

## **Business taxes (Lecture B1426 – 22.00 minutes)**

### **SEISS Claim Rejected**

*Summary – Despite being invited to join the Self Employment Income Support Scheme, the taxpayer was denied relief as they were not trading on a self-employed basis at the appropriate time.*

Shane Ellis had traded for a number of years as a self-employed franchisee but in February 2018, he incorporated and began trading through Ellis SAJ Limited.

Having received what he considered to be invitations to make claims, in May and August 2020, Shane Ellis claimed and received payment under the SEISS scheme.

His 2018/19 tax return included self-employed income but he declared that his self-employment had ceased on 27 September 2018. His return for the following year included employment income but no self-employment income.

In August 2021, with the taxpayer having ceased trading prior to 2019/20, HMRC issued an assessment to recover £14,070 in respect of the incorrectly claimed SEISS payments.

Following an unsuccessful review, Shane Ellis appealed to the First Tier Tribunal. He argued that HMRC should never have sent him the invitations as he had already notified them of his change of status. Having received the invitation, he claimed that the wording was confusing. He understood the words 'continue to trade' to include trading through a limited company.

HMRC sought to have the appeal struck out.

#### *Decision*

Unsurprisingly, the assessment was found to be valid. Based on the facts of the case, he was not eligible to claim relief under the SEISS.

The appeal was dismissed.

*Shane Ellis v HMRC (TC 09087)*

### **Eat Out to Help Out**

*Summary – An LLP's claims under the Eat Out to Help Out scheme were valid and accurate and HMRC's assessment was not objectively reasonable.*

This case concerned the Eat Out to Help Out Scheme that operated for three days per week (Monday, Tuesday and Wednesday) throughout August 2020, designed to encourage customers back into restaurants following the COVID lockdown in 2020.

Restaurants operating under the scheme applied a discount to qualifying sales (not alcohol) made at the restaurant equal to the lesser of £10 per diner or 50% of the value of the customers meal.

The restaurant was then able to claim the amount of discount by way of a support payment from HMRC.

Café Jinnah LLP registered for the scheme and made five claims totalling £103,351 for the five weekly periods in August 2020.

Initially HMRC paid the amount claimed but later sought to clawback £63,766, on the basis that the café had overstated payments made for meals supplied under the scheme. Following an investigation HMRC argued that cash which the cafe claimed was paid for those meals, was not so paid.

The café disagreed and appealed.

### *Decision*

The First Tier Tribunal commented that this is the first case concerning this scheme and as a "reverse suppression" case, it is somewhat unusual as normally HMRC are arguing that cash sales are understated, rather than overstated.

The Tribunal also noted that Café Jinnah LLP had paid VAT and the LLP members had paid income tax on the full amounts, including the cash receipts received for the supply of the meals under the scheme.

The First Tier Tribunal accepted that the HMRC officer genuinely believed that the LLP's claim was overstated as bank statements did not show additional takings during scheme days.

However, the First Tier Tribunal found that the officer had not been objectively reasonable in the conclusions that he reached.

Having been told that a large number of new customers came to the restaurant on scheme days and that most paid in cash, the officer believed that this should have been reflected in significant bank deposits but this was not the case. He believed that the meals were being paid solely by credit card.

The First Tier Tribunal found that it was unreasonable for HMRC to assume that meals were paid solely by credit card on scheme days.

The LLP stated that figures appearing on bank statements at this time would not match takings. With banking hours restricted during COVID and with long queues, the LLP chose to pay out more as cash expenses, including staff wages and drawings, with the balance of cash kept on site in a secure safe.

The First Tier Tribunal stated:

“there was significant corroborating evidence to support these additional takings. The officer had been told of the change of pattern of eating habits, the way in which the restaurant could be reconfigured, the difficulties with taking cash to the bank. It seems to us that the scheme was having precisely the desired effect.”

The HMRC officer had overlooked a number of relevant factors:

- RTI records showing wages were paid but not from the bank account;
- VAT and income tax had been accounted for paid on the additional takings;
- both the partnership accounts and the LLP balance sheet showed an increase in cash in hand;

- an analysis of purchases suggesting an increased supply of meals, not supported by credit card payments.

The First Tier Tribunal concluded by saying the HMRC officer did not seriously consider any other matters which could have supported the claim. Consequently, the First Tier Tribunal found that HMRC's assessment was not objectively reasonable.

The appeal was allowed.

*Café Jinnah LLP v HMRC (TC09085)*

## **Sports nutrition bars**

*Summary – Sports nutrition bars containing a flapjack and either a cake bar or brownie were standard-rated confectionery.*

Tim Davies had a background in sales, marketing and business development and was a keen sportsman with an interest in maintaining an active lifestyle.

He believed that he had found a gap in the market for selling a product to those carrying out vigorous exercise which provided both:

- carbohydrates before exercise for energy; and
- protein afterwards to help rebuild muscle.

