

Personal tax round up

(Lecture P1146 – 14.25 minutes)

Locum urologist – mixed decision

Summary – Under a hypothetical contract, a locum urologist was found to be employed by one hospital but self employed at another.

George Mantides is a locum urologist. He is the sole director and owner of the shares in George Mantides Ltd. Between March and August 2013 George Mantides Ltd made Mr Mantides' services available to the Royal Berkshire Hospital, and between September and October 2013 George Mantides Ltd made those services available to Medway Maritime Hospital.

Royal Berkshire Hospital and Medway Maritime Hospital paid George Mantides Ltd for those services. At both Royal Berkshire Hospital and Medway Maritime Hospital Mr Mantides's work consisted of conducting outpatient clinics, procedures and minor operations. At Royal Berkshire Hospital he also undertook a small amount of on-call duty.

HMRC raised assessments for PAYE and Class 1 NIC for £30,000 on George Mantides Ltd on the basis that the payments were caught by the IR35 legislation.

George Mantides Ltd appealed arguing that any hypothetical contracts between the entities would not have been ones of employment.

Decision

The First Tier Tribunal considered the arrangements with both hospitals, concluding that one did fall foul of the IR35 rules while the other did not.

At the Royal Berkshire Hospital:

- Mr Mantides had to provide his personal service with no provision for a substitute;
- He was subject to some control by the hospital. However, his work was not closely supervised: he was not told how to deal with outpatients or how to operate. Overall the level of control did not point strongly towards employment;
- There was sufficient mutuality of obligation to indicate employment. There was an obligation to work and obligation to pay for the work done. The Tribunal found it likely that the hospital would have been under a duty to use reasonable endeavours to provide the 10 half-day sessions per week contracted during the contract period;
- Using the hospital's equipment pointed weakly towards employment;
- He bore the risk that his contract could terminate early and of having to find new work but these are risks borne equally by a salaried employee;

- It was likely that the contract would be terminable with at least a week's notice which was not an indication of self-employment;
- The lack of any employee benefits points away from employment.

Taking all these factors together and standing back the First Tier Tribunal concluded that had Mr Mantides' services been provided under a contract with the hospital, he would have been an employee (both on the income tax and the NI tests).

The circumstances of Mr Mantides's work for Medway Maritime Hospital differs in three material respects from those of his work for Royal Berkshire Hospital:

1. Under the notional contract with Medway Maritime Hospital he had a right to send a substitute if that substitute was approved by the agency, making it a possibility;
2. The notional contract with Medway Maritime Hospital could be terminated with just one day's notice. One day's notice is almost illusory and does not point to employment;
3. The notional contract with Medway Maritime Hospital would have contained no obligation on Medway Maritime Hospital to try to provide either 37.5 hours or 10 half day sessions in a week. There would not have been even a qualified obligation to provide work. That points away from employment.

In other respects, the circumstances of the Medway Maritime Hospital engagement would be the same as the Royal Berkshire engagement. However, standing back and looking at the factors together with the three noted above, the First Tier Tribunal found that the balance lies on the side of self-employment (both as regards the income tax and the NI tests).

George Mantides Ltd v HMRC (TC07202)

Radio broadcaster – successful IR35 appeal

Summary – Successful scriptwriter has convinced the courts that his work as a radio presenter for the same company over an 18-year period does not fall foul of IR35.

Paul Hawksbee is a successful scriptwriter as well as being known for presenting the radio show which arises in this appeal. After a variety of other roles in television and sport, in 2000 he and his colleague, Andy Jacobs, began to write and perform a light-hearted cricket show for Talksport. At the end of 2000 they were asked by Talksport to present a three-hour sports-based show each day from Monday to Friday. This was the Hawksbee & Jacobs Show, which has now been running for 18 years.

The extent of his paid work outside this show has varied considerably over the years, but has been considerable. For example, he wrote for all 161 episodes of “Harry Hill’s TV Burp” between 2002 and 2012. For the three years subject of this appeal, the income from Talksport comprised on average approximately 90% of his total income. Prior to this period his non-Talksport income was a higher percentage of his total income. For instance, for the two tax years preceding the period under appeal the Talksport income comprised approximately 70%.

