

Business tax round up (Lecture B1306 – 17.33 minutes)

Leisure complex

Summary – Claims for capital allowances, loss relief and VAT input tax recovery on expenditure incurred when constructing a sports and leisure complex adjacent to the taxpayer's home were denied. No trade was being carried on.

Graham Wildin was the principal partner of an accountancy firm known as Wildin & Co, which provided a range of services and employed 30 members of staff.

In addition to his main residence, known as Altea, Graham Wildin owned two terraced cottages which backed onto Altea. Over the years, he had constructed various buildings at these properties including a vintage car showroom, an Oriental Garden with a number of related outbuildings, a large outdoor play area, an amusement arcade, an 8-person hot-tub and sauna, and an indoor swimming pool that was under construction.

In 2013, he started work on the construction of a substantial sports and leisure complex on his estate that included a sports hall, squash court and fully equipped gym, a bowling alley, a 16-seater cinema, a small casino and a kitchen with X-Box games to play as well as board games like chess and Monopoly. When interviewed by, among others, the Daily Mail, he explained that the complex was to be used by his family.

On 13 August 2013, Graham Wildin registered for VAT by submitting Form VAT1, ticking the boxes for 'Voluntary Registration' and 'Intend to make taxable supplies in the future'. He stated that he was registering as sole-proprietor with the trading name as 'Forest of Dean Luxury Holidays'.

He submitted tax returns for his business showing nominal turnover figures and large losses, created as a result of capital allowances claimed. Further he sought to reclaim input tax on the construction costs of the complex.

As a result of HMRC enquiries, Graham Wildin confirmed that he:

- had deliberately stressed to the newspapers that his new Complex was for private use in an attempt to gain planning permission
- intended to let out one of the properties as a holiday let with access to the Complex for £3,000 to £4,000 a week, and his own private residence occasionally;
- confirmed that all capital allowances claim related to the Complex;

HMRC took the view that as an accountant, he would understand the difference between private and business expenditure; his actions appeared fraudulent, and the case was referred for Criminal Investigation.

HMRC raised closure notices, discovery assessments, penalties and VAT surcharges totalling £297,630.65 (not including interest),

Graham Wildin appealed to the First Tier Tribunal

Decision

The First tier Tribunal found that Graham Wildin had made it clear to the Press that his new Leisure Complex was intended for his family's use.

The First Tier Tribunal found that there was no evidence of any trade being carried on. HMRC had been correct to deny Graham Wildin's claims for capital allowance and loss relief claims and with no economic activity, input VAT was not recoverable.

The appeal was dismissed.

Graham Michael Wildin v HMRC (TC08394/V)

Windfarm studies and project management

Summary – Environmental studies and project management costs relating to the construction of windfarms partly qualified for capital allowances

The four companies in this case were all members of the same group, whose parent company was Orsted A/S, a Danish company. Each company owned and operated an offshore windfarm used to generate and sell electricity.

Between them, they claimed capital allowances on £48million of expenditure, incurred prior to the construction of the windfarms. Broadly, the expenditure fell into the following four categories:

1. Environmental impact studies and assessments;
2. Metocean studies on water level, wave regime, currents and wind conditions;
3. Geophysical and geotechnical studies; and
4. Project management, design and procurement.

HMRC accepted that each company was entitled to capital allowances on the costs incurred on the construction and installation of the wind turbines as well as the electrical array cables which connected them. However, HMRC argued that the expenditure on environmental studies and project management put the companies in the position to incur expenditure on the provision of plant, but the expenditure itself was not plant. The expenditure was "too remote from" and "was not on the provision of" the windfarm or the wind turbines themselves. Consequently, this expenditure did not qualify for allowances.

The companies appealed, arguing that they were entitled to capital allowances. The taxpayers believed that the term 'on the provision of' extended to expenditure directly relating to the plant's design and installation. To function effectively, the plant needed to be appropriately designed.

Alternatively, the companies argued that the expenditure qualified as deductible pre-trading revenue expenditure.

Decision

The First Tier Tribunal confirmed that each windfarm was a separately identifiable item of plant used to generate and facilitate the sale of electricity. The issue to decide was whether the 'provision of plant' extended to plant design.

The Tribunal identified two types of design:

1. 'Necessary design' without which the windfarms could not function, expenditure on which did qualify for capital allowances;
2. 'Unnecessary design' without which the windfarms could continue to generate electricity and so capital allowances were not available.

Reviewing the various environmental studies, the First Tier Tribunal identified which studies were necessary (qualifying for capital allowances) and which were unnecessary (not qualifying for capital allowances). Where costs did not qualify, the Tribunal found that they also did not qualify as deductible pre-trading revenue expenditure as the expenditure was capital in nature.

