

Personal tax round up (Lecture P1446 – 17.08 minutes)

Pool cars

Summary – Despite an HMRC officer agreeing a company pool car policy with two companies, HMRC's subsequent NIC assessments were valid.

David Walpole was director of both MWL International Ltd and Maywal Ltd, both of which traded in commodities.

In April 2021, having concluded that certain prestige cars leased by the companies and used by various employees were not pool cars, HMRC sought to collect Class 1A National Insurance Contributions as follows:

- Maywal Ltd: £50,072 for the tax years 2015/16 through to 2018/19;
- MWL International Ltd: £7,814 for 2019/20.

The companies appealed HMRC's decisions on the basis that the cars satisfied the statutory conditions, and so were pool cars. Alternatively:

- HMRC was estopped from arguing that the cars were not pool cars during the relevant period; and/or
- The companies had a legitimate expectation that the cars would be treated as such.

The estoppel and the legitimate expectations were said to derive from a meeting held in 1993 between David Walpole and an HM Inspector of Taxes at which it had been agreed that the cars were pool cars.

Decision

Ss.167(3) and 168(3) ITEPA 2003 sets out the statutory requirements for a car to qualify as a pool car and states that a car only qualifies as a pooled car if all the following conditions are satisfied:

1. It is available to, and actually used by, more than one employee.
2. It is made available by reason of their employment.
3. It is not ordinarily used by one of them to the exclusion of the others.
4. Any private use by an employee is merely incidental to their business use of it.
5. It is not normally kept overnight on or near the residence of any of the employees unless it's kept on premises occupied by the provider of the car

The First Tier Tribunal found that:

- one of the cars failed almost all the statutory conditions and so was plainly not a pool car;

- the other cars were available to David Walpole, his son and his wife by reason of their employments and were actually used by them for private use, meaning they too were not pool cars.

On the issue of whether HMRC were estopped from issuing retrospective NIC decisions, the Tribunal found that HMRC were not estopped from retrospectively changing the agreement made at the meeting for two reasons:

1. HMRC could not be estopped from enforcing a statutory provision;
2. the Inspector had no authority to enter into a forward agreement relating to the companies' tax or NIC positions.

The agreement was therefore void as regards the future, and a void agreement cannot be estopped.

Finally, did the companies have a legitimate expectation that HMRC would not retrospectively change their position? Having considered the case law, the Tribunal decided it did not have the jurisdiction to decide that issue.

The companies' appeals were dismissed.

MWL International Ltd and Maywal Ltd v HMRC (TC09169)

HICBC and car benefits

Summary –A taxpayer's company car benefit took him over the £50,000 threshold, meaning that he was liable to the High Income Child Benefit Charge (HICBC).

David Thompson was an employee, who had a company car.

Since November 2013, his spouse had been claiming child benefit for their first child, and then from the end of February 2016, for their second child as well.

In October 2019, he was sent a nudge letter:

- detailing the circumstances when a taxpayer would be liable to the High Income Child Benefit Charge; and
- requesting that he check whether he needed to pay the charge.

This was followed by a reminder sent a month later, but David Thompson could not remember whether he received either letter. Interestingly, in January 2020, his wife opted out of the child benefit allowance.

In May 2021, HMRC initiated a compliance check which resulted in assessments and penalties being issued for the High Income Child Benefit Charge for 2013/14 through to 2019/20.

David Thompson appealed, claiming that he had believed that he had never earned more than £50,000 in any of the tax years in question. However, he understood that his car benefits were likely to have taken him over the limit but argued that HMRC should have told him that this was the case.

He thought it was unreasonable for HMRC:

- to take four years to tell him that he owed them money;

- to ask him to resubmit his paperwork as HMRC had lost it and it was only when he told them that he had already submitted it and threatened legal action that they suddenly found it.

If he had known about the liability to the assessment and the penalties he could have put money aside to pay it.

Decision

The First Tier Tribunal confirmed that none of David Thompson's submissions amounted to a serious challenge that the assessments had been incorrectly calculated. Indeed, David Thompson now accepted that they were indeed correct.

Moving to the penalties, any ignorance of the law expired once David Thompson received the nudge letter and reminder in 2019. Further, his wife then cancelling the child benefit shortly after, confirmed that he was aware of the issue at that time.

With no reasonable excuse, the appeal was dismissed.

David Thompson v HMRC (TC09160)

Payments using offshore cars and accounts

Summary – Although the taxpayer did not personally benefit from the remittances made, he was taxable on mixed fund bank transfers and credit card payments effectively 'remitted' to the UK.

In 2006, Afzal Alimahomed's family sold their business and placed the sale proceeds into an account in Guernsey. Afzal Alimahomed and his family then moved to Dubai meaning that he became non-UK resident for the years that followed. Having been non-UK resident for more than five years, the proceeds from the sale of the business were then classed as 'clean capital' for remittance basis purposes.