From 2001 onwards, the pair performed their show pursuant to a series of two-year contracts. On the advice of his accountant, Paul Hawksbee set up Kickabout Productions Limited in January 2001 to provide his services on a range of projects. The contracts for his services on the show were provided through Kickabout Productions Limited.

HMRC determined that for the two contracts and periods under appeal the IR35 legislation applied to those services, on the basis that the hypothetical contract between Paul Hawksbee and Talksport would have been a contract of employment.

Paul Hawksbee appealed.

Decision

In line with other IR35 cases, the First Tier Tribunal considered the areas of mutuality of obligation, control and other factors contained within the two contracts.

The minimum of mutuality of obligation existed because Paul Hawksbee had to provide the services personally, and Talksport had to pay for them. He was obliged to work for at least 222 days a year. However, Talksport was not obliged to provide that work, even though in practice both parties expected that he would perform the minimum number of shows each year barring unforeseen circumstances.

Under both hypothetical contracts, Talksport controlled the where and when, but that was considered to be of relatively little significance compared to control of the how and what.

In relation to how Paul Hawksbee performed his services, Talksport had no effective control of a live broadcast, but the Tribunal placed little weight on this. In advance of each broadcast, editorial and artistic control of the content and format lay almost entirely with Paul Hawksbee.

However, the ultimate right of control in advance of a broadcast if the parties had been unable to agree on a material issue would have rested with Talksport. In relation to control over what services Paul Hawksbee could be required to provide, under both hypothetical contracts this was limited to the show and some ancillary obligations to promote the brand. Talksport could not, for instance, require Paul Hawksbee to act as a researcher or scriptwriter, to read the sports results, or to perform any role in relation to any other Talksport show.

Other factors considered by the Tribunal included the following:

- The degree of economic dependency and length of time over which the contracts had been renewed were material indicators of an employment relationship;
- Under the contracts Paul Hawksbee was restricted in his freedom to act as a radio presenter elsewhere but there was no restriction applying to the ways in which he habitually earned income outside the show as a television script writer;
- Neither hypothetical contract contained any right for another person to be substituted for Paul Hawksbee. Given the Tribunal's finding that Talksport were contracting for the unique expertise and work product of Paul Hawksbee, this was to be expected;

- Neither hypothetical contract contained any rights in respect of holiday, sick pay, pensions or paternity leave - clearly pointing away from employment;
- Neither hypothetical contract contained provisions relating to medicals, training, appraisals or formal disciplinary or grievance procedures - clearly pointing away from employment;
- Talksport paid a fee per show, regardless of how long it took him to research and prepare for each show. His ability to continue to do other work and to generate and progress opportunities depended on how effectively he managed his time outside the three hours per weekday when the show was on air;
- Although PaulHawksbee was strongly associated by listeners with the show, the factors identified above do not support the view that he was part and parcel of the Talksport organisation;

Looking at the picture as a whole, the Tribunal narrowly concluded that the relationship was a contract for services. The Tribunal added that, if contrary to their conclusions, the analysis of the relationship under the hypothetical contracts was properly described as “doubtful” (per MacKenna J) or “borderline” (per Dragonfly) then the clear statements in the hypothetical contracts by the parties as to their intentions, namely to create a contractor relationship and not one of employment, supported their conclusion that the relationship was not one of employment. The appeal was allowed.

Kickabout Productions Limited v HMRC (TC07230)

Property sale

Summary – The gain on the sale of a property should be recalculated using a reduced figure for sale proceeds, resulting in no gain become chargeable.

In November 2001 Jeremy Sage bought a property from which he then ran his business.

In December 2005 he sold a half share in the property to Mrs Peterson, his domestic partner.

In 2010, the couple separated and Jeremy Sage moved out of the property. On 30 April 2010 the property was sold for £300,000 to Lyndhurst Services Limited, a company in which Mrs Peterson had an interest. Jeremy Sage did not include details of this sale on his 2010/2011 tax return.

