

Business tax round up (Lecture B1366 – 18.59 minutes)

Partnership finder's fee

Summary – The taxpayer failed to challenge the Supreme Court's previously stated position that a discovery assessment could not become "stale".

Paul Harrison was in partnership with his wife trading initially as forensic accountants and then later as property developers.

The couple agreed to buy a property using partnership litigation monies but the settlement never materialised. Instead, Paul Harrison's son and daughter-in-law bought the property. They sold it in November 2007 at a profit, with the partnership receiving £200,000 from the proceeds. HMRC were not notified of this sum or and nothing was reported on the Self Assessment return.

Sometime later, his son's affairs were investigated and in 2013 he was convicted of fraud and sentenced. During that investigation Paul Harrison informed HMRC of the £200,000 received.

On 25 September 2015, HMRC raised a discovery assessment in respect of what was described as a £200,000 "finder's fee". Paul Harrison appealed, accepting that £200,000 had been received but arguing that it was received by the partnership and that there were partnership trading losses and expenses to be set against it. HMRC revised its assessment on Paul Harrison to reflect that the £200,000 was received by the partnership and assessed him on a profit of £100,000.

The First Tier Tribunal had found that earlier losses and expenses of the partnership's trade as forensic accountants could not be set against the £200,000, as a partnership cannot carry forward a loss from one trade to set against the profits of another. Further, the Tribunal was not satisfied that any such expenses or losses existed.

Permission was granted to appeal to the Upper Tribunal on the grounds of whether the discovery assessment was valid. Paul Harrison argued that the discovery had become stale when the assessment was made. He claimed that the Supreme Court's decision in *Tooth v HMRC* [2021] UKSC 17 was not binding as the staleness issue in that case was not part of the reasoning for the Supreme Court's decision; it was 'obiter dicta'. He argued that the Upper Tribunal should be bound to follow the Court of Appeal's decision in that case where the assessment was found to have become stale.

Decision

The Upper Tribunal acknowledged that the Supreme Court's statement about staleness was obiter dicta. However, the judges noted that in *R v Barton and another* [202] EWCA Crim 575 the Court of Appeal had confirmed that obiter dicta could form a binding precedent.

The Upper Tribunal stated that the Supreme Court's decision was "clearly given in order to provide general guidance on the important question of staleness." The Court in the *Tooth* case explained that it was setting out its reasoning precisely because the points had "wider significance" than the case they were looking at.

The Upper Tribunal went on to say:

“The (Supreme Court’s) decision was exhaustive in its analysis; was given on the basis of full argument by leading counsel and took into account and dealt with a number of competing arguments, encompassing statutory interpretation, policy objectives and practicalities.”

In concluding, the Upper Tribunal found that the Supreme Court had clearly set out “definitive general guidance which it intended should be followed, by all courts and tribunals”. It would be wrong to ignore this guidance.

The Tribunal concluded that “the doctrine of staleness is, like Monty Python’s parrot, “not dead, only sleeping”. It is deceased.”

As the assessment was valid, the partnership was liable to tax on the fee.

The appeal was dismissed.

Paul Harrison v HMRC [2023] UKUT 00038 (TCC)

Intellectual property amortisation

Summary – Despite not being a company, the LLP was related to its corporate members meaning that the amortisation of Intellectual Property acquired from those companies was denied.

On 1 July 2013, shortly after Muller UK & Ireland Group LLP was incorporated, three UK companies transferred their trade and assets to the LLP in return for membership units. The assets transferred included brands, licences and software, together with goodwill, all of which fell within definition of “intangible fixed assets.”

In computing the LLP’s profits to be included in each corporate member’s company tax return for the periods ended 31 December 2013 to 2018, a deduction was taken for the amortisation of the assets acquired.

Since 1 April 2002, only internally generated intellectual property or intellectual property acquired from third parties is an allowable deduction for tax purposes. HMRC denied the deducted amortisation, arguing that the corporate members were related parties of the notional company,

The LLP and three companies appealed arguing that legislation defines ‘related party’ in terms of companies and control. There was no mention of partnerships until changes were made by FA 2016, widening the definition with a participation condition to effectively include partnerships.

Decision

The First Tier Tribunal found that it was illogical to conclude that the corporate members could not be ‘related parties’ simply because their notional profit allocation was coming from an LLP. The profit calculations were made on the basis that a UK company was undertaking the trade, which meant that the relationship between the LLP and its corporate members should be viewed as if the LLP were a company. On this basis, the appeal was dismissed.

Although not needed, the Tribunal went on to consider the impact of the FA 2016 changes to the definition of a related party. It was common ground that the LLP and its corporate members were related parties under the extended definition. The question was from when this applied. The

Tribunal found that the deduction of any relief for amortisation claimed after the effective date of the change in law, 25 November 2015, would be denied.

