

Personal tax round up (Lecture P1441 – 19.05 minutes)

IR35 case – wrong approach

Summary –The First Tier Tribunal had erred in law by adopting the wrong approach to the application of the Ready Mixed Concrete stage three test ‘in business on own account.’

Between 6 April 2012 to 5 April 2017, Adrian Chiles presented both television and radio shows for the BBC and ITV through a personal service company, Basic Broadcasting Ltd.

HMRC issued assessments for these tax years to collect income tax of £1,249,433 and national insurance contributions totalling £460,739 on the basis that the company was caught by the intermediaries legislation.

On appeal to the First Tier Tribunal, Basic Broadcasting Ltd was successful. When considering whether the hypothetical contract would be a contract of employment or a contract for services, the First Tier Tribunal undertook the three-stage test in the Ready Mixed Concrete case. The tribunal found that while there was sufficient mutuality of obligation and control, Adrian Chiles was in business on his own account.

HMRC appealed to the Upper Tribunal, arguing that the lower tribunal had erred in law when considering its application of this third stage test as to whether Adrian Chiles was in business on his own account. The First Tier Tribunal had failed to put relevant terms of the hypothetical contracts ‘at the heart of its analysis’. The First Tier Tribunal had not given sufficient weighting to a number of factors, including whether Adrian Chiles was in business on his own account *in relation to the hypothetical contracts with ITV and the BBC*.

Decision

The Upper Tribunal confirmed that the third stage of the Ready Mixed Concrete case only becomes relevant if the necessary mutuality of obligation and control tests have been established. In this case they were.

Following Atholl House, when considering the third stage test, we should bear in mind that an individual can perform similar services as an employee or as an independent contractor. The key to which applies lie in the terms of the hypothetical contract, rather than the terms and circumstances of other engagements. Further how, when and where work was done in later years should not be used to assess current years.

The Upper Tribunal concluded that the First Tier Tribunal ‘took the same sort of flawed approach’ as in the Atholl House case. The Upper Tribunal stated that the ‘business on own account’ third stage test should be looked at on the basis of whether the terms of the hypothetical contracts indicated that Adrian Chiles was in was ‘business on own account’. What the tribunal actually looked at was the relationship between the activities under that hypothetical contracts and the individual’s other activities. Had the tribunal focussed on whether the hypothetical contracts been entered into as part of an existing business on own account, this would have resulted in the tribunal keeping the terms of the hypothetical contracts at the centre of its consideration.

The Upper Tribunal stated that it could not conclude that the First Tier Tribunal would have reached the same conclusion but for its error. As the error was material, the decision was set aside and remitted back to the First Tier Tribunal.

There was a second ground of appeal by HMRC, should the first fail, which was not the case. However, the Upper Tribunal did go on to give its findings on whether the First Tier Tribunal had erred in law by failing to take into account, and the company failing to prove, whether relevant matters were known or reasonably available to the BBC and/or ITV. This was referred to as the 'knowledge issue'. Basic Broadcasting Ltd objected to this, claiming that the issue was not raised before the First Tier Tribunal; it was a new argument and 'it would be procedurally unfair to permit it to be argued in this appeal'.

The Upper Tribunal stated that in their view the reason this knowledge issue was not previously discussed was that parties were only aware of it being an issue following the Atholl House decision.

Whether it should be admitted or not was not material to the decision to set aside the First Tier Tribunal's decision in this case. However, when remitted back to the First Tier Tribunal, it must now be taken into account by them because that is now the prevailing case law following Atholl House. The Upper Tribunal stated that:

"It shall be for the FTT to determine whether to make any further findings of fact and whether to allow further evidence to be admitted."

HMRC v Basic Broadcasting Ltd [2024] UKUT 165 (TCC)

Long term incentive plan payment

Summary – Despite the taxpayer being non-UK resident and no longer employed, a sum paid to him was still taxable as employment income.

