJRS position as the employee had not been included in a return filed on or before 28 February 2020 and/or 19 March 2020. The First Tier Tribunal stated that "Retrospective correction of an oversight or other omission does not change the CJRS position."

The First Tier Tribunal stated that the company might have a claim against its accountants but that it did not have the jurisdiction to decide such issues.

Luca Delivery Limited v HMRC (TC08752)

Director’s loan write off (Lecture P1371 – 16.04 minutes)

Summary – When a company was placed into creditors’ voluntary liquidation, the effective date of the directors’ loan write off was the date of the settlement agreement.

Simon and Debra England were directors and participators of Alexander Lauren Associates Limited. The company provided car finance to the motor trade via the internet.

On 26 September 2012, the company was placed into creditors’ voluntary liquidation. At that time the directors had a balance on the Directors’ Loan Account of £1,009,063.

A settlement agreement was entered into on 28 October 2013, whereby provided the directors settled £100,000 over the next two years, the remaining £909,063 would be released. If the repayment terms were not met, the full balance would become payable immediately.

The directors believed that the write off was taxable over two years and so no entries were included on their 2013/14 tax returns.

HMRC disagreed, stating the full amount released was taxable in 2013/14, when the settlement agreement was signed.

The directors appealed.

Decision

The First Tier Tribunal analysed the settlement agreement in detail and noted that the agreement stated that:

The £100,000 payment over two years represented the "full and final settlement" of the balance due;

Clause 4, which was headed “Release”, confirmed that the Liquidator “was positively obliged to release/write off the £909,063.00” at the time of the agreement.

The Tribunal concluded that in substance the transaction was one of release and write-off of the £909.063 at the time of the agreement. It was binding at that date.

The appeal was dismissed.

Simon and Debra England v HMRC (TC08770)

Supply of workers (Lecture P1371 – 16.04 minutes)

Summary – An employment agency was not liable for PAYE and national insurance on worker's wages paid under a time to pay arrangement.

This case concerned a number of issues. The one that we are looking at here was whether the employment agency was liable to pay the PAYE and National insurance due when its client went into administration.

Prisma Recruitment Ltd sourced workers for a consultancy company, BGM Group Ltd.

BGM Group Ltd used the workers' services to fulfil consultancy work in the financial services sector for clients such as Royal Bank of Scotland and Barclays.

Prism Recruitment Limited accounted for PAYE and national insurance on the workers' wages and recharged the cost to BGM Group Ltd, with commission. However, Prisma Recruitment Ltd and BGM Group Ltd considered that the workers were employees of BGM Group Ltd, not Prisma Recruitment Ltd, with the agency acting as introducer, not hirer.

BGM Group Ltd charged the banks a consultancy fee. It did not directly recharge the workers' wages.

BGM Group Ltd then went into administration and HMRC approached Prisma Recruitment Ltd to pay outstanding PAYE and national insurance liabilities for the workers.

Prisma Recruitment Ltd reconsidered the arrangement with the BGM Group, and on reflection, considered that it was not liable to pay outstanding PAYE and national insurance liabilities under the agency worker provisions of Chapter 7 ITEPA 2003. The supply was of 'excluded services' under s.47(2)(b) ITEPA 2003. These services include those provided wholly in the worker's own home, or at other premises which are neither controlled nor managed by the client. Viewing the supply chain with the BGM Group, the workers supplied their service either from home, or at the banks' premises. These were neither controlled nor managed by Prisma Recruitment Ltd's client, the BGM Group.

HMRC took the view that the banks were the client, and the workers' services could not therefore be excluded services as work was carried out at their premises.

Decision

The First Tier Tribunal found that the BGM Group was Prisma Recruitment Ltd's client, with no contract existing between Prisma Recruitment Ltd and the banks.

The banks, Prisma Recruitment Ltd and the BGM Group all viewed the workers as employees of the BGM Group.

The fact that Prisma Recruitment Ltd had accounted for PAYE and national insurance and entered into a time to pay agreement with HMRC for these amounts, did not change this analysis.

The appeal was allowed in relation to PAYE and NICs and directed the overpaid tax and NICs (which was allegedly paid by Prisma Recruitment Limited to dissuade HMRC from taking enforcement action) to be refunded.

Prisma Recruitment Limited v HMRC (TC08762)

Adapted from Tax Journal (31 March 2023)

Capital taxes

Ties had not been ‘substantially loosened’ (Lecture P1371 – 16.04 minutes)

Summary – An Australian-born individual was UK resident in 2011/12 and part of 2012/13, meaning he was liable to pay in excess £1million CGT on the disposal of his UK properties.

