

Personal tax update (Lecture P1356 – 17.09 minutes)

PAYE offset denied

Summary – With no PAYE paid and the partnership losses used to reduce the tax liability to virtually nil, no PAYE credit was available.

James Baillie worked in the mobile phone industry and had his own companies. He was aware of “MTIC fraud” and was falsely accused of involvement in such a MTIC scheme, spending some 8 months in prison, before he was acquitted.

In 2003/04, earnings of £2,067,600 had been credited to James Baillie’s directors loan account with Baillie Limited. He claimed that this was the net earnings, after deductions for PAYE and NIC, where the gross earnings were actually £4,425,000. This company was put into receivership. HMRC issued a final proof of debt against Baillies Limited which did not include the disputed PAYE liabilities.

James Baillie invested in film partnerships and it was not disputed that James Baillie claimed and had the right to utilise UK tax losses amounting to £3,642,125 arising from two film partnership transactions, the Third Close Film Fund No 3 Partnership and Grosvenor Park 2001 Partnership (the Film Partnerships). In 2003/04, his available partnership losses covered the whole of his income for the year, leaving only £2.50 as payable. As a result, he sought to reclaim the PAYE referred to above and understood that in order to do so, the PAYE must have been paid, which he believed had been done. He argued that HMRC had not included a debt for PAYE on the liquidation, so it must have been paid.

HMRC argued that the PAYE had not been paid, which was confirmed by James Baillie’s advisers. While losses from the partnership were available to be offset against other profits, they could not be set against the PAYE related earnings, as the PAYE had never been paid.

Decision

The Tribunal noted that HMRC had amended James Baillie’s tax return to reduce his employment income to the amount on his director’s loan account, removing the credit for PAYE deducted. Mr Baillie’s available partnership losses covered the entirety of this income for the year.

Consequently, the Tribunal concluded that HMRC were correct not to include the PAYE in the debts settled by the liquidator, since from their perspective, no income tax was due from James Baillie or Baillies Limited at that time.

The First Tier Tribunal found that the only evidence provided of the PAYE payment having been made to HMRC was the accounting entry in his director’s loan account.

As the Tribunal stated:

“in the McVeigh decision, the mere entry in the accounts of a company is not sufficient to amount to payment. In order to succeed, Mr Baillie needs to show that payment of this amount was actually paid to HMRC.”

James Stuart Baillie v HMRC (TC08661)

High income child benefit charge discovery

Summary - Discovery assessments issued to collect unpaid high income child benefit charges were invalid as the law at the time only allowed HMRC to assess tax relating to untaxed income.

Jason Wilkes had not submitted tax returns as his income was fully taxed under PAYE. However, he earned more than £50,000 and his wife had been receiving child benefit. Following up on an HMRC nudge letter received in November 2018, Jason Wilkes established that he was liable to the High Income Child Benefit Charge (HICBC), HMRC issued discovery assessments to collect the sums due for the tax years 2014/15 to 2016/17.

Jason Wilkes appealed and he was successful at both the First Tier and Upper Tribunals who found that legislation allows HMRC to assess income that ought to have been so assessed. At the time, it did not allow a discovery assessment to be used to collect a tax charge such as the HICBC.

HMRC appealed to the Court of Appeal.

Decision

Agreeing with the Upper Tribunal, the Court of Appeal confirmed that the HICBC was an unpaid tax charge, that did not relate to untaxed income. Jason Wilkes had been correctly taxed on his income through PAYE, meaning that no additional tax was due on his income. The discovery assessments were invalid.

The Court of Appeal stated that it was not its role amend the legislation to enable HMRC to collect the HICBC. In any case, the Court could not be sure that the wording differed from Parliament's intentions.

HMRC's appeal was dismissed.

Note: In s.97 FA 2022, the legislation was amended with retrospective effect, to allow HMRC to use discovery assessments to recover the HICBC. However, this legislation does not apply to discovery assessment appeals made before 30 June 2021.

HMRC v Jason Wilkes [2022] EWCA Civ 1612

Personal Liability Notice to collect NICs

Summary – With the company in Creditor's Voluntary Liquidation, the Personal Liability Notice was not time-barred.

Gary Wagstaff was the sole director of Warehouse Holdings Limited (WHL). The company set up a PAYE scheme that was active from December 2009 to August 2013 and during this time, the company made deductions of income tax and NICs from its employees' salaries.