Together with Mike Naylor, a sports nutritionist, he set up Duelfuel Nutrition Limited for the purpose of developing and marketing this opportunity. Mike Naylor advised as to the necessary nutritional content (proteins, carbohydrates, fats, vitamins and minerals).

The product developed was sold through supermarkets and at gyms, and included a:

- flapjack (to provide carbohydrates before exercise for energy); and
- cake or brownie (protein afterwards to rebuild muscle).

Tim Davies concluded that zero rated VAT treatment was essential to ensure it was as commercially viable as possible and so took advice from a VAT consultant, concluding amongst other things that using oats as the only cereal in the flapjack was important and both the flapjack and cakes needed to be baked.

HMRC disputed the VAT classification, arguing that the product was standard rated. The company appealed, arguing that a flapjack and either a cake bar or brownie packaged and sold together were zero rated for VAT purposes (Item 1 of Group 1 Schedule 8 VATA 1994).

Both parties agreed that the products were 'food of a kind used for human consumption' within Item 1. **H**

**however:**

- Duelfuel Nutrition Limited argued that the product qualified as 'cakes' making them zero rated.

- HMRC argued they fell within Excepted Item 2 and were standard rated confectionery because either:
  - Note 5 deemed the products to be confectionery; or
  - If Note 5 did not apply, the products were confectionery on general principles.

### *Decision*

The First Tier Tribunal questioned what would happen if the Tribunal found that one item was standard rated, while the other was zero rated, meaning that the issue of composite or multiple supplies would need to be considered.

Acknowledging that this was not something that had been debated to date, both counsel agreed that the Tribunal should simply decide the VAT status of the individual products and, if necessary, the parties would bring the issue to the Tribunal at a later date.

The First Tier Tribunal adopted a multifactorial test, and examined the:

- nature and description of the products including size and appearance;
- ingredients;
- the manufacturing process;
- taste and texture as well as when the products were consumed;
- packaging and where the products were sold.

The Tribunal concluded that the ordinary person would not consider these to be cakes. A typical cake would be a high-calorie food eaten by everyone as a treat. This product was not made, marketed or consumed in this way.

Although the ordinary person would find that the products were not confectionery, these were 'sweetened prepared food which is normally eaten with the fingers', meaning they qualified as standard rated confectionery.

*Duelfuel Nutrition Limited v HMRC (TC09055)*

### **Organix and Nakd bars**

*Summary – Having been remitted back to the First Tier Tribunal, a new panel has found that both Organix and Nakd bars were 'confectionery' for VAT purposes.*

Back in 2018, Morrisons made a number of appeals seeking to recover £1million of output tax on various types of 'Organix' and 'Nakd' bars, arguing that they were zero, rather than standard rated.

Having consolidated the appeals into one, the First Tier Tribunal found that the bars were confectionery, not cake, making them standard rated.

On appeal to the Upper Tribunal, it was found that in reaching its decision the First Tier Tribunal had wrongly treated certain factors as irrelevant.

The Tribunal should have considered the:

- healthiness of the products and their marketing as healthy; and
- fact that the products do not contain ingredients associated with traditional confectionery (cane sugar, butter or flour).

The Upper Tribunal remitted the appeal back to the First Tier Tribunal to be heard by a new panel.

### *Decision*

The First Tier Tribunal stated that it needed to consider if the 'ordinary person in the street' would see these products as confectionery.

The First Tier Tribunal concluded that the products looked, felt and tasted like confectionery, being similar in size to chocolate bars and intended to be eaten with hands.

The Tribunal noted that although the bars were made with dried fruits, nuts and oats, *"the absence of traditional confectionery ingredients" did not outweigh factors such as the look, feel, and taste of the products.*

The Tribunal gave little weight to the 'healthy' marketing angle employed, stating that marketing is aimed at maximising sales rather than to inform the customer of a products health benefits. Indeed, all of the bars fell within the Food Regulations 2021 as food which is 'less healthy'.

Both the Organix and Nakd bars were found to be standard rated 'confectionery'.

*WM Morrison Supermarkets Plc v HMRC (TC09095)*

### **Floor space v turnover for overhead apportionment**

*Summary - The dual use of the hospitality and entertainment areas meant that the special method based on floor space, rather than turnover, did not guarantee a more precise calculation of recoverable input VAT than the standard method.*

Hippodrome Casino Ltd operated a 'Las Vegas style experience' with its venue including live gaming, gaming machines, bars, a restaurant, lounges, conference spaces and a theatre.

Gaming activities generated high exempt income while hospitality and entertainment income were standard rated and accounted for significantly less of the total income.

Had the company adopted the standard partial exemption method, non-attributable VAT incurred on overheads would have been apportioned between taxable and exempt supplies based on turnover.

Believing that this did not produce a fair result, the company sought to use the Standard Method Override based on floor area. The company argued that this more accurately reflected the economic use of the expenditure than the standard recovery method.

On appeal, the First Tier Tribunal found in the taxpayer's favour, agreeing that the special floor area method did provide a more precise calculation for allocating overheads.

