

Personal tax update (Lecture P1411 – 23.43 minutes)

Employed or self employed

Summary – The First Tier Tribunal concluded that the hypothetical contract between worker and the BBC was one of self-employment.

This case has been to the Court of Appeal and back, with the lower Tribunals having previously found in the taxpayer's favour. As a refresher, Kaye Adams worked as a TV presenter, supplying her services to the BBC via her personal service company, Atholl House Productions Ltd. HMRC raised income tax and national insurance assessments for just under £125,000 under the IR35 rules.

Having lost at the First Tier Tribunal, HMRC appealed to the Upper Tribunal who considered the content of the actual contract as well as that of a hypothetical contract. Applying the Ready Mixed Concrete tests, the Upper Tribunal concluded that mutuality of obligation existed and that the BBC had sufficient control over when, where and how work was carried out.

Moving to the third test, the Upper Tribunal considered whether there were sufficient other factors that would override mutuality of obligation and control. Namely, was Kaye Adams in business on her own account? Accepting that she was already carrying on similar activities on her own account prior to working for the BBC, the Tribunal concluded that the BBC work was part of her existing sole trade and this was not a contract of employment. The intermediaries' legislation did not apply.

The case moved to the Court of Appeal who accepted the hypothetical contracts satisfied both mutuality of obligation and control but disagreed with the approach taken when deciding whether under the hypothetical contract, Kaye Adams was in business on her own account. Just because she undertook other similar work in business on her own account, did not automatically mean that the BBC work was part of that business and so fell outside of the IR35 rules. The case was remitted back to the Upper Tribunal to apply the correct test. The Tribunal was asked to analyse the specific circumstances that applied in this case, taking into account new facts that could be presented.

The Upper Tribunal decided the First Tier Tribunal was best suited to revisit the case.

Decision

The First Tier Tribunal confirmed the Court of Appeal's finding that the terms of the actual contracts between Kaye Adams and the BBC should reflect the terms of the written agreements between them.

Moving to the hypothetical contract, the First Tier Tribunal stated that this should be determined by considering the terms of the actual contracts as well as how those contracts were actually carried out. Having done so, the Tribunal decided the terms of the hypothetical contracts were the same as those found by the Upper Tribunal.

The Tribunal confirmed that for there to be an employer and employee relationship, there must be:

1. mutuality of obligations;
2. a degree of control over "employee"; and

3. the other terms of the contract must be consistent with there being an employment contract.

The First Tier Tribunal decided that previous findings on mutuality of obligation and control remained unchanged, pointing towards employment.

The final question to answer was whether the hypothetical contracts would have been employment contracts or, under those contracts, would Kaye Adams be seen *as someone acting in the course of a business on her own account*.

The Tribunal reviewed the terms of the hypothetical contracts and stated that these tended to "indicate that the relationship between the BBC and Ms Adams would have been one of employment".

However, with other areas pointing away from employment, the Tribunal reached a "finely balanced" decision, finding that under the hypothetical contracts Kaye Adams was self-employed and not employed. There were a number of points in her favour:

- she had her own brand as a presenter, with a history of working as a freelancer;
- it was common practice for the BBC to treat presenters as self-employed independent contractors;
- there was an absence of control over her other engagements and there was a *meaningful* amount of time available for her to undertake such work;
- there was a distinct lack of training and she had to use her own equipment;
- unlike other employees, she had no entitlement to sick pay, paid leave or pension entitlement; further she could not apply for other roles within the BBC.

Atholl House Productions Limited v HMRC (TC/2018/02263)

HICBC nudge letters

In both of the following cases a nudge letter was sent to the taxpayer concerning the need to pay the High Income Child Benefit Charge (HICBC). What was the outcome when both taxpayers claimed ignorance of the law?

Michael Barrett v HMRC (TC08970)

HMRC sent letters regarding the HICBC to Michael Barret dated 29 November 2019 and 4 June 2021 at an old address, where he had not resided since May 2019. He had set up a re-direct of mail, but these letters were not received. Finally, on 14 September 2022, he received a letter at his current address.

As an employee, taxed under PAYE, he had never been asked to complete a Self Assessment tax return. With his children born before the introduction of the HICBC legislation and HMRC failing to sufficiently communicate the changes to the law, he did not realise that he needed to do so to report liability to the HICBC.

The taxpayer appealed against the penalty for failing to notify his liability to the charge but accepted his liability to the assessment.

