

Business tax update (Lecture B1286 – 19.00 minutes)

Sky TV presenter and IR35

Summary – A sports TV presenter engaged by Sky TV was held to be a deemed employee under IR35, resulting in PAYE and Class 1 NICs payable of £281,000.

Dave Clark was a boxing and darts presenter who undertook work for Sky TV, initially on a self-employed basis but, at the company's request, from 2003, he provided his services through his personal service company, Little Piece of Paradise Ltd. This case concerned the period from 2013/14 through to 2017/18. Following a review, HMRC sought to collect £281,000 in PAYE and NICs under the IR35 legislation.

Dave Clark argued that under the contract, there was no mutuality of obligation, he was allowed to provide a substitute and Sky TV had little control over his work as he was presenting live broadcasts and he was responsible for preparing his shows at home in his own time.

Decision

Once again, we return to whether had the presenter been engaged directly, would he have been engaged under a hypothetical contract of service or a contract for services.

The First Tier Tribunal established that during the period concerned, contracts were signed under which Little Piece of Paradise Limited agreed to provide the services of Dave Clark as a lead presenter of professional darts for a total of 64 days a year when tournaments were being televised. There was a fixed annual fee payable, invoiced monthly irrespective of whether any days were actually worked in that month. Dave Clark was subject to a number of restrictive covenants for non-disclosure and non-compete. Where conditions were not met, Sky had the right to terminate the contract with immediate effect. Sky provided all the necessary equipment, organised Dave Clark's travel and accommodation and paid reasonable expenses. Although he prepared for the programmes in his own time and had control over his service delivery, Sky retained editorial control.

The First Tier Tribunal concluded that:

- mutuality of obligation was present as Sky TV had first call on Dave Clark's services and in return, he was paid 12 monthly instalments calculated based on a fixed fee;
- Sky TV had control over what, when and where services were performed. Further, the extensive restrictive covenants governing his work indicated a high level of control by Sky. The Tribunal acknowledged that through necessity, as with any expert, Dave Clark had a high degree of control over how his work was delivered but this was not the deciding factor.

The Tribunal concluded that Dave Clark was not in business on his own account but was dependent on Sky paying for his work done. Due the restrictive covenants, he was not free to work elsewhere outside of the contracted 64 days.

Although theoretically possible, there was no right of substitution. When such a substitution had taken place, it was Sky who had engaged and paid an existing Sky Sports presenter, and not Dave Clark himself.

On balance, the First Tier Tribunal concluded that any hypothetical contract was caught by the IR35 legislation.

The appeal was dismissed.

Little Piece of Paradise Limited v HMRC (TC08300)

Default surcharge – reasonable excuse?

Summary – There was no reasonable excuse for a “Faster payment” being received one day late. The default surcharge remained payable.

Rada In Business Limited had been in the VAT default surcharge regime since the period 07/20, meaning that all payments had to be made on time for the next 12 months to avoid a surcharge penalty.

The company submitted late returns and payment in both 7/20 and 10/20. This appeal related to the company’s third default in the 01/21 period, attracting a surcharge at the rate of 5% on outstanding VAT. The due date for filing and payment was Sunday 7 March 2021. The return was received on time but the payment was not received by HMRC until Monday 8 March 2021, having been sent by "Faster Payment" on Friday 5 March.

A 5% surcharge of £2,281 for being one day late was charged.

The company appealed

Decision

“Faster payments” are processed 365 days a year, including non-working days, with funds usually transferred within a couple of hours at most. However, the company provided no evidence to the Tribunal as to why this "Faster Payment" had taken three days to reach HMRC. They would have expected such an issue to have been raised with the bank, so providing a supporting audit trail. Consequently, the Tribunal concluded that this was not a reasonable excuse for the late payment.

Further, the Tribunal concluded that a year into the COVID-19 pandemic, the company should have had procedures in place to ensure payments were made in time. Remote working and staff on furlough was also not a reasonable excuse.

The company’s appeal was dismissed.

Rada In Business Limited v HMRC (TC08268)

New regime for filing and payment penalties

For VAT returns starting on or after 1 April 2022, the new harmonised penalty regime will come into force, replacing the existing default surcharge that applies to both late returns and payment.

Going forward, separate penalties will apply for late submission and late payment, plus interest. As a reminder, the two systems will broadly work as follows:

Late VAT returns

Late VAT returns will fall under a points-based penalty system, with each late return resulting in a penalty point being awarded.

A taxpayer will become liable to a fixed £200 penalty only after they have reached the points threshold, with the threshold being dependant on the taxpayer's submission frequency (annually = 2 points, quarterly = 4 points, monthly = 5 points).

If the taxpayer continues to miss submission deadlines after they have reached the points threshold and have been issued with a penalty, they will become liable for a further fixed rate penalty for each additional missed obligation.

Total points can be reset to zero once the taxpayer has met the following two conditions:

1. Submission of returns on or before the due date, for a period of time based on their submission frequency:
 - annually — 24 months
 - quarterly — 12 months
 - monthly — 6 months
2. All returns that were due within the preceding 24 months have been received.

We understand that a taxpayer's default surcharge history will not be carried forward into the new system, meaning that everyone will start with a clean slate. There is no soft landing on the late filing penalties.

Late payment

VAT paid late will have a penalty charged based on the amount and how late the payment is made.

The first penalty will be calculated as 2% of the outstanding amount if the taxpayer settles between 16 and 30 days after the due date. If there is any tax left unpaid 30 days after the due date, the penalty is set at 2% of the outstanding amount at day 15 plus 2% of the outstanding amount at day 30. In most instances this will amount to a 4% charge at day 30.

A second late payment penalty will be charged at a rate of 4% per annum, calculated on a daily basis on the total unpaid tax incurred from day 31.