Between 2 April 2008 and 31 July 2016, Michael Saunders was employed by Hibernia Atlantic UK Ltd. During this time both he and his company were UK resident.

In April 2013, he entered into an agreement under which he was granted Stock Appreciation Rights, all of which vested while he was still employed by the company.

From 31 July 2016 Michael Saunders ceased his employment and from 1 August 2016, he became non-UK resident.

In January 2017, he received a payment of £1,236,956 from his former employer linked to the stock appreciation rights that he been award.

This payment was processed through the Employer's payroll and subjected to deductions of £549,679.26 PAYE and £26,405.08 Class 1 Primary (Employee's) NICs at source.

Michael Saunders claimed split-year residency treatment. Consequently, he prepared his 2016/17 Self Assessment return on the basis that he received the payment while non-UK resident, meaning that the payment was not taxable in the UK. He believed that a repayment of tax was due.

Following an enquiry, HMRC issued a closure notice amending his return on the basis that the payment was taxable income in the UK.

Michael Saunders appealed to the First Tier Tribunal arguing that the Stock Appreciation Rights were 'valuable contractual or property rights'. The reward for employment was delivered at the time of grant and was taxable at that time to the extent of any value immediately conferred. From that date onwards, the payment bore no ongoing connection to his employment. The payment was made as a result of this ownership, and not as a reward for the performance of his employment duties.

Decision

The Stock Appreciation Rights were part of an incentivisation plan to promote the success of the group, with employees incentivised to remain in employment or leave as good leavers. The value of the Rights was realised by a payment following a Liquidity Event or Sale, with the value increasing as the performance of the company improved.

The Tribunal stated that the Stock Appreciation Agreement detailed the grant and vesting terms. Further, it stated that “Mr Saunders might become entitled to receive a payment after his employment had ceased, in circumstances where he was a good leaver and there was a Closing Date within two years. This was part of the overall reward to which he was entitled as part of his employment”

Consequently, the sum paid was payment of employment income, as a result of the condition of a sale occurring.

Michael Saunders v HMRC (TC09129)

CJRS - variable rate employees

Summary – Payments under the Coronavirus Job Retention Scheme should have been calculated on the basis that its employees were variable rather than fixed rate employees.

Jama Academy Limited was an after-school tuition centre which had been in existence since 2018.

The company had two employees, the director Mr Jama and his colleague Mr Ali, both of whom provided tuition services to pupils preparing for exams.

During COVID, the company made claims under the Coronavirus Job Retention Scheme, calculating the amounts claimed based on the two employees being “fixed rate” employees.

A fixed employee is one where the employment contract requires employees to be paid an annual salary in equal weekly or monthly instalments, irrespective of the number of hours actually worked in a particular week or month. Where this was the case, the reference salary was the amount of salary payable to the employee in the last weekly or monthly period ending on or before 19 March 2020.

HMRC accepted that the company was eligible to claim under the Coronavirus Job Retention Scheme but that the company had overclaimed as its employees were not fixed-rate employees.

The company appealed.

Decision

The First Tier Tribunal found that the employees were variable rate employees. Their employment contracts did not provide for a fixed salary but rather they were paid an hourly rate. Although the contracts specified fixed hours, the employer could, when required, vary those hours.

The Tribunal confirmed that where the employee was a variable rate employee, the calculation of the reference salary for the Coronavirus Job Retention Scheme payment should be based on the higher of the:

- average monthly (or daily or other appropriate pro-rata) amount paid to the employee for the period comprising the tax year 2019/20 before the period of furlough began; and
- actual amount paid to the employee in the corresponding calendar period in the previous year.

The appeal was dismissed.

Jama Academy Limited v HRC (TC09131)

Jointly owned property

Summary – The taxpayer owned a 50% share in a flat owned jointly with her brother and could deduct costs supported by appropriate evidence. Lettings relief was restricted to the gain that was covered by PPR relief.