Darryn Lyons was born in Australia and moved to the UK in 1988, with the intention that one day he would return to Australia. To that end, he had bought several properties and built up an Australian business alongside his UK property and business transactions.

By 2010 he was starting to plan his return to Australia, finally moving there in October 2011, well before the start of 2012/13. He remained in Australia for much of the next six months but returned to the UK on 29 April 2012 for just over a month to make final arrangements in respect of his UK assets. After that, he visited the UK infrequently.

Darryn Lyons believed that:

- he could spend up to 45 days in the UK each tax year without becoming UK resident;
- he was resident in Australia by 2012.

HMRC disagreed and assessed him to CGT totalling in excess of £1million UK property gains made in 2012/13. This tax year preceded the introduction of the statutory residence test. Under the earlier rules, Darryn Lyon’s was UK resident as his UK ties had not been ‘substantially loosened’ before 6 April 2012.

Darryn Lyons appealed.

Decision

In deciding whether Darryn Lyons had ‘substantially loosened’ ties with the UK by the start of 2012, the First Tier Tribunal took into account his appearance on reality TV shows in both countries, as well as the fact that he ran businesses and owned properties in both countries. Further the Tribunal considered the timing of when he had shipped his pets and personal belongings to Australia as well as when his cars were shipped, gifted, or sold. Finally, the Tribunal considered when his UK bank account was closed and when he stopped paying council tax and being on the electoral register.

The First Tier Tribunal accepted that by 2011/12 Darryn Lyons had increased his ties with Australia. However, by April 2012, he had not passed the ‘substantially loosened’ test. He still had the majority of his belongings in his UK home and was both chairman and shareholder of his UK business. He continued to have UK bank accounts and mortgages and was registered with a UK doctor and dentist. He had UK health insurance, a UK life insurance policy, a UK mobile phone and was still on the UK electoral register. The First Tier Tribunal found that Darryn Lyons had done 'little more than develop a clearer intention to relocate and put the commercial properties on the market'.

The appeal was dismissed.

Darryn Lyons v HMRC (TC08765)

Property for daughter’s sole use (Lecture P1371 – 16.04 minutes)

Summary – Despite a mother merely assisting her daughter to obtain a mortgage to be able to buy her new home, higher rate Land Transaction Tax was payable as the mother owned another home.

Olivia Hayes wanted to buy a property to live in as her main residence but was only able to do so with the help of her mother, Lorraine Hayes, who was the borrower under the mortgage used to buy the Property.

Lorraine Hayes owned another property with her husband, in which she lived. She did not and has never lived in the new property.

The property was acquired for £136,000, with an effective date of 28 May 2021 and the property transfer form (TR1) and the land transaction return submitted to the Welsh Revenue Authority (WRA) showing that the transaction was a higher rates transaction and included Land Transaction Tax due of £5,440, which was paid.

However, on 2 July 2021 an amendment was made to the return to add the second buyer, Olivia Hayes, who had been inadvertently left off the first return.

A further amendment was made on 18 January 2022, to state that it was a normal residential transaction, without the application of the higher rates of Land Transaction Tax, reducing the amount payable to zero.

Following an enquiry by The Welsh Revenue Authority a closure notice was issued, amending the return to show that the higher residential rates applied and that therefore the original amount of Land Transaction Tax, £5,440, was due.

Lorraine Hayes appealed arguing that her involvement in the purchase and ownership of the property was simply a “paper exercise” to enable her daughter to buy the property. On her own, her daughter did not meet the affordability requirements to obtain the necessary mortgage and therefore the mortgage company required Lorraine Hayes to become a borrower on the mortgage as well. The intention was that as soon as her daughter’s affordability requirements improved, she would come off both the mortgage and the deeds of the property.

Decision

The Tribunal stated that Lorraine Hayes claimed that she did not have any beneficial interest in the property but did not have any documentary evidence to support that position.

The Tribunal found that the evidence that was available showed that Lorraine Hayes was the joint owner of the property at the Land Registry and that no specific arrangements had been shown that would alter the usual beneficial ownership consequences of that title.

Consequently, the Tribunal found that the transaction was a higher rates transaction in accordance with Land Transaction Tax Act 2017. It had no power to deviate from the legislation, under which the higher rates clearly applied.

Mrs Lorraine Hayes v The Welsh Revenue Authority (TC08754)

Power cables and mixed use (Lecture P1371 – 16.04 minutes)

Summary - The existence of an electricity distribution network on in the grounds of a property did not render that property of mixed use for SDLT purposes.

On 23 August 2019 James Faiers bought a property near Canterbury and paid Stamp Duty Land Tax (SDLT) on the basis that the property and grounds were entirely residential property.

