

Business tax update (Lecture B1261 – 23.09 minutes)

Taxpayer loses IR35 appeal

Summary - A project manager contracting through an intermediary personal service company was subject to the IR35 legislation and so liable to income tax and NICs as an employee.

Robert Lee worked almost continuously for seven years as a project manager for Nationwide through his personal service company, Northern Light Solutions Limited (NLS). The terms of the various contracts were all similar, requiring him allocate tasks to the project team and to determine the costs and timescales for delivering projects. Under each of the contracts, he worked for a fixed term, with fixed hours and a fixed day rate. There was no holiday or sick pay. Included in his contracts was an unexercised right of substitution that would have required Nationwide's consent.

Believing that the arrangements fell foul of the IR35 rules, HMRC issued Income Tax determinations and NIC notices in respect of three tax years.

On appeal, the First Tier Tribunal had found that had a hypothetical contract existed between Robert Lee and Nationwide, it would have been one of employment. Robert Lee was subject to the kinds of controls that were consistent with being a highly skilled employee.

NLS appealed to the Upper Tribunal arguing that the First Tier Tribunal had erred in their decision relating to mutuality of obligation, the level of control exercised by Nationwide and that the company's ability to provide a substitute was not hypothetical.

Decision

The Upper Tribunal concluded that sufficient mutuality of obligation existed. It did not matter that there would have been no obligation on Nationwide to offer work or indeed, for Robert Lee to accept work, if a project ended early. What mattered was that until the contract ended, there was clearly an obligation to pay for work done and an obligation to do the work provided.

On the issue of control, the Upper Tribunal found that, although Nationwide could not insist that Robert Lee work on a project other than the one in his contract, Nationwide had sufficient control over when and where he worked. Under his contracts he was required to work a 7.5 hour day and Nationwide could require him to work from a particular office.

Based on the case facts, although there was a right of substitution on the contracts, the Upper Tribunal concluded that it was unlikely that NLS would be able to provide a satisfactory substitute with the right experience, security clearance and familiarity with the project. Following the decision in the *Pimlico Plumbers case*, the dominant feature of the contract was an obligation for Robert Lee to perform the role himself.

The First Tier Tribunal's decision was upheld.

Northern Light Solutions Limited v HMRC [2021] UKUT 0134 (TCC)

Ghost account to conceal income

Summary – A sole trader had under-declared income from his business for six tax years, receiving customer payments into a bank account in his mother's maiden name.

In 2005 Roger Whitlock commenced his self-employed business of removing household and garden rubbish from domestic properties, builders and other businesses.

On 9 March 2017, HMRC opened an enquiry into his Self Assessment tax return for the tax year 2015/2016. This was prompted by the fact that all figures were reported in round thousands, his expenses seemed very high compared with other businesses and his profits chargeable to tax were always just above or occasionally just below the personal allowance limit.

Roger Whitlock claimed that he usually worked alone, he did not issue invoices to his customers and that all cash received from customers was banked the following day and that he did not retain any cash.

HMRC:

- established that expenses claimed were more than had been withdrawn from his bank account;
- showed him reviews of his "team" on social media in 2014 and 2015 and were able to prove that he had insured multiple vehicles;
- identified a bank account in his mother's maiden name which recorded payments to and from Roger Whitlock's bank account.

He accepted that not all receipts had been banked and that he did indeed have a team of people working for him, meaning that his business was in fact larger than he had made out.

As for the bank account, he claimed that these were loans from his mother to assist him financially. However, the sum of the payments from him to his mother's bank account was greater than the sum of the payments from his mother's bank account to him. Furthermore, in some transactions the same amount of money was transferred back and forth between the accounts in the same amount on the same day. He claimed that his mother used telephone banking to make her transfers but none of the bank statements showed any sign of telephone banking having been used. He was unable to explain payments from her account for commercial vehicle insurance and payday loans. Further, there was no evidence supporting the fact that she used the account for her own income and expenses. He denied that the account was in fact a ghost account that he operated for the purposes of his business. HMRC included all payments to him from his mother's bank account as additional trading income.

Finally, having flagged that there was no sign of any 'ordinary household' expenses coming out of his bank account, HMRC added a further figure of £100 per week to his turnover to represent the fact that he was likely to have paid for his ordinary household expenses in undeclared cash generated by his business.

In total, HMRC added approximately £38,000 as under-declared income for 2015/16. Given his business had not varied in size in the previous five years and the figures were again rounded, based on the 'presumption of continuity', it could be inferred that similar under-declarations had occurred in earlier tax years. HMRC issued discovery assessments for the five years before.

Although he disputed the figures in HMRC's discovery assessments and the closure notice, Roger Whitlock could not put forward any reliable alternative figures. He had very little in the way of business records and, apparently, no method of recording the receipt of cash. He had offered HMRC £20,000 to settle his liabilities and could not understand why this was not acceptable.

Roger Whitlock appealed to the First tier Tribunal against the Closure notice for 2015/16 and the discovery notices for the previous five years.