Muller UK & Ireland Group LLP and Others v HMRC(TC08742)

Evidence to zero rate sales overseas sales

Summary – The taxpayer was in possession of all the evidence required to be able to zero rate sales made to the US.

Pavan Trading Limited ran a sub post-office with a retail outlet and made wholesale supplies of derma fillers, beauty products and orthopaedic products. The company submitted monthly VAT returns.

This case concerned the VAT returns for December 2018 and January 2019 that included the sale of medical syringes. These were acquired from a Birmingham-based pharmaceuticals company. Prior to exporting to the US, Pavin Trading Limited unpacked the goods, and replaced the supplied EU information sheets with US information sheet. Each package included an invoice and the CP72 customs declaration document required when exporting to the US. The packages were sent from the Post Office, with a certificate of postings, and packages could be tracked using the Post Office tracking system.

Following an enquiry, HMRC raised a VAT Assessment for £70,652.00 treating the sales as standard-rated and not zero rated. HMRC identified a number of areas where the documentary evidence supplied by the company to prove that the goods had been exported was unsatisfactory. However, the main reason given was that the company was required by law to physically give that paperwork to HMRC within three months of each supply, which had not happened. HMRC clearly stated that had this deadline been met, HMRC would have accepted the export evidence for zero rating purposes.

The company appealed.

Decision

The First Tier Tribunal stated that:

“Paragraph 3.5 of Notice 703 (which has force of law) specifies that the time limit for exporting the goods and for obtaining the relevant evidence is in each case three months from the time of the supply.”

This meant that the company just needed to have obtained the evidence within 3 months from the time of supply. There was no requirement to disclose the evidence to HMRC within that period. With a complete audit trail from the acquisition of the goods through to their receipt by the US customers and evidence of payment, the company had satisfied this requirement. The Tribunal stated that “If there was ever a counsel of perfection for the provision of export documentation, then this appellant has achieved it.”

In summing up, the First Tier Tribunal was extremely critical of HMRC stating that the only reason that the company had to bring the appeal was due to on “an erroneous view of the law set out in HMRC’s own Notice 703,” further compounded “by the nonsense written by the review officer”, and finally “by HMRC’s statement of case and skeleton argument.”

Insulated roof panels

Summary – Providing insulation and protection from the outside elements, roof panels did not qualify for the reduced rate of VAT as energy-saving materials.

Greenspace (UK) Ltd supplied and fitted insulated conservatory roof panels onto the pre-existing roof structure.

The company charged VAT at the reduced rate of 5%, arguing that it was supplying insulation for roofs that qualified as energy savings materials under Note 1(a), Group 2, Schedule 7A VATA 1994.

HMRC disagreed and raised a £2.5 million VAT assessment on the basis that the supplies should have been standard rated.

Greenspace (UK) Ltd lost their appeal at both the First Tier and the Upper Tribunals. The case moved to the Court of Appeal.

Decision

The Court of Appeal found that when the First Tier Tribunal had decided that the company supplied a roof, rather than insulation, they had made an error of law. This was not the correct approach.

The issue to decide was whether the supply made by Greenspace (UK) Ltd was something more than insulation for roofs as “Note 1 cannot be extended beyond its plain words.” If the company supplied more than insulation for roofs, the reduced rate would not apply as it would fall outside of note 1(a), making it a standard rated supply.

The Court of Appeal found that Greenspace (UK) Ltd supplied and fitted panels that insulated the conservatory, but these panels also protected the conservatory from the outside elements. Without the waterproof aluminium casing with protective powder coating, rain would be let in. The supply was more than a supply of insulation for roofs as the panels also protected the conservatory from the outside elements.

The appeal was dismissed.

Greenspace (UK) Ltd v HMRC [2023] EWCA Civ 106

DIY housebuilder claim

Summary – A DIY housebuilder VAT reclaim was denied as the building created was an extension to an existing building and not a new separate dwelling.

In April 2016, Daniel Dunne submitted a planning application for a “two storey side extension and single storey rear extension to a residential property in Northern Ireland. This case concerned only the rear extension which consisted of a bathroom, kitchen and sleeping accommodation.

In September 2019, Daniel Dunne submitted a DIY Housebuilders VAT reclaim. He argued that although the initial plan had been for the rear extension to be attached to the existing property, the property built was a ‘detached bungalow’ so a separate dwelling.

He stated that planning permission was amended informally due to time constraints. His wife was terminally ill and died six months after completion. The building was created to make sure that his wife could stay at home rather than go into a hospice.

Resubmitting the application would have taken two more years which she did not have, so he discussed the changes informally with the local authority building control, who agreed that he did not need to build the corridor connecting the building to the existing property.

HMRC rejected the claim on the basis that the works were not considered to be a new dwelling for VAT purposes.

Daniel Dunne appealed.

Decision

The First Tier Tribunal accepted that there was an informal amendment to the planning permission to remove the proposed connecting corridor between the existing property and the building.