In March 2020 he amended his return as he believed that the property had been misclassified and should have been classified as mixed/non-residential. He argued that the existence of a commercial electricity distribution network within the grounds and operated by Eastern Power Networks meant it was not solely residential property and so the lower rates of SDLT applied.

HMRC opened an enquiry into the amended return, later issuing a closure notice concluding that the property acquisition did not qualify as a mixed-use transaction.

James Faiers appealed.

Decision

The First Tier Tribunal acknowledged that the pole and cables:

- were clearly used for a separate, non-residential purpose, carrying electricity, which was a commercial operation and the pole and cables were on the land for a commercial purpose;
- limited activities like putting up a marquee or a trampoline and prevented trees being planted close to the cables.

However, the poles and cables did not stop him mowing beneath the equipment and, from the exhibited photographs, there is no difference in quality or appearance between the ground underneath the cables and the rest of the ground in that part of his land. Sheep could safely graze under the equipment and indeed, new trees had been planted and a large play fort erected close to the equipment.

The Tribunal concluded that while the cables placed limits on what James Faiers could do in that part of his land, they did not prevent the land looking like, or being used for ordinary day to day purposes in a similar way to, the surrounding area.

The Tribunal stated that the pole and cables could be described as “akin to a right of way, something which impinges on the owner's enjoyment of the grounds but does not in any realistic way make the affected land any less part of the grounds of the dwelling”.

The property was not mixed-use, and the appeal was dismissed.

James Faiers v HMRC (TC08768)

Sub-sale scheme fails

Summary – Subsale relief was not available on the grant of the option and so Stamp Duty Land Tax was payable.

In July 2011, Oisin Fanning, who was chief executive officer of San Leon Energy plc, took part in a stamp duty land tax avoidance scheme involving subsale relief. He bought a residential flat for £5 million and, at the same time as the contract for the acquisition of the property was completed, granted a call option to San Leon Energy for £100 under which the company could buy the flat for a market value consideration. However, under the scheme, the company would not exercise the option.

Oisin Fanning claimed that stamp duty land tax was not due because subsale relief applied (s.45 FA 2003).

The First Tier Tribunal and Upper Tribunal agreed with HMRC that relief was not due.

Oisin Fanning appealed.

Decision

The Court of Appeal said s.45(1)(b) required there to be an assignment, subsale or other transaction under which San Leon Energy would become entitled to call for a conveyance of the property no later than the completion of the sale to the taxpayer. The grantee of an option, however, 'had no such entitlement unless and until the option is exercised'. The grant of an option therefore did not meet the statutory requirements of s.45(1)(b) if it was not exercised before the completion. It was not an 'other transaction' as referred to in that provision.

The court considered this conclusion was consistent with the policy objectives. Parliament could not 'readily be taken' to have intended s.45 to be a means of avoiding SDLT by 'the simple mechanic of the grant of an option when the original buyer ended up with enjoyment of the property, rather than the purchaser under the subsale.

Oisin Fanning’s appeal was dismissed.

Oisin Fanning v HMRC [2023] EWCA Civ 263

Adapted from the case summary in Taxation (6 April 2023)

Administration

Agent not authorised (Lecture P1371 – 16.04 minutes)

Summary – With the taxpayer having no knowledge that returns were submitted by his agent, HMRC's discovery assessments were invalid.

Robert Robson worked offshore and was referred to Capital Allowances Consultants Ltd by a work colleague who thought that he might be entitled to a rebate.

On 29 September 2016 Capital Allowances Consultants Ltd advised that they had requested an authorisation code from HMRC, which Robert Robson forwarded to them following its receipt.

Rather than processing rebate claims, Capital Allowances Consultants Ltd proceeded to submit Self Assessment tax returns via the Agents Services Account as follows:

- 2015/16 return - generating an overpayment of tax of £8,250 repaid to the nominee named on the return, Cryoblast;
- 2016/17 return - generating a repayment of £16,513 to the named nominee on the return, ECO Cooling Solutions Ltd.

On 1 March 2019 HMRC wrote to Robert Robson regarding claims for Enterprise Investment Scheme relief contained in the returns. He confirmed that he had never made such investments and so discovery assessments were raised on 29 March 2019 and on 3 April 2019 to collect the monies due to HMRC.

Robert Robson appealed. He accepted that he was not eligible for EIS relief. However, he argued that he had no knowledge of the claims being made on his behalf and that the person alleged to be acting on his behalf was acting fraudulently.

Decision

Having received rebates in the past, the First Tier Tribunal accepted Robert Robson's:

- explanation that "due to the erratic pay structure of his work and bonus payments he believed he was due a tax rebate and had received similar payments in the past";
- evidence that he contacted Capital Allowances Consultants Ltd to seek assistance as he had always been PAYE and did not understand how to claim money owed.