The Tribunal used a similar approach for the project management expenditure, concluding that this qualified for capital allowances to the extent that it related to:

- studies where capital allowances were available;
- negotiating contracts with manufacturers and installation vessel providers; and
- overseeing construction and installation.

The appeal was allowed in part.

Gunfleet Sands Ltd and others v HMRC (TC08387)

Intangibles transferred

Summary - The market value of assets transferred between group entities was £1 and so no CGT was payable. No intangibles relief was available on the consideration paid and the sum could not be treated as a distribution.

In 2008, Jasper Conran Optical LLP incorporated its design, manufacture and marketing of optical products business by transferring it to JC Vision Ltd for £8.25 million with:

- Jasper Conran, the majority partner in the LLP, reporting a capital gain and CGT payable of £1.4million;
- JC Vision Ltd treating the consideration paid as an expense amortised in its accounts and claiming relief for these amounts under the intangibles regime.

HMRC disagreed with the treatment, arguing that the market value of the intangible assets transferred was £1 and so:

- no amortisation relief was available for the company
- the £8.25 million payment from the company to LLP should be taxed on Jason Conran as a distribution and not as a capital gain.

Decision

All parties agreed that this disposal between connected parties should be deemed to take place at market value.

Central to the valuation decision, was whether the trademarks that were required for the business to be able to operate successfully were transferred as part of the deal.

The transfer agreement stated:

“For the avoidance of doubt, no part of the consideration is attributable to the grant of any licence by Mr Conran to use or sub-licence any of his trademarks. The Purchaser, by virtue of being a wholly-owned Subsidiary of Jasper Conran Holdings Limited (which is entitled to use the trademarks under licence from Mr Conran and make them available to its subsidiaries) is already entitled to use or sub-licence such trademarks.”

The First Tier Tribunal agreed with HMRC's £1 valuation, finding that in arriving at the market value, they must look only at the assets transferred under the agreement. This did not include the trademarks and the Tribunal could not assume that the purchaser “held their own right to use the trademark”.

Given that the market value of the transfer was £1:

- the company was not entitled to intangibles relief on the £8.25 m paid;
- no CGT was payable.

Finally, the First Tier Tribunal concluded that the payment was not taxable on Jason Conran as a distribution. Jason Conran received the £8.25 million as he was the majority partner in the LLP. The Tribunal did not accept HMRC's submission that the payment was made to him as “the (indirect) holder of the shares” in the company. The payment was made out of the assets of the company, and not in respect of shares. The Tribunal concluded that if it had been a distribution, HMRC would need to explain why that distribution was not treated as being made at the £1 market value.

Jasper Conran and JC Vision Ltd v HMRC (TC8391/V)

Adapted from the case summary in Tax journal (18 February 2022)

Theatre tax relief denied

Summary - A company putting on shows at a theme park and zoos was not entitled to theatre tax relief. The customers did not pay specifically for the shows meaning that were not paying members of the public and the commercial purpose condition was not met.

SGA Productions Limited is an events production company and at various times had contracted to provide live performance shows at the Legoland Windsor park site and at Whipsnade Zoo.

The company believed that each show constituted a theatrical production and so claimed Theatre Tax Relief of £60,506 in respect of the live performances.

HMRC disagreed, arguing that the ‘commercial purpose’ condition under S.1217GA CTA 2009 had not been met and performances were not made ‘paying members of the general public’. The entry fee covered all of theme park and zoo facilities and could not be apportioned.

SGA Productions Limited appealed to the First Tier Tribunal arguing that the price paid for entry into the theme park and zoo was a fee allowing them to watch the shows. Consequently, this meant that paying members of the general public did watch the shows.

Decision

The First Tier Tribunal found that 'paying members of the general public' meant that each individual had made a payment that was 'referable specifically to the theatrical production in respect of which a claim for relief is made'. In other words, the payment must be for the specific purpose of gain entry to the theatrical performance.

The Tribunal found that, on admission, customers paid their fee to gain entry to the theme park or zoo. At that time, they did not consider themselves to be paying to attend a show. It was up to them whether they decided to spend time watching the show or to spend time elsewhere at the park and zoo.

Further, the Tribunal concluded that it was not possible to apportion the admission cost to cover the live shows. If the show had been called, they would not have been entitled to a refund.

The customers were not paying members of the public and the commercial purpose condition was not met.

The appeal was dismissed.

SGA Productions Limited v HMRC (TC08397)

Dog grooming courses

Summary – Dog grooming is not a subject ordinarily taught in schools or universities and so the provision of dog grooming courses was standard rated, not exempt.