The company:

- filed its P35 Return for the tax year 2009/10 on 20 March 2012, almost two years after the deadline of 19 May 2010, declaring NICs due of £13,238.26;
- failed to submit its P35 Returns for the tax years 2010/11 to 2012/13;
- failed to submit monthly RTI returns for the tax year 2013/14.

Between June 2012 to October 2013 the company made payments to HMRC totalling £22,258.68 but failed to pay any further sums due for the periods 2009/10 to 2013/14.

On 20 November 2015 the company entered Creditors' Voluntary Liquidation (CVL).

Using computerised P11 Deduction Working Sheets provided by the company, HMRC were able to ascertain the NICs deducted from employee salaries in the years 2009/10 to 2013/14. In October 2016 HMRC submitted a proof of debt to the liquidators that included a claim for unpaid NICs for the tax years 2009/10 to 2013/14.

On 13 March 2019, on the basis that the company's failure to pay the NICs arose due to neglect by Gary Wagstaff, HMRC issued a Personal Liability Notice for unpaid NICs plus interest, totalling £301,941.10.

The sole issue before the First Tier Tribunal was whether the Personal Liability Notice was issued out of time. Gary Wagstaff contended that under s.9 Limitation Act 1980, the NICs were subject to a limitation period of six years. He argued that the NICs in respect of periods prior to the tax month ending 5 March 2013 were statute barred by 13 March 2019, when the Personal Liability Notice was issued. The First Tier Tribunal had dismissed Gary Wagstaff's appeal against the notice, finding that the Personal Liability Notice was not time-barred.

Gary Wagstaff appealed to the Upper Tribunal.

Decision

The Upper Tribunal found that:

"When a company enters into CVL, its unsecured liabilities are inevitably in and to be determined within the liquidation. There is no other regime that applies to determine the existence of WHL's liabilities and their enforceability for limitation purposes".

The 6-year limitation period claimed by Gary Wagstaff did not apply. It did not matter that the Personal Liability Notice was not issued until March 2019.

The Upper Tribunal finished by saying:

"There is no inherent unfairness in a culpable director remaining liable so long as their company is (still liable).

...And in any event, limitation periods are often extended, for example if the debt is acknowledged.

...Furthermore, when the company is dissolved, it is no longer liable to pay and so a PLN could not be issued."

At the time the Personal Liability Notice was issued, the company was still liable as the Creditors' Voluntary Liquidation was not completed, and the company was not dissolved until the months immediately prior to the Upper Tribunal's hearing.

The appeal was dismissed.

Gary Wagstaff v HMRC [2022] UKUT 00327 (TCC)

SDLT on grazing land and woodland

Summary – Grazing and rewilding land were not residential property, meaning that the mixed use rates of SDLT applied to the purchase.

Gary Withers and his wife bought a dwelling with an independent annexe, some 39 acres of gardens, fields and woodlands. They submitted their SDLT return on the basis that the property was mixed use as some of the land was used for sheep grazing and for cutting hay, and further land fell under a Woodland Trust rewilding scheme. The couple also claimed Multiple Dwellings Relief (MDR).

HMRC accepted the claim for MDR but argued that the land was wholly residential, with the grazing and rewilding land representing the dwellings 'grounds' (s.116(1)(a) FA 2003).

The grazing land had been used for this purpose continuously for 20 years and the Woodland Trust rewilding land was subject to strict conditions regarding access and use, as well as obligations on the Withers to control pests and not graze livestock. Written agreements were in place at the effective date of the land transaction. The taxpayer appealed.

Decision

Both parties agreed that the house and annexe were residential property; the issue was whether the land could be used by the owner as they wished, making it part of the garden and grounds of the property.

To qualify as mixed-use land, the First Tier Tribunal stated that the land needed to have a function other than garden or grounds. With both grazing and Woodland Trust agreements in place at the time purchase, the Tribunal found that these areas of land had separate purposes. More specifically, the sheer volume of sheep grazing meant that the land had a commercial use. Farming equipment including a feeding station and water troughs demonstrated that the land was used agriculturally rather than for personal use. Under the rewilding agreement with the Woodland Trust, the Withers were responsible for 50% of the relevant costs and they had an obligation to control rabbits and prevent animals grazing.

The Tribunal found that the purchase was of mixed-use and the appeal was allowed.

Gary Withers v HMRC (TC8649)

Multiple Dwellings but not mixed use

Summary - A commercial lease entered into to enable the taxpayer to reduce their SDLT breached anti-avoidance provisions so the scheme failed but Multiple Dwellings Relief was then available.