The Tribunal did not find it unreasonable that Robert Robson had relied on what he believed to be "regulated accountancy advice in pursuing a rebate". He had not acted carelessly.

The documentary evidence submitted supported Robert Robson's claim that he believed that his agent was dealing with a tax rebate. By submitting tax returns that included EIS claims, Capital Allowances Consultants Ltd had acted fraudulently.

The First Tier Tribunal found that Robert Robson had not authorised Capital Allowances Consultants Ltd to submit Self Assessment returns or claim EIS relief.

As the company was not the taxpayer’s authorised agent, the return could not be deemed to have been submitted on his behalf.

The appeal was allowed.

Robert Robson v HMRC (TC08746)

Failure to file

Summary – Penalties imposed for failure to file the taxpayer’s Self Assessment return were found to be appropriate and correct.

Onuchika Eleonu worked through an umbrella company, Nopalaver Payroll Solutions Ltd, as a senior community practitioner in the NHS.

In April 2019, she received a notice to file a Self Assessment return for 2019/20. In November 2020 she sought advice from Citizen’s Advice about her tax affairs but as of the appeal hearing date, the Self Assessment return had still not been filed.

During this time, HMRC had issued late filing penalties which included daily penalties.

Onuchika Eleonu filed a notice of appeal in November 2021.

Decision

The First Tier Tribunal found that there was no evidence to support the taxpayer’s claims that she had a reasonable excuse for not filing the return.

Initially, she claimed that as a payrolled employee, with tax and national insurance deducted at source, she did not believe that HMRC had the right to ask her to file a Self Assessment return, as she had already paid over what was due. She claimed that she had received legal advice to support this belief but could produce no supporting evidence.

She put forward other reasons for not filing her return but could produce no evidence to support an illness claim or the fact that a change of address had meant that she did not receive the notice to file the return.

Finally, she claimed that she had submitted the return. HMRC had no record of this and she could provide no evidence of submission to support her claim.

The appeal was dismissed.

Onuchika Eleonu v HMRC (TC08726)

Deadlines

1 May 2023

- Corporation tax for periods ended 31 July 2022 (SMEs not liable to pay by instalments)

3 May 2023

- Filing date for printed form P46 (Car) for quarter ended 5 April 2023

7 May 2023

- Electronic filing and payment of VAT liability for quarter ended 31 March 2023

19 May 2023

- PAYE/NICs/CIS/student loan liabilities due for month to 5 May 2023 if not electronic
- File monthly CIS return

21 May 2023

- File online monthly EC sales list – business based in Northern Ireland selling goods
- Submit supplementary intrastat declarations for April 2023
  - arrivals only for a GB business
  - arrivals and despatch for a business in Northern Ireland.

22 May 2023

- PAYE, NIC, CIS and student loan should have cleared HMRC's bank account

31 May 2023

- P60 to employees on the payroll at 5 April 2023
- Accounts to Companies House
  - private companies with a 31 August 2022 year end
  - public limited companies with a 31 November 2022 year end
- Filing date for CTSA returns for companies with periods ended 31 May 2022

News

No more paper returns

From 6 April 2023, taxpayers wishing to file a paper Self Assessment return will need to call HMRC to request the forms required. Forms will no longer be sent out automatically and will not be available for download.

Exemptions will apply for those aged over 70 who have not previously filed online and for sight impaired taxpayers, who will continue to receive paper forms automatically.

https://www.tax.org.uk/hmrc-stakeholder-digest-23-march-2023

Late payment interest rises again

Following the Bank of England base rate increase from 4% to 4.25%., HMRC has once again increased their interest rates.

The current late payment and repayment interest rates applied to the main taxes and duties that HMRC currently charges and pays interest on are:

- late payment interest rate — 6.75% from 13 April 2023
- repayment interest rate — 3.25% from 13 April 2023

Interest charged on underpaid quarterly instalment payments will be 5.25% from 3 April 2023.

https://www.gov.uk/government/publications/rates-and-allowances-hmrc-interest-rates-for-late-and-early-payments

Business Taxation

Lineker avoids IR35 (Lecture B1371 – 19.03 minutes)

Summary – Gary Lineker had signed contracts for his work acting as principal for his partnership. As he had contracted directly, he was not caught by IR35.

Gary Lineker provided his services to the BBC and BT Sport through Gary Lineker Media, in partnership with his wife at the time, Danielle Bux.

Danielle Bux was entitled to a fixed sum of £30,000 each year.

For 2013/14 to 2017/18, he filed Self Assessment tax returns, including partnership pages reporting his partnerships profits on which he paid income tax and class 4 National Insurance.