Inadvertently, some income from overseas sources was added to the Guernsey account making it a mixed fund account (S.809Q(6) ITA 2007). Further, he moved money from this account to a personal account with Barclays in the Isle of Man, making this a mixed fund account as well.

Later, with their old business in administration, the family repurchased it. Afzal Alimahomed returned to the UK in 2014 to help run it and, having fallen foul of the 90-day test, became UK resident for 2015/16 and 2016/17, with the remittance basis of taxation being in point.

Afzal Alimahomed did not hold a UK bank account but rather sums paid in the UK were funded from his offshore accounts and by using his offshore debit/credit cards.

His tax returns for 2015/16 and 2016/17 both included a claim for the remittance basis but with no amounts remitted.

HMRC opened an enquiry which subsequently led to Afzal Alimahomed accepting that certain amounts should have been included in the tax returns under enquiry as well as for some earlier years. Amendments were therefore made.

However, not all items were agreed. Consequently, HMRC issued a discovery assessment for 2015/16 taxing foreign income that had been remitted to the UK but omitted from his tax return. HMRC also issued a closure notice for 2016/17 on the same basis.

The sums under dispute were as follows:

- payments to his son's UK bank account for his son's personal use and direct payments of his son's university-related expenses including rent, using his offshore credit card, and his offshore bank account.
- other transfers from his offshore account into the UK bank accounts of friends and family who were not relevant persons, for their own use;
- jewellery, gifts and flights to the UK for non-relevant persons, using his offshore credit card;
- Jewellery purchased in the UK for him and his wife using his offshore credit card.

Afzal Alimahomed appealed arguing that the payments made were not taxable remittances. As the relevant person (s.809M ITA 2007), he derived no personal benefit from these transactions. The money had not been 'brought to' or 'used in' the UK for his benefit (s.809L).

Decision

The First Tier Tribunal found that, when deciding whether a taxable remittance had been made, personal benefit was not relevant. The Tribunal stated that all that was required was for it to be established that the taxpayer initiated the transfers from his offshore bank account, which he did. Afzal Alimahomed had 'brought money (or other property) to the UK when he initiated bank transfers from his offshore account into the UK bank accounts of non-relevant persons such as his son, his landlord and his university.

Further, by using an offshore credit card in the UK, Afzal Alimahomed had created a 'relevant debt' for the remittance basis (s.809L ITA 2007). Settlement of the credit card balance using a mixed fund offshore bank account amounted to the use of income or chargeable gains outside the UK taxable under the remittance basis in the UK (s.809L(3)(c). ITA 2007). The Tribunal recognised that non-relevant person benefitted from the service/gifts, but it was the taxpayer who made the purchases using his offshore credit card, using foreign income or gains to pay the offshore credit card company.

There was some good news for the taxpayer. HMRC could validly raise a discovery assessment in respect of 2015/16 if the loss of tax had been brought about carelessly or deliberately. Although HMRC's statement of case claimed a deliberate understatement of tax, this was not proved at the hearing, as HMRC did not include this in cross-examination. The discovery assessment was set aside in full.

The appeal was allowed in part.

Afzal Alimahomed v HMRC (TC09178)

Trading had now begun (Lecture P1446 – 17.08 minutes)

Summary – Having lost his claim for Entrepreneurs' Relief on an earlier disposal, the taxpayer was successful when he appealed his second disposal as by then the partnership had been trading for the required period.

John Wardle owned 14.65% of a Limited Liability Partnership (LLP) that was established in 2015 to acquire, construct, and operate a power plant using wood waste biomass.

In November 2016, he disposed of just under half of his interest in the LLP, claiming Entrepreneurs' Relief against the gain. He reported the gain in his 2016/17 tax return but HMRC denied the relief on the basis that the LLP has not started to trade. Despite a number of contracts existing relating to the construction, operation, and financing of the plant, including a contract to purchase feedstock from a supplier, the First Tier Tribunal found in HMRC's favour that trading had not commenced as no electricity was being produced and the case was dismissed (John Douglas Wardle v HMRC (TC08485)).

The Environment Agency's permit to operate the power plant was granted in May 2017 and by December 2017, the plant could import electricity under the Power Purchase Agreement. In March 2018, testing of the power plant took place and by the end of the month Ofgem accreditation was granted, back dated to 31 December 2017. Between April 2018 and May 2019 commissioning and final construction took place but no electricity was generated in this period.

It was not until June 2019 that electricity was generated commercially for the first time, with accounts to 31 December reporting turnover of £173,528 and a total loss of £11,177,548.

On 28 February 2020, John Wardle disposed of his remaining interest in the LLP, reporting the gain in his 2019/20 tax return where he claimed Entrepreneurs' Relief.

HMRC opened an enquiry into the return, concluding once again that Entrepreneurs' Relief was not available as the partnership had not been trading for the required time. A closure notice was issued to that effect in March 2023.

John Wardle appealed to the First tier Tribunal.