However, the Tribunal stated that to be able to make a DIY housebuilders' claim under s35 VATA 1994, "the planning permission must be for a dwelling". The Tribunal found that, although informally amended, the permission granted was still not for a new dwelling.

Correspondence with the council confirmed that the removal of the connecting corridor from construction was not considered to create a separate dwelling for planning purposes. Indeed, post-completion local authority correspondence continued to refer throughout to the works as "an extension ... not attached to your main house". No correspondence confirmed that approval was given for a new dwelling.

As Neil Warren, independent VAT consultant, stated:

'The commercial reality of the project was that it produced a "granny flat" rather than a new dwelling and therefore a DIY claim was incorrect.

As an extension of a dwelling is specifically excluded from qualifying for a claim under s35 VATA 1994, the appeal was dismissed.

Daniel Dunne v HMRC (TC08716)

Digital newspapers

Summary – Digital editions of newspapers were not zero-rated under Item 2, Group 3, Schedule 8 VATA 1994.

This case concerned whether zero-rating of print newspapers extended to the digital editions of The Times, The Sunday Times, The Sun and The Sun on Sunday for the period between 30 August 2010 and 4 December 2016.

It was common ground that the decision in relation to the period in question would also be applicable to the period up to 1 May 2020. However, as from 1 May 2020, there was no dispute as the VAT (Extension of Zero-Rating to Electronically Supplied Books etc) (Coronavirus) Order 2020, (SI No 2020/459) (the "2020 Order") extends the zero-rating to newspapers "when supplied electronically".

The Court of Appeal had found in favour of HMRC and so the matter progressed to the Supreme Court.

News Corp UK & Ireland Ltd argued that, by applying the 'always speaking' principle, 'newspapers' under Item 2, Group 3, Schedule 8 VATA 1994 covered the digital versions of newspapers now available online. Statute should be interpreted taking into account changes that have occurred since it became law, even if those changes could not have been reasonably foreseen at the time the law was enacted.

Decision

The Supreme Court stated that they needed to consider both the “always speaking” principle of UK statutory interpretation as well as the EU law requirement to interpret exemptions from VAT strictly using the “standstill” provision. This provision prevents extending zero-rating categories beyond those that existed when the Sixth VAT Directive was enacted in 1975.

The Court stated that the always speaking principle was significantly limited in this case as it should “not conflict with the requirement for zero-rating for newspapers to be strictly construed and not extended.” The digital version of newspapers needed to meet the definition of 'newspapers' under the standstill provision back in 1975. At that time, newspapers were goods acquired giving customers immediate access to the news on paper, without the need for a device or connectivity to read it. By contrast, digital or online newspapers were services that required the use of a device connected to the internet. Such devices did not exist when the law was introduced and so zero rating could not apply.

The appeal was dismissed.

News Corp UK & Ireland Ltd [2023] UKSC 7

Wildlife Park construction

Summary – Construction services provided to a charity should not have been zero-rated under the relevant charitable purpose provisions.

The Zoological Society of Hertfordshire, a charity, engaged Paradise Wildlife Park Limited to construct a lion enclosure, an external dinosaur exhibition and a shop called the “Dino Store”.

On the basis that the buildings were to be used solely for a relevant charitable purpose, the charity had issued a certificate confirming non-business use, with Paradise Wildlife Park Limited then treating the work as zero-rated construction services.

HMRC disagreed and raised an assessment on Paradise Wildlife Park Limited for £411,641, charging VAT at the standard rate.

Subsequently, Paradise Wildlife Park Limited agreed that the work on the shop should not have been zero-rated but appealed the VAT charged on both the lion enclosure and “World of Dinosaurs” external exhibit.

Decision

The First Tier Tribunal referred to Note 6(a) Group 5, Schedule 8, VATA 1994 which states that use for a relevant charitable purpose means use by a charity otherwise than in the course or furtherance of a business.

The Tribunal acknowledged that the lions' enclosure had a conservation function and the dinosaur exhibit an educational purpose. However, both also made the wildlife park a more attractive place to visit, meaning there was also a business purpose. Customers pay for admission to the park and under s.94(2)(b) VATA 1994, a business activity includes consideration charged for admission to any premises.

The Zoological Society of Hertfordshire runs the wildlife park as a commercial attraction to raise funds for its charitable activities. The First Tier Tribunal found that both the lion enclosure and outside dinosaur exhibit formed part of the charity's business of running and charging admission to the wildlife park.

As a result, the Tribunal concluded The Zoological Society of Hertfordshire had incorrectly issued the certificate as what was built did not consist of buildings intended for 'use solely' for a relevant charitable purpose. HMRC were correct that the construction services should have been standard rated.

The Tribunal also considered whether the external, walk-through dinosaur exhibit was even a building. It concluded that it was not as, although it was a permanent structure, it had no walls, and could not be considered a building.

The appeal was dismissed.

Paradise Wildlife Park Limited v HMRC (TC08729)