HMRC sought to charge PAYE and NIC on the basis that the work fell within the Intermediaries legislation.

The couple appealed.

Decision

The First Tier found that IR35 could apply to a partnership as s.49(3) ITEPA 2003 states that rules include "a partnership or unincorporated body of which the worker is a member." This is further confirmed in s.52 ITEPA 2003 and by s.164 ITTOIA 2005 that details 'special rules for partnerships' when calculating the profits to be treated as employment payments under the intermediaries legislation.

The Tribunal confirmed that Gary Lineker Media was a valid partnership but went on to consider s.49(1)(b) ITEPA 2003 which states that the intermediaries legislation does not apply where the services are provided under a contract signed directly between the client and the worker.

The Tribunal found that in each case the broadcaster concerned had contracted with the partnership for the services of Mr Lineker and that the contracts were signed by Gary Lineker, rather than Danielle Bux. S.5 Partnership Act 1890 gives the partners the power to bind the firm, each partner acting as principal and as agent. As a matter of law, when Gary Lineker signed the contracts for the provision of his services, he did so as principal thereby contracting directly with the BBC and BT Sport. The intermediaries legislation could not apply.

The judge went on to say that had the contracts been signed only by Danielle Bux acting as principal on behalf of the partnership, Gary Lineker would not have contracted directly and IR35 would have applied. His services would have been provided not under a contract directly between the BBC/BT Sport and Gary Lineker.

The appeal was allowed.

Gary Lineker And Danielle Bux (T/A Gary Lineker Media) v HMRC (TC08774)

Intermediaries legislation applied (Lecture B1371 – 19.03 minutes)

Summary – The First Tier Tribunal were correct to find that under a hypothetical contract Eamonn Holmes was employed by ITV and IR35 applied.

Red White and Green Limited is the personal service company of Eamonn Holmes who is a journalist and broadcaster. During the period 2011 to 2015, he worked as a presenter on many projects including as a presenter of 'This Morning' for ITV and 'Sunrise' for Sky News.

This appeal concerned his work for ITV and covered the tax years 2011/12 to 2014/15.

HMRC issued determinations and notices on the basis that the intermediaries legislation applied. These were upheld by the First Tier Tribunal.

Red White and Green Limited appealed to the Upper Tribunal arguing that the First Tier Tribunal erred in its decision both in relation to control and when considering the whole picture.

Too much weight had been given to "how' the role was carried and not enough focus had been placed on 'what' services were performed. The company argued that editorial control was not the deciding factor. Eamonn Holmes had "considerable autonomy" over the way in which he provided his services and cited various examples including that he could decide when and where he would prepare for the programmes and when he arrived at and left the studios.

Looking at the big picture, the First Tier Tribunal's decision had disregarded certain factors, including that the Tribunal gave no weight to Eamonn Holmes' other activities, in particular the fact that he was in business on his own account.

Decision

In reaching its decision on control, the Upper Tribunal found that control over what is to be done is an important factor but control over how, where and when services are to be performed remains relevant.

The Upper Tribunal found that:

- compliance with the industry regulator was a relevant factor; indeed, in *Kickabout* the Court of Appeal described it as being "highly relevant";
- whilst there was no right of deployment to undertake other roles as such, there were rights to require Eamonn Holmes to carry out promotional work as and when reasonably required and without further payment.
- there was a contractual right for ITV to require Eamonn Holmes to present 'This Morning' on such dates and locations that it notified at its sole discretion.

Those were relevant rights of control. The Upper Tribunal were satisfied that the First Tier Tribunal reached a conclusion which was available to it on the evidence and there is no ground for it to interfere with that conclusion.

The Upper Tribunal confirmed that the First Tier Tribunal had not erred when painting its picture. In their judgment it was clear that the First Tier Tribunal 'took an approach which involved balancing all factors which it considered to be relevant.'

The First Tier Tribunal expressly stated that it was 'taking account of the full range of other activities Mr Holmes carried out' and identified factors which suggested that the ITV contract were not part of his business on his own account.

He did not display any of the characteristics of being in business on his own account as regards his work for ITV. This work gave him 'no real ability to increase his profits from his work, save by doing a good job and having his contract renewed; he did not have any real economic risk or risk of bad debts'.

The appeal was dismissed.

Red White And Green Limited v HMRC [2023] UKUT 00083 (TCC)

Share activity not trading (Lecture B1371 – 19.03 minutes)

Summary – Buying and selling shares was not a trade which meant that losses from that activity could not be offset against other income.