In addition, interest will accrue daily after 30 days.

We understand that HMRC will not be charging a late payment penalty for the first year from 1 April 2022 until 31 March 2023 provided that the amount due is paid in full or a time to pay agreement is in place within 30 days of the payment due date.

<https://www.gov.uk/government/publications/interest-harmonisation-and-penalties-for-late-submission-and-late-payment-of-tax/interest-harmonisation-and-penalties-for-late-payment-and-late-submission>

Supply of medical staff

Summary –Supplies made by a company employing consultants and GPs were supplies of staff, making them standard rated. They were not supplies of exempt medical care.

Mainpay Limited supplied medical consultants and specialist GPs to an intermediary company called Accident & Emergency Agency Limited. This agency company then supplied the consultants and GP Specialists on to various hospital clients, which were generally NHS Trusts.

The issue to decide was whether Mainpay Limited was supplying medical care (Group 7 Schedule 9 VATA 1994/ Article 132(1) (c) of the Principal VAT Directive 2006/112/EC), meaning that its supplies were exempt from VAT or, as HMRC contended, the company was making a standard rated supply of staff.

The First Tier Tribunal had found in HMRC's favour and Mainpay Limited appealed to the Upper Tribunal.

Decision

Much of the argument before the Upper Tribunal was based on whether the First Tier Tribunal had been correct to decide that the NHS Trusts had control over the consultants and Specialist GPs supplied by Mainpay. The argument was that if Mainpay Limited retained control of its consultants and Specialist GPs then it could not be making a supply of staff and that its supplies were the exempt supply of medical care. If, however, Mainpay ceded control over the consultants and Specialist GPs to the NHS, it was accepted that this would be a supply of staff which, it was common ground, would not be exempt from VAT.

The Upper Tribunal found that the First Tier Tribunal were correct to consider the facts and circumstances under which the supplies took place including who controlled, directed and supervised the consultants. It was clear that although the consultants were paid by Mainpay Limited, the consultants' rate of pay was determined by negotiation between the agency and the NHS Trusts; not by Mainpay Limited. Mainpay Limited was not involved in the day-to day provision of medical care. Mainpay Limited would not know where in a hospital a consultant was based or what hours the consultant was working on any particular day . Mainpay Limited could not direct consultants to undertake an assignment but rather it was the intermediary company and the NHS Trusts that decided which consultant would undertake an assignment. There was no contact between the consultants and Mainpay Limited as to medical or professional matters. Even Mainpay Limited's Employee Handbook and Guide indicated that it was supplying staff, not medical care.

The Upper Tribunal concluded that the exemption contained in Article 132(1)(c) and Item 1(a) of Group 7 of Schedule 9 to VATA did not apply to the supplies made by Mainpay Limited. The appeal was dismissed.

Mainpay Limited v HMRC [2021] UKUT 0270 (TCC)

COVID-19 testing

COVID tests are now a common-place requirement for individuals travelling abroad but how are they treated for VAT?

HMRC considers that the objective purposes of COVID-19 testing are diagnosis and the protection of human health. This includes tests taken when travelling abroad. As a result, such testing may be treated as exempt medical care provided that the normal conditions are satisfied.

In summary:

- Sales of tests where the test is self-administered with an immediate result are standard rated;
- Sales of tests which include testing and diagnosis by someone other than the buyer are exempt where the testing and diagnosis is carried out or directly supervised by a registered health professional; otherwise they are standard rated;
- Tests administered by the pharmacist in pharmacies are exempt;
- Tests in GP surgeries are exempt where administered or directly supervised by a registered healthcare professional;
- Tests supplied by manufacturer to hospitals, pharmacies or GP surgeries are standard rated.

<https://www.gov.uk/government/publications/revenue-and-customs-brief-11-2021-vat-liability-of-coronavirus-covid-19-testing-services>

Grant of store pod long leases

Summary - The supply of Store Pods to investors was the exempt supply of a building and not the standard rated supply of storage facilities.

In December 2014, Harley Scott Commercial Limited purchased the freehold of a building in Nottingham and did not opt to tax.

Subsequently, third-party contractors were engaged to fit out the building as a self-storage facility that included the installation of Storage Pods. The external structure of the building remained unchanged and was described as being a large shed with an A-frame roof. It had mezzanine floors which were a steel frame covered with plywood. On the ground floor the base was concrete. Each floor was kept in place with bolts. The Store Pods were manufactured from single skin sheet metal with steel swing doors. There were corridors, communal areas and stairwells.

The company granted long leases over the Storage Pods to investors, who leased them back on a six-year lease to Harley Scott Commercial Limited in return for rent thus guaranteeing an advertised 8% return. The company then sought customers to whom they granted licences to use the units for storage. This supply also included office facilities, conference rooms, internet, car parking and security facilities. The supply also included "office facilities, catering facilities, conference rooms and free wifi as well as facilities you would expect such as manned reception areas, security facilities and supplies". Other facilities such as car parking spaces were also provided.

Harley Scott Commercial Limited argued that the supply of the Store Pods to the investors was the exempt supply of part of a building. The Store Pods were simply rooms in the building, the equivalent of flats in an apartment block.

HMRC disagreed, contending the company was supplying standard rated storage facilities and raised best judgement assessments totalling £653,000.

Following a review, the company appealed to the First Tier Tribunal.

Decision

The First Tier Tribunal found that it was the clear intention of both Harley Scott Commercial Limited and its investors to obtain an interest in a building that could be used to generate income.

The long leases were registered in the Land Registry, with the Store Pods being immoveable property. The pods were like rooms in a building and the supply was of a part of that building and so exempt from VAT.

Harley Scott Commercial Limited v HMRC (TC08299)