The First Tier Tribunal accepted the taxpayer's argument that he had not received the first two letters. Once he was aware of the issue, he promptly sought to resolve it.

Deciding that he had an 'objectively reasonable excuse' for the failure to notify, the penalty was cancelled.

Douglas Lakeland v HMRC (TC08997)

As in the previous case, Douglas Lakeland was an employee, who was not required to submit a Self Assessment return. His wife had been claiming child benefit since 2001.

The couple claimed that neither of them was aware of the HICBC, although according to HMRC's records, Douglas Lakeland had been sent a generic letter, SA252, in 2013 about its introduction.

In January 2021, HMRC sent Douglas Lakeland a nudge letter about the charge, which he claimed not to have received.

In July 2021, with income exceeding the £50,000 limit, HMRC issued assessments for the years that the couple had failed to pay the HICBC.

On appeal, the First Tier Tribunal confirmed the assessments, accepting that the taxpayer and his wife were 'honest and honourable people who were very upset that they had fallen foul of the tax authorities and were very keen to rectify things'.

The Tribunal found that on the balance of probabilities, Douglas Lakeland had not received either the SA252 or subsequent nudge letter. Consequently, Douglas Lakeland had a reasonable excuse for failing to notify the charge based on ignorance of the law. The appeal against the penalties was allowed.

PPR relief on four properties sold

Summary – The taxpayer was found not to be trading but the decision as to whether the profits on sale of his properties were exempt from CGT has been remitted back to the First Tier Tribunal.

Between 2010 and 2015, Mark Campbell bought and sold four properties:

- 10 Woodhouse Close, purchased on 17 December 2010 for £80,000 and sold on 24 April 2012 for £116,000;
- 28 Bramhill Close, purchased on 12 October 2012 for £95,000 and sold on 22 January 2015 for £125,000;
- 2 Bramhill Close, purchased on 8 February 2013 for £100,000 and sold on 20 June 2014 for £147,000;
- 8 Wigshaw Lane, purchased on 17 June 2015 for £95,000 and sold on 31 March 2016 for £245,000.

He did not notify any of the properties to HMRC.

HMRC issued assessments charging income tax on his trading transactions or, alternatively the transactions were capital in nature but not covered by main residence relief. Further, HMRC charged penalties on the basis of deliberate failure to notify his liability.

Mark Campbell appealed, arguing that he intended to live in each of properties as his main residence but was unable to do so due to his father's ill health. He claimed that he was employed as his father's full-time carer, residing at his home. Consequently, any gains on the property were covered by the job-related accommodation exemption within s.222(8) TCGA 1992.

Despite the presence of a number of badges of trade, the First Tier Tribunal rejected HMRC's claim that Mark Campbell was trading. The Tribunal identified factors which it considered pointed away from a trade.

However, the Tribunal did not accept that he was living in job-related accommodation it did "not accept that the accommodation was provided for the purposes of employment".

Mark Campbell appealed to the Upper Tribunal. HMRC cross-appealed on the ground that the taxpayer was trading.

Decision

The Upper Tribunal found that the First Tier Tribunal's decision that there was no trade had been appropriately reached. It had 'correctly directed itself as to the law' and none of the factors considered by the First Tier were irrelevant. Further, a "checklist" approach based on the badges of trade was not necessary. With no error of principle involved, the First Tier Tribunal had reached a decision that "was within the range of decisions open to it". HMRC's appeal was dismissed.

Moving to the job-related accommodation issue, the First Tier had made errors in law by failing to:

1. Consider whether the accommodation was provided 'by reason of the employment'; the Tribunal had concluded that it had not been provided 'for the purposes of the employment'.
2. Take into account the medical evidence that was directly relevant to the question of whether the accommodation was necessary for the performance of the employment duties.

The Upper Tribunal remitted the case back to a differently formed First Tier Tribunal and also remitted the penalty appeals back for that Tribunal to apply the correct tests to determine deliberate behaviour and provide reasons which would justify their finding.

Mark Campbell v HMRC [2023] UKUT 00265 (TCC)

Renovated properties as main residence

Summary – Due to the circumstances, buying, renovating and selling three properties at a profit did not amount to trading. The taxpayer had occupied all three properties as his home, meaning that no CGT was payable either.