Daniel Ridgway wanted to acquire two adjacent properties: a semidetached house and a property converted from a garage, previously used as an artist's studio. The two properties had separate titles and land registrations.

Daniel Ridgway wanted to make the best offer possible. He took advice on how to reduce the SDLT payable, so enabling him to increase the price he could offer. He was advised that if the 'artist's studio' was in commercial use at completion, then following HMRC's Guidance at SDLT00365, his purchase would qualify for the lower mixed-use rates of SDLT.

The guidance stated:

'SDLT is assessed on the basis of use at the time of the purchase, so if there is a genuine arm's length commercial tenancy, that should be mixed use, rather than residential.'

Daniel Ridgway was also advised that if a commercial lease was not possible, Multiple Dwellings Relief could be claimed.

Based on this advice, and prior to the purchase, Daniel Ridgway found a photographic studio that agreed to take on a 9-month commercial lease. This prohibited use of the property as a dwelling and further, sub-letting was not allowed. With the lease in place at completion, Daniel Ridgway claimed mixed use relief from SDLT.

HMRC stated that their guidance did not have the force of law and preferred to apply their latest thinking. Consequently, HMRC argued that, despite not being used as a dwelling at completion, it was suitable to do so, meaning that the residential rates applied. HMRC's current guidance reflects this thinking.

HMRC denied the Multiple Dwellings Relief as, although the taxpayer would have been eligible for the relief, the claim was not made in the SDLT return.

Decision

The First Tier Tribunal found that the terms of the commercial lease and the consequences of breaching those terms made the property not "suitable for use" as a dwelling at the effective date.

However, under the s.75 FA 2003 anti-avoidance provisions, mixed use relief was denied. The Tribunal noted that although s.75A FA 2003 refers to "Anti-avoidance", the section applies whether or not there is a tax avoidance motive (*Project Blue Limited v HMRC* [2018] UKSC 30). All that is required is that a lower amount of SDLT would be payable because of the scheme transactions. Daniel Ridgway had entered into the commercial lease to reduce his liability to SDLT, so enabling him to pay the largest price possible for the properties and so out-bid the competition. Having fallen foul of s.75A, the lease was ignored, meaning that the notional transaction that had taken place was simply the sale and purchase of the properties.

Finally, the Tribunal considered the Multiple Dwellings Relief claim and found that:

- Multiple Dwellings Relief was deemed to be available as a result of the disregard of the commercial lease;
- there is no statutory requirement to make a claim for relief in a land transaction return or an amendment to a return.

The appeal was allowed in part.

Daniel Ridgway v HMRC (TC08636)

Rugby player was too late

Summary – An application for permission to make a late appeal against HMRC's IR35 assessments was dismissed.

Michael Lynagh, a former professional rugby player, was employed by Dow Jones but also provided his services as a “pundit” through his personal service company, MPTL Limited.

HMRC challenged the tax treatment of the services provided, arguing that they fell foul of IR35. HMRC raised assessments to collect income tax and NICs totalling some £230,000.

Following a statutory review, HMRC sent a letter that upheld the application of IR35 and the determinations and decisions made. The letter was lengthy and detailed, extending to 19 pages. It concluded with a section setting out MPTL Limited’s appeal rights, stated that an appeal had to be made in writing to the First Tier Tribunal within 30 days.

MPTL Limited’s agents notified HMRC that they intended to appeal within the time limit but failed to notify the tribunal.

Unhappy with their agents, MPTL Limited appointed new agents, who then discovered that the previous agents had failed to lodge an appeal with the First Tier Tribunal by the deadline stated. The new agents applied for permission to make a late appeal.

Decision

The First Tier Tribunal considered the three-fold test set out by the Upper Tribunal in *Martland v HMRC* [2018] UKUT (TCC):

1. How late was the appeal? - 59 days late was sufficiently long to be considered ‘serious’.
2. What was the reason for being late? - there was no good reason for the appeal not being made on time. HMRC’s letter was clear and the agents were a professional firm who should have been aware of the procedure for filing appeals. The company could not distance itself from its agent. Stating that “compliance with clear time limits, failures by MPTL’s professional advisers are to be treated as failures by MPTL itself.”
3. Circumstances of the case - The Tribunal did not feel that the case was sufficiently strong as outside of his “pundit” role, Michael Lynagh worked as an employee for Dow Jones and had no other self-employment activities to support his case.

The application was refused.

MPTL Limited v HMRC (TC08669)