Julie Lalou ran a business providing dog grooming and dog grooming courses and this appeal concerned the courses that she ran. Having originally treated the supplies as standard rated, she later believed that her dog grooming courses were exempt from VAT. In December 2017, she submitted a VAT de-registration application on the grounds that her only taxable supplies of dog grooming, fell below the VAT registration threshold. HMRC later agreed. However, in October 2018, she submitted an error correction notice claiming £102,000 of VAT previously accounted for. In July 2019, HMRC advised that the supply of dog grooming courses was in fact standard rated and reinstated her registration. HMRC stated:

“When an individual teacher supplies education or training in a personal capacity or as a member of a partnership, on their own account and at their own risk, the supply is exempt under item 2, Group 6, Schedule 9 VATA 1994.”

HMRC went on to say:

“However, this is only providing that the instruction is in a subject ordinarily taught in a school or university.”

On the basis that this was not the case, HMRC raised an assessment of £12,203 in relation to the VAT quarter ended September 2019 for which a return had not been made.

Julie Lalou appealed to the First Tier Tribunal.

Decision

The First Tier Tribunal agreed that the dog grooming courses involved the supply of tuition whereby Julie Lalou transferred skills and knowledge to her students on her own account and at her own risk. The Tribunal accepted that dog grooming courses were educational and ordinarily taught in a good number of further education colleges in England that led to a qualification of some kind.

However, the Tribunal confirmed that the test was whether dog grooming was ordinarily taught in a schools or universities in the EU. The Tribunal stated that they were provided with no evidence that dog grooming was taught in the UK anywhere other than certain Further Education Colleges in England; nor were they provided with any evidence at all about the position in other EU member states.

As a result, the Tribunal found that Julie Lalou had not met the burden of proving that dog grooming was taught in a wide number of schools or universities in the EU. Some evidence of the position in other EU member states (and other parts of the UK) was necessary.

The appeal against the assessment to VAT and HMRC's decision to reinstate her VAT registration were dismissed. The Tribunal recognised that it may seem unfair that HMRC were able to change their mind over the deregistration but stated that it had no general "fairness" jurisdiction.

Julie Lalou T/A Dogs Delight v HMRC (TC08380)

Car boot sale pitches

Summary – The provision of car boot sale pitches with basic onsite facilities was a licence to occupy land and not the provision of a standard rated service.

Rufforth Park Limited had run car boot sales every Sunday morning for 40 years. The sellers included both members of the public selling second hand goods and traders. Most of the pitches were in the open but there were some covered pitches in a disused building. No advance booking was possible and spaces were allocated on a first come first served basis. Anyone who turned up and pays their fee was given a space, their website made clear that no electricity, lighting or tables were provided for sellers. The park did have toilet facilities and a café selling some refreshments but these facilities were basic and the minimum one would expect at any venue or event.

Based on VAT office advice, the company initially charged VAT on the supply of pitches. However, the company believed that it was not providing a service but rather, a licence to occupy land for the day to sell goods under Item 1, Group 1, Schedule 9 VATA 1994

After a few years, the company demonstrated to the VAT office that other car boot sale businesses were not charging VAT and subsequently, all of the VAT previously paid was refunded with interest.

However, later HMRC changed their mind arguing that the advertising promoting the events on the internet and social media, as well as the toilet and café facilities meant that the company was granting the right to occupy land together with other goods and services such that the overarching supply was of a service. The supply of pitches was standard rated and in December 2019 issued an assessment for £82,995.00 for the VAT periods 12/16 to 3/19 inclusive. Although not the subject of this appeal, there was a further assessment for £53,000, which would be payable if the First Tier found in HMRC's favour.

Decision

The First Tier Tribunal concluded that it was not appropriate to compare the provision of pitches at a car boot sale to a pitch provided at a trade fair (*CRC v Zombory-Moldovan (t/a Craft Carnival* [2016] UKUT 433 (TCC)).

Rufforth Park Limited ran 'an ordinary car boot' in a field with very basic facilities. This was a relatively passive activity with limited added value. The company was not providing "a service to the sellers giving them the opportunity to participate in an expertly organised and run event." The company had no obligation to put on the events at all.

Further, the First Tier Tribunal considered HMRC's VAT *Notice 742*, which at the time of the hearing, referred to 'granting traders a pitch in a market or at a car boot sale' including the use of shared toilets, kitchen and other facilities.

The First Tier Tribunal found that there was a single land supply and no VAT was payable.

Rufforth Park Limited v HMRC (TC08395/V)