Nicholas Henderson was a partner in a professional firm. He had been buying and selling shares for a number of years in his personal capacity, which were treated as capital transactions but in the 2013 and 2014 tax years he did not undertake any activity.

Having inherited a substantial sum of money, he gave notice to the partnership, went on 'garden leave' from 1 December 2015 and finally retired on 31 January 2016. He placed most of his inherited money in a discretionary investment account, where the investment decisions were made by fund managers with no input from him. The returns from these investments were not part of this appeal.

He started making execution-only share transactions at some point between receiving his inheritance and handing in his notice to the partnership. It is the returns from these investments which are the subject of this appeal.

He was not a registered or regulated trader and did not buy or sell shares on behalf of third parties. He held shares for between a few days and several months. Shares were not always sold in the same blocks as purchased.

He made a loss in 2015/16 and 2016/17. He claimed loss relief on the basis that the activity was carried on in a non-active capacity as he could not demonstrate that he had spent more than 10 hours per week on average across the tax year on the activity. The sideways loss relief claims had therefore been restricted to £25,000 in accordance with s74A ITA 2007.

By May 2017, he had decided that the income from his share transactions was not enough to support his outgoings and so he took up a new employment. By 5 April 2018 he had sold all but three of the shareholdings.

HMRC denied his loss relief claims stating that his activities did not amount to a trade or, if it was a trade, it was not carried on commercially.

Nicholas Henderson appealed.

Decision

The First Tier Tribunal stated that while the badges of trade had limitations, the relevant badges could ‘nevertheless provide a useful framework within which to consider the circumstances’ (Eclipse Film Partners No 35 LLP [2015] STC 1429).

The First Tier Tribunal concluded that:

- while not conclusive, trading on average one trade per week was indicative that the activity was not trading;
- the one to two hours a day that he spent on his share activity, fitted around other activities, was more in line with him managing an investment portfolio;
- he had no clear plan for the activity, and what he did was not carried out in an organised way as would be expected if he were running a business;
- someone who was undertaking as a serious trading activity would have made changes to the activity when faced with accumulating losses. He failed to do this.

Standing back, and looking at the overall picture, the First Tier Tribunal concluded that Nicholas Henderson was not trading. He was managing a portfolio of personal investments for growth rather than income.

Nicholas Henderson v HMRC (TC08755)

Profits reallocated via a corporate member

Summary - Discretionary deferred profits reallocated via a corporate LLP member to its LLP members were taxable as miscellaneous income.

The individual LLP members were members of the HFFX LLP and were involved in coding and developing automated foreign exchange trading. The LLP deployed the automated trading to make substantial profits.

The LLP entered into a scheme to defer the entitlement of the individuals to part of their profit shares. Under the scheme, a share of the profit was allocated and paid to a corporate partner, GSA Member Ltd, which then had discretion to allocate sums as 'special capital' to the individual members, taking account of the managing member's recommendations.

HFFX LLP argued that the individual members were taxable only on the share or the profit allocated directly to them. The share allocated to GSA Member Ltd was taxable at corporation tax rates and the payments of special capital were also not chargeable to income tax as they were the transfer of a capital asset.

Decision

HMRC had appealed against the First Tier Tribunal's decision that the full LLP profits were allocated to the individual members when the profits were divided. In the light of the decision in *BlueCrest Capital Management LP* [2022] UKUT 200 (TCC) in which a similar argument was dismissed, HMRC accepted that their appeal on this point should be dismissed (but reserved their right to revive the point on appeal to contend that *BlueCrest* was wrong).

The appellants appealed against the First Tier Tribunal’s decision that the amounts received by the members as special capital were taxable as miscellaneous income under s.687 ITTOIA 2005. The dispute here centred on whether there was a sufficient link between the source and the recipient. The appellants argued that there had to be a legal obligation on the payer to pay. Because of the discretionary nature of the allocations to individual members, this was lacking in this case.

The Upper Tribunal held, however, that the case law showed that it was enough for there to be a legal obligation to exercise a discretion and a payment following that exercise. The member's right to allocation in accordance with the LLP deed, once a discretion was exercised in their favour constituted a source with a sufficient link to the payment.

This was sufficient to dismiss the appellants' appeals, but the Upper Tribunal also considered HMRC's alternative argument that the amounts received were taxable under the sale of occupation income rules (ss. 773 – 778 ITA 2007). The appellants argued that the conditions were not met because their activities were not a profession and because the avoidance of tax was not a main object of the arrangements. The Upper Tribunal held, however, that the First Tier Tribunal had been entitled to reject both arguments. If it were wrong on the miscellaneous income issue, therefore, the Upper Tribunal would have dismissed the appeals on the sale of occupation issue instead.