HMRC appealed to the Upper Tribunal, arguing that the First Tier Tribunal had erred in law. The First Tier Tribunal had failed to consider the fact that floorspace had a dual purpose; floorspace used for taxable supplies was also effectively used economically for exempt supplies of gaming.

### *Decision*

The Upper Tribunal found in HMRC's favour. The First Tier Tribunal had made an error of law by failing to give reasons for rejecting HMRC's argument that the hospitality and entertaining floor space had a dual purpose.

The Upper Tribunal remade the decision rejecting the 'flawed' Standard Method Override, which did not guarantee a more precise calculation of economic use than that the standard turnover method. The hospitality and entertainment areas were also used economically for the gaming activity. The bars and restaurants were not profitable on their own but rather enabled customers to stay longer, by having have a break, drink, or eat some food and so spend more money on exempt gaming activities.

*HMRC v Hippodrome Casino Ltd [2024] UKUT 00027 (TCC)*

### **Land Rovers: commercial vehicle or car?**

*Summary – Land Rovers converted to become cars were not subject to the self-supply rules as the vehicles were not available for private use.*

Three Shires Trailers Limited bought and sold trailers.

In August 2021, the company bought two Land Rover Discovery vehicles, which were to be used to transport trailers to customers, to collect trailers from suppliers and to enable staff to attend trade fairs around the country.

On the basis that the vehicles were commercial vehicles used in the trade, the input VAT was reclaimed in full.

However, a few days after purchase, three-fold-up seats with seat belts were installed behind the driver and passenger seats and the side windows and back windows, which had been blacked out, were cleared. This was to enable more people to be transported to trade shows. The company that carried out the work advised that the seats were 'not permanent' and did 'not affect the status of the vehicles for tax purposes'.

Initially, HMRC disallowed the input tax claim on the basis that the vehicles were now 'blocked' cars.

Following a review, the input VAT was allowed but HMRC sought output VAT on the self-supply arising from converting the vehicles from commercial vehicles to cars.

Confirming that the vehicles were kept on the business premises and not used privately or kept at employee homes, the company argued that a self-supply charge was not due. These were 'qualifying' cars (Article 5 VAT (Cars) Order 1992).

### *Decision*

The First Tier Tribunal confirmed that the vehicles had been converted from commercial vehicles to cars.

As a 'qualifying' motor vehicle used exclusively for business purposes and not made available for private use:

- input VAT was recoverable;
- the self-supply output VAT charge was not in point.

The appeal was allowed.

*Three Shires Trailers Limited v HMRC (TC09044)*

### **NHS trust car park fees**

*Summary – Charges for car parking operated by an NHS Trust on their sites was not standard rated, meaning that the output tax was repayable.*

This is an important case that looks at charges levied for car parking at healthcare sites operated by NHS foundation trusts where:

- The trust argued that it was engaging as a public authority under a special legal regime and that there were no "significant distortions of competition", making them a non-taxable person (S.41A VATA 1994);
- HMRC argued that VAT should be levied at the standard rate of 20% as the Trust was not acting as a public authority. Alternatively, if it was VAT should still be charged as there would otherwise be significant distortions of competition.

The claim to recover VAT does not extend to income generated where the management of car parking was outsourced to a third-party operator.

The Trusts in this case was Northumbria Healthcare NHS Foundation Trust but it should be noted that there are around 50 similar appeals by other NHS bodies stayed behind the decision. The total tax at stake is in the region of £70million.

Both the First Tier and Upper Tribunals dismissed the Trust's appeal and the case moved to the Court of Appeal, with the Trust arguing that the Upper Tribunal had erred by concluding that the Trust did not supply car parking under a special legal regime.

#### *Decision*

The Court of Appeal found that Northumbria Healthcare NHS Foundation Trust was acting as a public authority under a special legal regime, rather than under the same legal conditions as private car park operators. Under the 2015 Parking Principles and the other guidance produced by the Department of Health, Northumbria Healthcare NHS Foundation Trust had a legal duty to follow these guidelines by providing parking as they did for patients, visitors, carers and certain staff. With car parking provided under a special legal regime, the Trust was acting as a public authority.

When looking at distortion of competition, the Court of Appeal found that HMRC had failed to demonstrate that a significant distortion of competition would arise if VAT was not charged.

The Court of Appeal stated:

*“Distortion, let alone significant distortion, cannot be assumed based on participation in the car parking market, or based on a finding that competition exists”.*

HMRC needed to provide ‘findings of fact, based on evidence’ and not merely assumptions. The facts needed to demonstrate that by not charging VAT, the Trust had created significant distortion of competition.

The Court of appeal stated that:

*“In order for HMRC to demonstrate that there would be significant distortions of competition, additional evidence would be required to particularise the distortions. This would need to include some form of economic assessment”.*

These findings of facts were *not present in this case*.

The Court of Appeal set aside the earlier decision.

Northumbria Healthcare NHS Foundation Trust’s claim for the repayment of VAT was allowed.

*Northumbria Healthcare NHS Foundation Trust v HMRC [2024] EWCA Civ 177*