Decision

With Roger Whitlock unable to offer any evidence to the contrary, the First Tier Tribunal agreed with the evidence that HMRC had presented.

He had deliberately under-declared his income and the appeal was dismissed.

Roger Whitlock v HMRC (TC08136)

No loss relief as not trading

Summary - Participants in a tax avoidance scheme designed to create losses were denied sideways relief as they were not trading and there was an absence of economic loss.

Anthony and Ross Outram were brothers whose cases were heard together due the similar nature of the facts involved.

As part of a criminal investigation involving a search of the scheme provider, Montpelier Tax Planning, HMRC became aware of the brother's involvement in that scheme.

The brothers sought no advice before entering into the scheme, stating that they both relied on Montpelier Tax Planning for everything, who in turn reassured them that their involvement in the tax planning scheme was trading activity, and that this was confirmed by counsel. Consequently, the brothers claimed that they were self-employed options traders and claimed trading losses for 2005/06 against other income in that year and by carrying it back.

Suspecting fraud, HMRC opened a COP 9 enquiry, believing that the brothers had submitted incorrect tax returns containing loss claims believed to be knowingly incorrect. The brothers chose not to make a contractual disclosure and HMRC issued discovery assessments that disallowed most of the losses, arguing that their behaviour had been deliberate.

The brothers appealed.

Decision

The Tribunal found that there was no trade and they had not suffered an economic loss. Choosing not to use a trading platform, the brothers engaged the tax planning services of Montpelier. Knowingly, they had entered into a tax avoidance scheme with the sole aim being to create a significant loss, enabling them to claim substantial tax repayments. The brothers knew when they filed their Self Assessment returns that they were not carrying on a trade entitling them claim loss relief.

The Tribunal stated:

'This was not a question of the appellants turning a blind eye. They did not ask questions or read documents because they knew precisely what they were doing.'

The appeal was dismissed.

Anthony Outram and Ross Outram v HMRC (TC08107)

R&C Brief 7 (2021): Charging of electric vehicles

Revenue and Customs Brief 7 confirms that supplies of electric vehicle charging through charging points in public places are standard rated and that a reduced rate of VAT applies for 'de minimis' supplies if the supply is ongoing to a person's house or building, and less than 1000 kilowatt hours a month.

The Brief also explains that businesses can recover the input tax for charging electric vehicles as follows:

- Sole traders can recover the input tax for charging an electric vehicle at home or at other places where the charging is for business use;
- VAT when employees charge an electric vehicle at home for business use cannot be recovered as the supply is made to the employee and not to the business;
- VAT on employees charging an employer's electric vehicle used for business and private use at the employer's premises can be recovered on the business element of the input tax suffered in one of two ways, provided the employee keeps a record of business and private mileage:
 1. Recover the full amount of VAT for the supply of electricity used to charge the electric vehicle and record an output tax charge (deemed supply) on the amount for private use; or
 2. Recover VAT on the business element only.

<https://www.gov.uk/government/publications/revenue-and-customs-brief-7-2021-vat-liability-of-charging-of-electric-vehicles>

Management charges to foreign subsidiaries

Summary – A holding company recharging management services to its subsidiaries through a loan account that remained unpaid was an economic activity supplied for consideration.

Tower Resources plc is a UK holding company. Its business is to acquire licences to explore for and produce oil and gas in Africa. These operations generally take up to 10 years before the first production of oil and are far from certain to succeed, with only about 20% of ventures operating on a commercially viable basis.

The activities are operated through local foreign subsidiaries, with the parent company funding the subsidiaries management, logistical and technical services. Tower Resources plc suffered input tax on invoices from UK companies which were passed on to its subsidiaries with a 5% mark up as part of their management fees.

Tower Resources plc believed that these management charges fell under the general B2B rule for services, making them outside the scope of VAT as the services were provided outside the UK. The management services invoiced were charged through intercompany loan accounts, that were technically repayable on demand, but at the time of the appeal had not been repaid.

Input tax suffered by Tower Resources plc on supplying the management services was reclaimed on the basis that the services would be subject to VAT if they had been supplied to a UK based entity. HMRC accepted that the UK invoices to Tower Resources related to genuine supplies and that there an economic activity existed but disallowed £1.45m of input VAT, arguing that the company was not making taxable supplies for consideration to its subsidiaries.

On appeal, HMRC provided an alternative argument that if Tower was making taxable supplies, then it was not doing so in the course of an economic activity.

The First Tier Tribunal had found that the management services were supplies for consideration and that those supplies were an economic activity and so the company was able to recover the input tax claimed.

HMRC appealed to the Upper Tribunal.

Decision

The Upper Tribunal concluded that there was a genuine business activity and that a parent funding its subsidiaries' activities through debt was normal commercial practice. It did not matter that the loans remained unpaid.

The Upper Tribunal disagreed with HMRC, concluding that the supplies were made for consideration. The fact that both parent and subsidiaries knew that the loans would only be repaid if the subsidiaries had the funds did not break the direct link between supply and consideration. In fact, the Upper Tribunal stated that, in their view, there was nothing that stated that there could be no consideration if the payment of contractual consideration was subject to any contingency at all.