There were two further minor matters which the Upper Tribunal considered. It held that a discovery assessment on one of the individual members was validly made and upheld the First Tier Tribunal’s decision not to redact its judgment to remove confidential and commercially sensitive figures.

HFFX and others v HMRC [2023] UKUT 00073 (TCC)

Adapted from the case summary in Tax Journal (31 March 2023)

VAT and indirect taxes

Seller was not a developer - Supreme Court decision

Summary – The seller of a property that had been opted to tax did not meet the provisions allowing him to disapply that option, meaning VAT was chargeable at the standard rate.

In May 2001, Mr Moulsdale bought a property on which the seller had opted to tax. He opted to tax the property enabling him to claim back the input VAT incurred on his purchase.

In 2014, Mr Moulsdale sold the property to a company which was not registered for VAT. He did not add VAT to the purchase price believing that Paras 12 - 17, Schedule 10 VATA 1994 applied, meaning his option to tax was disapplied and so the sale of the property was VAT exempt.

HMRC disagreed and raised an assessment to collect the VAT due.

Mr Moulsdale's appeal was dismissed by the First Tier and Upper Tribunals as well as the Court of Session.

Decision

The case turned on whether the taxpayer was a 'developer' of the land as defined in Schedule 10 paras 12 to 17.

Under schedule 10:

1. If Mr Moulsdale intended or expected the purchaser to pay VAT on the sale price for the building (that price being more than the minimum set of £250,000) then he would be a developer of the land. That would mean that paragraph 12(1) of Schedule 10 disapplied the option to tax, so that the sale of the land reverted to being an exempt transaction on which he should not charge VAT.

2. However, if he did not intend or expect that the purchaser would pay VAT on the price of the building, then he would not fall within the definition of a "developer of the land" and the option to tax would still apply, making the sale subject to VAT.

Mr Moulsdale argued that because he exercised the option to tax in relation to the land, he did intend or expect that the purchaser would pay VAT on the purchase price of the land, meaning that the sale was exempt.

The Supreme Court agreed with HMRC that the relevant intention or expectation as to whether the purchaser would pay VAT on a capital expense in relation to the building must be an intention or expectation about incurring VAT on some other cost and not simply the purchase price. In this case, the intention/expectation related only to the actual price of the building and so VAT was chargeable at standard rate.

The Supreme Court maintained that Schedule 10 is aimed at ensuring that exempt businesses cannot recover input tax. The Supreme Court stated that:

> "This purpose would be defeated on the construction Mr Moulsdale argues for. On his broad construction, the provisions would enable him to have the benefit of the option to tax the land as long as that was favourable to him but enable him to switch off the option to tax simply by selling it if he did not want to have to charge the purchaser VAT on the purchase price".

HMRC was therefore correct that Mr Moulsdale should have charged VAT on the sale price and his appeal was dismissed.

Moulsdale t/a Moulsdale Properties v HMRC [2023] UKSC12

Supplies closely related to education (Lecture B1371 – 19.03 minutes)

Summary – Supplies made in relation to a training restaurant were exempt while those relating to a hair and beauty salon and performing arts centre were liable to VAT.

Fareham College was a further and higher education college that operated a training restaurant, a hair and beauty salon and a performing arts centre from which services were provided to the public. These were staffed by students to help them gain practical work experience as part of their courses.

During the period 1 May 2011 to 30 April 2015, the college accounted for output tax on these supplies. However, on 30 July 2015 the college sought a repayment of nearly £70,000 of output tax paid. The college argued that these supplies were closely related to the provision of their exempt training making them exempt under to Item 4 Group 6 Schedule 9 VATA 1994.

HMRC disagreed, arguing that the basic purpose of the supplies was to obtain additional income through transactions that were in direct competition with other commercial businesses. Consequently, the VAT exemption did not apply. Fareham College appealed.

Decision

The First Tier Tribunal found that Item 4 should be interpreted in line with Article 134(b) of the Principal VAT Directive. This excludes supplies from exemption where the purpose is to obtain income through transactions in direct competition with those of commercial enterprises subject to VAT.

The First Tier Tribunal found that the main purpose of the restaurant was not to obtain additional income but rather to provide work experience for students in a realistic working environment. Indeed, it operated at a loss. Consequently, these supplies were VAT exempt.

However, with insufficient evidence supplied, the First Tier Tribunal was not convinced that the basic purpose of the college's supplies from the hair and beauty salons as well as performing arts centre was not to obtain additional income in direct competition with other commercial enterprises that were subject to VAT.

No evidence was submitted in relation to the performing arts centre and the evidence supporting the hair and beauty salons was inconclusive. These supplies did not fall within the VAT exemption.