Gary Ives had bought and sold three properties:

- 27 Ringmer Avenue, Fulham: Bought in November 2008 as two flats for £760,000 and sold as a single dwelling in August 2010 for £1.775 million;

- 69 Wandsworth Bridge Road: Bought October 2010 for £750,000 and sold in January 2012 for £1.5 million;
- 24 Crondace Road, Fulham: Bought for £1.731 million in July 2012 and sold in December 2013 for £3.25 million.

All three properties needed to be renovated and during this time, he lived in them with his wife as their main residence, meaning that no CGT was payable on sale.

Throughout this period Gary Ives also owned a fourth residential property, that was his original family home. This was occupied by some of Gary Ives' adult children.

HMRC argued that they were trading transactions and so the profits on sale were liable to income tax. Alternatively, they were capital in nature, with no principal private residence relief available as they were not his main residence.

Decision

The First Tier Tribunal considered the badges of trade, and commented that a number of these were satisfied, which might indicate trading. With three profitable transactions having taken place in a short period of time, after having completed renovation work, it was easy to see why HMRC would want to conclude that Gary Ives was trading.

The First Tier Tribunal found that the property transactions did not amount to trading, as all three sales were carried out for personal, non-trading reasons.

The First Tier Tribunal considered the scope of the closure notices HMRC had issued to the taxpayer, deciding they did not preclude them from considering the potential capital gains outcome.

Although Gary Ives worked in the building trade, he was more of a small project or odd jobs man.

Based on the witness statements provided, it was clear that all three properties had been intended to be used and, for a short period, were actually enjoyed as family homes. There was no evidence to suggest that Gary Ives intended to resell the properties at the time of purchase. However, for various family reasons and changes in circumstances, the couple needed to move on sooner than intended.

The First tier Tribunal found that Gary Ives was entitled to principal private residence relief.

Gary Ives v HMRC (TC08989)

Inadequate facilities for MDR

Summary – With no cooker, hob or washing machine, the detached annexe bought with the main house was not suitable for use as a dwelling and Multiple Dwellings Relief was denied.

Jonathan Ralph, a wealthy South African businessman, owned a flat in London. In September 2020, he started working in London on 1 September 2020 and wanted to relocate his family to the UK.

On 6 November 2020 he exchanged contracts to purchase a property for a £3,300,000 and completed the purchase the following month.

He filed his Stamp Duty Land Tax (SDLT) return, claiming Multiple Dwellings Relief (MDR) on the basis that the property's detached annexe had been lived in by the previous owner's son, just before the COVID lockdown.

Following an enquiry, HMRC denied the MDR and Jonathan Ralph appealed.

The property was a large house, sitting in some 40 acres of land and included a detached three bay garage with rooms above on the first floor (the annexe).

The annexe included a bathroom with toilet, basin, shower and had central heating, fibre broadband, mains electricity, gas, water and a separate zone on the house alarm system. The utilities did not have separate meters and the annexe was not separately registered for Council Tax. The kitchen consisted of a microwave, kettle, toaster, fridge, table and a bench. There was no cooker as the annexe did not have the high voltage electricity connections needed to fit a cooker, electric oven or hob. The main room was fitted out with gym equipment, TV and sofa.

Following completion, the annexe was refitted to include an oven and electric hob, with the necessary high voltage power connections. However, in the two years since the alterations despite the annexe being used regularly by family and visitors, the oven and hob were never used and the high voltage connection never switched on.

A washing machine and tumble dryer had been bought, but the necessary plumbing connections had not been fitted. The taxpayer argued that the necessary water connections would be easy to carry out due to the existing infrastructure.

Jonathan Ralph and his family lived in the annexe for 6 months after completion while the main house was being refurbished but claimed that they never used cooker or hob, preferring to eat out or use the convection microwave. Washing clothes was not a problem as the family preferred to send their laundry out to be cleaned.

The issue to decide was whether the annexe suitable for use as a dwelling at the time of purchase?

Decision

The First Tier Tribunal accepted that the family's lifestyle did not require the use of a conventional cooker or a washing machine. However, it disagreed with Jonathan Ralph's argument that these days people had a different approach to cooking, often not requiring a hob or oven.

The First Tier Tribunal stated that the test was that of 'occupants in general' and if looked at objectively would they "find the property suitable for use as a dwelling"?

The Ralph family's lifestyle was not representative of people in general who would need a cooker, hob and plumbed in washing machine.

The appeal was dismissed.

Jonathan Ralph v HMRC (TC08969)