Further, the Upper Tribunal confirmed that a holding company providing administrative, financial and technical services to its subsidiaries for consideration constituted economic activity.

HMRC's appeal was dismissed.

Tower Resources plc v HMRC [2021]UKUT 123 (TCC)

Charity cancels registration

Summary – The charity was making exempt supplies of education or vocational training and supplies made by the restaurant were closely related to that exempt supply. Registration could be cancelled.

Step By Step (Northern Ireland) Limited is a registered charity which had registered for VAT back in 2011.

The charity provides training for people with learning difficulties and was funded by grant payments from Southern Regional College. No fees were charged to students. As part of this training, the charity runs a restaurant on its premises that is open to the public and is staffed by students. On the website of the Charity Commission for Northern Ireland, it states “Step by Step NI Ltd operates the One Eighty Degrees Restaurant as a not-for-profit social enterprise. The restaurant is used as a training environment for young people with learning disabilities to give them the qualifications, skills and experience to gain meaningful employment in the hospitality industry...”.

In 2018, the charity applied for its VAT registration to be cancelled on the basis that it did not make any taxable supplies, but rather exempt supplies of education.

HMRC refused the application, on the basis that the supplies of education and vocational training made were outside the scope of VAT, and not exempt, as the supplies made were not closely related to any supply of education or vocational training in any event.

Decision

The First Tier Tribunal stated that, under Sch 9 Group 6 VATA 1994, supplies of education and vocational training are exempt from VAT if provided by an 'eligible' body. A charity is an eligible body in this context.

In Brockenhurst College(C-699/15) [2017] STC 1112 it was decided that restaurant meals produced by students for the public qualified as exempt from VAT if the main supply of education was also exempt, making the meals 'closely linked' to the education.

The First Tier Tribunal concluded that the provision of training by Step By Step (Northern Ireland) Limited was an exempt supply of education or vocational training. Further, the supplies made by the restaurant were closely related to that exempt supply and so were accordingly exempt.

The charity no longer needed to be registered for VAT and HMRC's refusal to cancel that registration was unreasonable.

The appeal was allowed.

Step By Step (Northern Ireland) Limited v HMRC (TC08038)

Assessments out of time but penalties upheld

Summary – Assessments for VAT periods 10/15 to 04/17 were within the statutory time limit but the assessments for periods 08/10 through to 07/15 were made more than one year after evidence of facts, and so were out of time. However, all penalties were upheld.

Albany Fish Bar Limited runs a fish and chip shop and Waseem Akhtar is the Company's director and shareholder.

Having visited the company's premises in July 2016, HMRC established that the Company had been systematically excluding lunchtime sales from its VAT returns. Consequently, in August 2017, HMRC issued "best judgement" assessments under s73(1) VATA 1994, charging the Company VAT of nearly £110,000 for VAT quarters 08/10 to 04/17,

In the same month, HMRC issued the Company with a penalty of just under £88,000 on the basis that the behaviour had been deliberate and concealed. Later, in January 2018, HMRC issued a personal liability notice making Waseem Akhtar liable for 100% of the penalty on the basis that the inaccuracies were attributable to him.

The Company appealed the assessments and the penalty, and Mr Akhtar appealed the personal liability notice. The appeals were joined by the Tribunal on 18 March 2018.

Decision

The First tier Tribunal agreed that the company had been deliberately suppressing its lunchtime sales for VAT periods 08/10 to 04/17; that this behaviour was deliberate and concealed, and that the inaccuracies were attributable to Mr Akhtar.

The First Tier Tribunal considered whether the assessments had been made in time. Under s73(1) VATA 1994 assessments "shall not be made later than" the time limits set out in VATA s 73(6), namely:

- “(a) 2 years after the end of the prescribed accounting period; or
- (b) one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge.”

The Tribunal concluded that in relation to VAT periods 10/15 to 04/17, the assessments were within the time limit but that the assessments for periods 08/10 through to 07/15 were made more than one year after evidence of facts, and so were out of time.

Moving on to the penalties, the First Tier Tribunal did not reduce the penalties relating to the out-of-time periods. The Tribunal stated that a penalty is payable if a person gives HMRC a VAT return which "contains an inaccuracy which amounts to or leads to...an understatement of a liability to tax". The Company was liable to a penalty under Sch 24 because it had deliberately submitted VAT returns which contained inaccuracies for all periods from 08/10 through to 04/17. The Tribunal went on to say that it is well-established that "liability does not depend on assessment" (see *Whitney v IRC* [1926] AC 37), so the fact that some of those correcting assessments had been set aside did not change the Company's liability to a penalty.

Finally, the Tribunal found that Waseem Akhtar was responsible for the inaccuracies and that 100% of the penalty so calculated was payable by him.

Albany Fish Bar Limited and Waseem Akhtar v HMRC (TC8083)