Fareham College v HMRC (TC08740)

Invoicing after leaving a group **(Lecture B1371 – 19.03 minutes)**

Summary – Services supplied whilst a company was a member of a VAT group, but invoiced and paid after it had ceased to be a member, were liable to VAT.

At a time when both companies were a member of the same VAT group, The Prudential Assurance Company Limited received investment management services from Silverfleet Capital Ltd, who was entitled to a performance-related fee.

In 2007, Silverfleet Capital Ltd left the VAT group and ceased providing these services.

In 2014 and 2015, the benchmarks for performance related fees relating to these earlier services were reached, which triggered the invoicing of a £9 million fee, after the company had left the group.

HMRC argued that there was a continuous supply of services with delivery taking place while the companies were part of a VAT group, but with invoices issued and payments made after the supplier had left the group. Consequently, VAT was chargeable on the fee when invoiced and paid.

The Prudential Assurance Company Limited disagreed, arguing that the services were only supplied when the two companies were part of the same VAT group, meaning that the fees were outside the scope of VAT.

The First Tier Tribunal had ruled in favour of The Prudential Assurance Company Limited and so HMRC appealed to the Upper Tribunal.

Decision

Having reviewed the case law, the Upper Tribunal concluded that this particular point had not been litigated before. The Upper Tribunal found that the time of supply deeming provisions had to take priority over the VAT grouping deeming provisions in this context. The Tribunal found that a continuous supply of services took place when the parties were no longer members of the same VAT group. As a result, the supply took place when the services were invoiced, not when they were provided, which was after Silverfleet Capital Ltd had left the VAT group and VAT was chargeable.

HMRC v The Prudential Assurance Company Limited [2023] UKUT 54 (TCC)

Driving sessions for under 17s **(Lecture B1371 – 19.03 minutes)**

Summary – The company's supplies did not include the right of admission to a circus, funfair or something similar and so the temporary reduced VAT rate introduced during COVID did not apply.

In 2009, when The Young Driver Training Limited originally registered for VAT, the company's business was described on the VAT1 as "Other Personal Services not elsewhere classified- Provision of driving lessons off the highway for under 17-year-olds." These lessons were carried out on private land, such as large car parks and exhibition centre grounds.

In order to assist the hospitality sector during COVID, a temporary 5% VAT rate for admissions to tourist attractions and cultural events was introduced. The company changed the wording on its website to read 'driving experiences for under 17-year-olds' and at the same time the company submitted a VAT484 changing its trade classification. From this time, it charged VAT to customers at the 5% rate.

HMRC disagreed and issued an assessment treating the supplies as standard rated.

The company appealed.

Decision

The First Tier Tribunal stated that to apply the reduced rate of VAT the supplies needed to fall within Group 16, Part II, Sch 7A VATA 1994 by meeting two criteria:

1. The supply must be of a ‘right of admission’;
2. The venue or event must fall within the list provided in Group 16 or be of sufficient similarity.

The First Tier Tribunal found that the supplies were not just for the 'right of admission' because they also included the use of a vehicle with supervised tuition. The main supply was driving tuition, albeit, not to pass the official driving test. The child was being taught ‘how to operate the clutch (if manual transmission), brake, accelerator, steering and gearbox (manual or automatic) to enable them to safely and competently drive the vehicle under supervision. The experience was advertised as teaching teens to become safer drivers, giving them a head start when it comes to learning to drive. Further they would get ‘plenty of teaching and fun behind the wheel.’

The event and venues stated in Group 16 are:

> “shows, theatres, circuses, fairs, amusement parks, concerts, museums, zoos, cinemas and exhibitions and similar cultural events and facilities”.

The company argued that the lessons were similar to those provided by circus or funfair. The First Tier Tribunal disagreed that the experience was similar to a dodgems ride and stated that:

> “Both a circus and a fair offer a range of attractions and amusements and a customer who has purchased an entrance ticket is able to freely wander around to view all the available attractions. This can be contrasted with what the Appellant offers: a specific pre-booked Experience in a fenced off area.”

Finally, fiscal neutrality was not relevant because the supplies made by amusement parks and fairs were very different from those provided by The Young Driver Training Limited. Customers expected supervised tuition; they were not just paying for admission to enter the premises of a circus or fair.

The Young Driver Training Limited v HMRC (TC08748)

Revenue & Customs brief 4/2023

From 1 May 2023 the valuation rate of interest used by HMRC in valuing the retained rights under discounted gift schemes will increase from 4.5 per cent per annum to 6.75 per cent.

https://www.gov.uk/government/publications/revenue-and-customs-brief-4-2023-change-to-the-valuation-rate-of-interest-used-for-discounted-gift-schemes