

## **Business tax update (Lecture B1386 – 18.49 minutes)**

### **Appeal struck out for the third time**

*Summary – The issue of capital allowance computations was not a new matter and so the appeal was struck out by the First Tier Tribunal.*

Between 2009/10 and 2012/13, Waterloo Car Hire bought second hand cars and made them available for use by its self-employed mini cab drivers. In 2012, the cars were included in the cost of sales figure as purchases.

HMRC opened an enquiry into the partnership's 2012 return and subsequently issued closure notices and discovery assessments disallowing the purchase of cars and also their sales. The cars should have been included in the capital allowance section of the tax return.

In 2016, the First Tier Tribunal concluded that the cars were fixed assets, subject to capital allowance legislation, and not items that could be included in cost of sales.

In 2017, permission to appeal against this decision was refused by the First Tier and Upper Tribunals. In refusing permission to appeal, the partnership was not precluded from seeking to agree capital allowance figures with HMRC, in order to take account of the conclusion that vehicles were capital assets subject to capital allowances.

In March 2019, the partnership lodged a further appeal which was struck out on the grounds that the 2019 appeal was based on grounds which entirely sought to re-litigate the 2016 appeal, which was outside of the First Tier Tribunal's jurisdiction.

On 28 August 2020, the partnership lodged its third appeal against HMRC's decision relating to the capital allowance treatment of cars. HMRC applied to have the appeal struck out arguing that the partnership was bound by the original decision in the 2016 appeal as the 2019 and 2020 appeals related to the same cause of action as the original matter. On that basis, the appeal should be struck out under rule 8(2)(a) of the Procedure Rules.

#### *Decision*

The burden of proof rested with the partnership to show that the assessments raised by HMRC were incorrect. The First Tier Tribunal stated that:

*“unless the Appellant can produce evidence to show that, on the balance of probabilities, it has been overcharged by the Assessments, the Assessments shall stand as good.”*

The Tribunal stated that during the 2016 appeal the partnership had never submitted the capital allowance computations now sought to be relied on. The Tribunal found that the subject matter and the underlying right of appeal in this third appeal was the same as during the two earlier appeals. The issue of capital allowance computations was not a new matter as they were a necessary part of the decision in the first appeal. As stated earlier, capital allowances was an area where the taxpayer could seek to agree figures with HMRC in order to take account of the conclusion that vehicles were capital assets subject to capital allowances.

The Tribunal was satisfied that the appeal must be struck out under rule 8(2)(a) of the Procedure Rules

*Waterloo Car Hire (A Partnership) v HMRC (TC08848)*

### **Basis Period Reform online tool**

HMRC are launching an online tool on 29 August 2023 that will allow businesses, the self-employed and their agents to request details of overlap profits where that data is held by HMRC.

An online 'g-form' will be available, with submissions processed by a dedicated team in HMRC who will then respond by email.

The form will be able to handle requests by agents covering multiple clients and will be publicised by HMRC ahead of its launch.

In the meantime, overlap figures can continue to be requested from HMRC by letter.

<https://www.att.org.uk/technical/news/>

### **Services provided by cosmetic clinic**

*Summary - Supplies of aesthetic, skincare and wellness treatments did not constitute medical care, making them standard rated.*

Dr Shotter holds a number of medical degrees, including an MBChB in medicine and surgery from the University of Leeds. She is registered with the GMC. She was training to become an anaesthetist, but in about 2012, she decided to focus on what she called 'aesthetic medicine'. Initially, she traded as a sole trader, treating patients from her own home, and through three salons. During this time, she was also working for the NHS.

In 2014, she set up Illuminate Skin Clinics Ltd and registered for VAT. Through this company she ran her private clinic offering a range of aesthetic, skincare and wellness treatments, including fat freezing, thread lifts, chemical peels, fillers, facials, intravenous drips and boosters.

Following a visit by HMRC in February 2019, HMRC:

- concluded that the company's supplies were standard rated and not exempt;
- rejected the company's February 2017 VAT repayment claim;
- raised a best judgment assessment for underpaid output VAT.

Following a statutory review, the company appealed to the First Tier Tribunal arguing that its supplies fell within Item 1, Group 7 Schedule 9 VATA 1994 as the exempt provision of medical care by a person on the register of medical practitioners.