Decision

S.169I(3) TCGA 1992 provides that a business is a material disposal for Entrepreneurs' Relief purposes "*...if the business is owned by the individual throughout the period of 2 years ending with the date of the disposal...*"

The parties agreed that for the appeal to succeed John Wardle needed to establish that the LLP was trading on a commercial basis with a view to the realisation of profit for the 2 years ending with the date of disposal so from 28 February 2018.

The key issue in this case was, once again, had the LLP started to trade and if so, from what date. In deciding when the LLP started trading, the First Tier Tribunal stated that the test to be applied was the three-step test in *Mansell v HMRC* (2006):

1. There must be a specific idea in mind of the type of profit-making activities to be carried on.
2. The business must be set up, in terms of “business structure to undertake the essential preliminaries, getting ready to face your customers, purchasing plant, and organising the decision-making structures, the management, and the financing.”
3. Operational activity must have commenced. This includes “dealings with third parties immediately and directly related to the supplies to be made which it is hoped will give rise to the expected profits, and which involve the trader putting money at risk”.

Both parties agreed step 1 had been satisfied, so the Tribunal moved on to consider steps 2 and 3.

Relying on the *Mansell* decision, the Tribunal found that 'set-up' did not require 100% completion, with electricity being generated:

- The existence of the partnership agreement meant the decision-making structure and management were in place;
- The finance was in place with funds being drawn down regularly from 24 August 2015;
- Contracts had been agreed, with the First Tier Tribunal believing it was unlikely that the contracts would be terminated as all parties were committed to a common goal.

The Tribunal did scrutinise the fact that as at 28 February 2018 the Ofgem certificate had not been obtained and a clause in the Power Purchase Agreement was not satisfied. However, they concluded that this did not preclude Step 2 (or indeed step 3) from being satisfied. In this case, while not complete, the business had been set up and 'the train was on the tracks travelling to its destination.'

The Power Purchasing Agreement was the LLP's agreement to sell and the purchaser's agreement to buy all metered output. This constituted operational activity. The First Tier Tribunal stated that HMRC had conceded at the hearing that, if the second step was satisfied, then the Power Purchase Agreement would satisfy the third step as “this was operational activity, being dealings with a third party that were immediately and directly related to the supplies to be made which it is hoped will give rise to expected profit and which involved the LLP putting money at risk.”

Having satisfied all three steps, the Tribunal concluded that the LLP had been trading for the required two-year period and the appeal was allowed.

Mr John Douglas Wardle v HMRC (TC09213)

Property transfer to company

Summary - Transferring his residential property to a company while still living in it resulted in 15% SDLT being payable, despite him being unaware of the charge.

Mr Ali's family had lived in 94 Mayfair Avenue for over a decade but decided they needed to move to a larger property.

Having exchanged contracts on both the house they were selling and the house they were buying, at the last minute, the vendor of the new home pulled out and the chain collapsed.

A mortgage advisor advised him that by transferring his Mayfair Avenue property into a company, he could take out a mortgage in the company's name and so avoid having to find a buyer.

Consequently, in 2021, he transferred the Mayfair Avenue property into his newly formed company for the sum of £650,000. The SDLT return was submitted on the same day and £27,000 of SDLT was paid on that day using normal rates.

In February 2022, he bought a new property which needed some work and so he remained living with his family in his old home until May 2022.

In March 2022, HMRC opened a compliance check into the SDLT return, later issuing a closure notice, resulting in additional SDLT of £70,500. With the property transferred to a company and a non-qualifying person being allowed to live in that property, the higher rate of SDLT was payable.

Mr Ali argued that he would never have lived in the property after transfer if he had known about the 15% charge. Neither the mortgage adviser nor solicitor had mentioned this. While living in the property, he had paid full market rent and moved out as soon as his new property was ready to live in. He argued that the law was unfair and should have provided a 'grace period'.

Decision

The First Tier Tribunal found that it was clear that the conditions for the 15% SDLT rate had been met, meaning that HMRC's assessment was correct. This was a 'high-value residential transaction' as it was an interest in a single dwelling for which chargeable consideration was in excess of £500,000 (Para. 1 Sch. 4A to FA 2003).

This higher charge could be avoided if the property was acquired exclusively for the purpose of "exploitation as a source of rents ...in the course of a qualifying property rental business" (Para. 5 Sch. 4A FA 2003).

However, the First Tier Tribunal agreed with HMRC that the transfer fell foul of the statutory carve out, that a property remains chargeable at the 15% rate if "it is intended that a non-qualifying individual will be permitted to occupy a dwelling on the land". A non-qualifying individual includes a person connected to the purchaser. As Mr Ali controlled the company, he was a non-qualifying individual.

Finally, legislation did not include a 'grace period' and with the First Tier Tribunal having no powers to consider its fairness, the tribunal stuck with the strict letter of the law and HMRC's assessment was upheld.

Mayfair Avenue Limited v HMRC (TC09176)