Following an enquiry by HMRC, a closure notice was issued for additional tax of £10,959.66 that was due as a result of the sale of his share of the property. Since then, HMRC allowed additional costs and expenses incurred in buying and selling the property and, as a result, the amount of CGT outstanding was reduced to £5528.16.

Jeremy Sage appealed arguing that the SDLT and VOA records were wrong and that he did not benefit from the sale of the property, save that his mortgage was discharged.

Decision

In the Tribunal’s view, HMRC had rightly assumed that as Jeremy Sage was a 50% owner of the property, he would have received £150,000 (50% of the £300,000) That £150,000 was then used as the basis of the CGT assessment.

However, the First Tier Tribunal found as a fact that Jeremy Sage did not receive one half of the £300,000 as his share of the transaction. The only benefit that he received was that his liability under the mortgage of £116,170.48 (half of £232,340.96) was discharged or assumed by Lyndhurst Services Limited.

The Tribunal concluded that HMRC's assessment was too high and that there was sufficient positive evidence to say that the CGT computation should be corrected using the figure of £116,170.48 instead of the £150,000 used by HMRC.

In their view this meant that the assessable gain was reduced from £40,812 to £6,982.48 which is covered by the annual exemption and so no CGT was payable in respect of the sale of his share of the Property. But they deferred to HMRC to provide the definitive figure.

With no tax to pay, the late payment penalty would no longer apply.

Jeremy Sage v HMRC (TC07174)

Share defence

Summary – Litigation costs were not incurred in defending the title of shares and so were not deductible in arriving at the gain arising on disposal.

Nigel Gray had acquired a minority shareholding in a BVI company in 2003.

In 2011, he had started legal proceedings against the majority shareholder under the relevant BVI provisions, and an out of court settlement was reached. As part of the settlement, he sold his shares to the majority shareholder receiving over \$4.6 million.

He argued that the litigation costs were deductible in arriving at the gain arising from the sale as they fell within s38(1)(b) TCGA 1992.

HMRC contended that the litigation costs had not been incurred 'to establish, preserve or defend any title or rights' over the shares, as share ownership had never been challenged.

Decision

The First Tier Tribunal agreed with HMRC. Stating:

'The rights that the appellant describes are rights that might derive from a shareholding. They are not over a shareholding.'

Up until the sale, the rights and obligations conferred or imposed on Nigel Gray by the Articles of Association never changed.

They added that even if the costs had fallen under s38 TCGA 1992, they had not been incurred 'wholly and exclusively for that purpose'. Mr Gray had a number of reasons to start the litigation, including obtaining a declaration that the affairs of the company were managed in a manner prejudicial to him.

The litigation costs were not deductible for CGT purposes and the appeal was dismissed.

Nigel Gray v HMRC (TC07208)

CGT on settlement

Summary - A cash payment was payable under a sale purchase agreement and so constituted an earn-out paid by the buyers to the sellers of the company, and was subject to CGT.

The taxpayers in this case were all UK tax resident owning the entire issued share capital of two UK companies that they sold. They included their share of the initial consideration from the sale in their self-assessment returns. This amount was not disputed.

However, under the share purchase agreement, should some outstanding litigation be settled, there was a potential earn-out element payable in the form of loan notes. In June 2013, the litigation was settled but rather than receiving loan notes, a deed of variation was executed so that the sellers received cash, rather than the loan notes.

The sellers argued that under the sale purchases agreement they were entitled to receive loans notes and not cash. The cash payments received were not derived from the sale of the shares under the SPA.

Decision

The First Tier Tribunal observed that the entitlement to the payment had been an asset, in its own right, and fell within the scope of s138A TCGA 1992 as an earn-out right. This asset was disposed of when the taxpayers received the payment in cash and so was subject to CGT.

In addition, the taxpayers argued that the closure notices issued by HMRC were invalid as they referred to the sale of a company in which two of the taxpayers did not own any shares. The Tribunal found that any reasonable taxpayer receiving the closure notices would have understood that the reference to the shares they did not own 'was simply a typographical error'.

D Briggs and others v HMRC (TC07166)

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