There was also a dispute as to whether the appeal extended to Item 4 as the "The provision of care or medical or surgical treatment and, in connection with it, the supply of any goods, in any hospital or state-regulated institution".

## *Decision*

The First Tier Tribunal found that the dispute was to be resolved only with reference to Item 1. The Tribunal stated that:

- the grounds of appeal only made reference to Item 1 only; and
- item 4 required a state-regulated institution. The company's premises were registered with the Care Quality Commission but only from August 2018, after the period 12/16 being considered in this case.

It was accepted that Dr Shotter was on the register of medical practitioners, which meant that the only point in dispute was whether the company's supplies constituted 'medical care'.

The First Tier Tribunal stated that the term medical means 'diagnosing, treating and, in so far as possible, curing diseases or health disorders.'

Illuminate Skin Clinics Ltd treatments were being supplied for cosmetic rather than medical reasons within the proper meaning and effect of the legislation. It was possible that the treatment might also improve the self-esteem and self-confidence of a person, but the clients had not been referred to the clinic on the grounds of helping to treat mental health issues.

The supplies should have been standard rated.

The appeal was dismissed.

*Illuminate Skin Clinics Ltd v HMRC (TC08846)*

## **No time-to-pay arrangement in place**

*Summary – Paying VAT via the National Direct Debit Service did not change the statutory VAT due date. With no Time to Pay arrangement in force, the default surcharge penalty was valid.*

*W. W. M. Rose & Sons Ltd* is a wholesaler of agricultural machinery, equipment and supplies. The company submits VAT returns on a quarterly basis and normally settles the VAT due through the National Direct Debit Service.

On 12 March 2021, a Surcharge Liability Notice was issued to the company for failing to pay the VAT due for its 01/21 VAT return on time, giving a surcharge period of 12 March 2021 to 31 January 2022.

This case concerned the company's return and payment for its 01/22 return. The due date for the VAT return and payment was 7 March 2022.

- The company's VAT return was received by 7 March 2022, showing VAT due of £96,802.73;
- VAT for the period was paid via the National Direct Debit Service on multiple dates, but after the due date.

The company was issued with:

- a default surcharge on 17 March 2022, calculated as 2% of the outstanding VAT that was due for that period;
- a Surcharge Liability Notice of Extension, notifying that the surcharge period was extended until 31 January 2023.

However, the company believed the due date of payment for the period 01/22 was 10 March 2022, as HMRC allow three days additional days for direct debits to clear. On that date, one of the directors had telephoned HMRC's VAT helpline to advise of the difficulty in paying VAT on time and sought to agree a Time to Pay arrangement. He took this conversation to mean that a Time to Pay arrangement had been agreed. On this basis, the company believed that no surcharge penalty should have been charged.

### *Decision*

The Tribunal stated that one of the conditions for cancelling a surcharge penalty was where a Time to Pay arrangement had been agreed by the normal payment date.

Legislation states that a VAT return and payment is due one month after the end of the VAT period but that this is extended by seven calendar days if the return is submitted electronically. In this case, the relevant date was 7 March 2022. The Tribunal confirmed that where payments are collected via the National Direct Debit Service, HMRC do allow three days for direct debit payments to clear but that the due date remains unchanged.

Due to cashflow problems the year before, the company was already within the default surcharge regime and so should have known that a subsequent default would result in penalties. As no Time to Pay arrangement was in force by 7 March, the default surcharge was validly issued. In fact, even if the due date had been 10<sup>th</sup> March 2022, no Time to Pay arrangement had been put in place by that date.

*W. W. M. Rose & Sons Ltd v HMRC (TC08830)*

### **Free personal protective equipment**

*Summary - Input tax relating to obtaining BSI approval and a CE mark for the product was recoverable in full, while input tax claimed relating to general overheads and manufacturing costs was to be apportioned between that incurred for non-business and business purposes.*

On 26 March 2020, 3D Crowd CIC was incorporated as a community interest company (CIC). The company was used to enable a group of individuals with access to 3D printers to produce personal protective equipment (PPE) in the form of protective face shields to be used during the COVID pandemic.

The company wanted to be able to sell the face shields to the NHS, but without BSI approval and a CE mark for the product, this was not possible. While accreditation was being sought, the company decided to donate masks to the NHS and give them away for free to care homes and other medical institutions. To fund their activities, the company raised £150,000 from public donations through a "Go Fund Me" account.

Given its intention to make taxable supplies, the company registered for VAT and HMRC accepted this had been done correctly.

By the end of May 2020, the company had enlisted many thousands of volunteers and over 200,000 face shields had been donated to the NHS and care homes.

Unfortunately, by the time that accreditation was received in September 2020, demand for PPE had diminished, resulting in no supplies for consideration.

The company sought to recover VAT in its return for the period 08/20. This related to costs incurred:

- in connection with seeking accreditation which was only achieved on 21 September 2020);
- on general overheads;
- on materials bought to produce face masks.

HMRC accepted that the company was properly registered for VAT but stated that by giving away all the PPE it produced, the VAT incurred was not linked to taxable supplies and so is not deductible. HMRC's decision was contained in a review letter dated 24 November 2020.

Any appeal by the company should have been made within 30 days of the date of the review letter but was out of time when made on 22 January 2021. However, HMRC did not object to the Tribunal allowing the out of time appeal. The Tribunal stated that HMRC were at pains to make it clear that they sympathised with 3D's position and were aware of the importance of their actions. Sadly, they were bound by the legislation.

### *Decision*

The First Tier Tribunal stated that it was "3D's task to establish (to the ordinary civil standard of the balance of probabilities) their right to deduct the VAT in question as input tax."

The First Tier Tribunal found that the company was a taxable person, accepting that its intention was to make taxable supplies once accreditation had been granted.

The Tribunal moved on to consider whether there was a sufficient link between the input tax being claimed and the future taxable supplies that would be made.

The First Tier Tribunal found that the VAT incurred:

- in obtaining the company's accreditation as a supplier was recoverable in full;
- on general overheads and manufacturing costs was to be apportioned between that incurred for non-business and business purposes.

The Tribunal stated that:

- some of the donated items could be treated as samples for securing future contracts, so enabling VAT recovery on a proportion;
- unfortunately, the large volume of gifted masks meant this argument could not be applied across the board;

- apportionment should be agreed between the parties with encouragement to take a pragmatic approach given the circumstances.

*3D Crowd CIC v HMRC (TC08837)*

### **Overstated input tax claims**

*Summary – Having failed to produce the required evidence to support the input tax claims, the Tribunal found HMRC’s assessment and related penalties were correct.*

Adekunle Omisakin-Adeyela was the director and owner of Coonley Trading Ltd, a plumbing and drainage, heating and plumbing contracting franchise.

The company registered for VAT on 5 April 2017.

Having submitted VAT returns for the period 1 August 2017 to 31 July 2019 showing a combined deficit between gross outputs and inputs of £154,862.70, HMRC wrote to the company to arrange a visit to check the company’s records.

On arrival, HMRC were told that the VAT records were held in storage. This was despite having specifically requested that the company’s records for the periods from 1 August 2017 to 31 July 2019 should be available at the visit. The director declined an offer of assistance to retrieve the records citing health and safety as a reason as there was heavy equipment within the unit. Instead, two weeks later, he informed HMRC that he had visited the storage unit but was “unable to locate the laptop and the relevant paperwork therein”. He said that he was considering closing the company due to continuing financial losses.

The director was unable to provide tax invoices to support many of the company’s input tax claims and so HMRC issued:

- an assessment for £25,272, which was later reduced to £11,400;
- a separate penalty for £7,281 for 'deliberate not concealed' behaviour which was transferred to the director by issuing a personal liability notice.

Both the company and the director appealed to the First Tier Tribunal.

### *Decision*

The First Tier Tribunal case report stated that HMRC gave the director every chance to support the input tax claims but that evidence was not forthcoming.

Where evidence was lacking or the purpose of an expense was unclear HMRC had, in many cases, given the company the benefit of the doubt.

Having supplied no evidence to support the claimed capital that was introduced to fund the loss-making business, the Tribunal found that it was reasonable to conclude that the company 'did not have the funds to make the alleged purchases’.

The First Tier Tribunal found that HMRC’s assessment was correct. Further, the behaviour leading to the inaccuracies on the VAT returns arose due to the director’s deliberate behaviour.

Consequently, the penalties had been correctly calculated and were upheld. Finally, the decision to issue the director with a Personal Liability Notice, making him liable to pay 100% of the VAT penalty, was correct.

The appeal was dismissed.

*Coonley Trading Ltd and Adekunle Omisakin-Adeyela v HMRC (TC08828)*