Elizabeth Rooke's brother had bought a flat but later, needing funds to buy a family home, her brother was considering selling the property.

In October 1999, Elizabeth Rooke had intended to lend money to her brother, secured by a charge, but later agreed to buy an interest (90/255) in the flat instead for £90,000, when the flat was valued at £255,000.

In 2003, she:

- increased her ownership share so that they owned the flat equally, paying an additional £44,865.50 to acquire a further 14.71% interest, calculated based on the market value of the flat at the time;
- contributed £23,924 towards the cost of a lease extension.

During her ownership period, the flat was either let or available to let to third party tenants until, in October 2013, Elizabeth Rooke moved in, occupying the flat as her main residence.

She moved out in February 2015, four months before the flat was then sold. The net proceeds of sale were £914,685 (after deducting legal fees and estate agent's fees).

The net proceeds of sale were split in equal shares between Elizabeth Rooke and her brother.

Elizabeth Rooke completed a paper tax return for the 2015/16, dated 25 October 2016 claiming the following deductions:

- The initial £90,000 paid in October 1999;
- £24,000 and £192,000 that she claimed she had paid in 2001;
- the additional equity purchase of £44,865;
- lease extension costs of £23,924
- PPR relief of £57,047 (24 + 18 months of occupation, out of 188 months of ownership)

- letting relief: £40,000 (being the lower of PPR relief given, the gain attributable to letting and £40,000)

Twice she amended her return, reducing her allowable costs and so increasing the capital gains tax due.

In March 2020 wrote to HMRC claiming overpayment relief.

She believed that she had overpaid capital gains tax by £18,881 as a result of mistakes made arguing:

- she had originally acquired 76.6% (90/117.5) of the flat, being her share of the “free equity” (£117,500) in the flat in October 1999, so the value after having deducted the mortgage.
- PPR relief claimed continued to be based on 13+18 months, already amended in her earlier return;

Despite asserting that she should be regarded as having acquired over 91% of the value of the flat (76.6% + 14.71%), the sales proceeds attributable to her in the calculation remained at 50%.

Not surprisingly, HMRC opened an enquiry into her return, ultimately denying the overpayment relief.

HMRC rejected her claims that:

- her interest in the flat in 1999 was determined by reference to the available un-mortgaged element of the flat’s value at the time, and not by reference to the overall value of the flat;
- she had made another equity purchase in 2001, as she was unable to provide any evidence of this;

Further, her claims for PPR relief and lettings relief were incorrect:

- She was entitled to PPR relief of 21 months, being 17 months of occupation between October 2013 and February 2015 plus the final four months of ownership between February 2015 and the sale in June 2015. This totalled £33,349;
- Her claim for lettings relief was restricted to £33,349.

Elizabeth Rooke appealed.

Decision

The First Tier Tribunal found in HMRC’s favour, relying on documentation submitted at appeal rather than on some of Elizabeth Rooke’s claims, which were found to be “in many places, inconsistent”.

She was taxable on 50% of the proceeds, less the sums she paid in 1999 and 2003, the lease extension costs, as well as the main residence relief based on 21 months of actual and deemed occupation, with lettings relief restricted accordingly.

Elizabeth Rooke’s appeal was dismissed.

Elizabeth Rooke v HMRC (TC09170)

Late EIS income tax relief claim

Summary – An appeal to allow a late claim for EIS income tax relief to effect EIS disposal relief on an £8 million disposal failed as the tribunal had no jurisdiction to allow the late claim.

Following an investment in a company known as “People Apps Ltd”, on 1 September 2013, Kaljinder Singh Kalay was issued with shares.

In November 2019, he disposed of his shareholding, submitting his 2019/20 tax return with a claim for EIS disposal relief totalling £8,281,189.

In October 2021, HMRC opened an enquiry into this return.

Realising that a claim had not been made for EIS income tax relief when the shares had been acquired, the taxpayer’s agent made a claim for EIS income tax relief by amending his 2019/20 tax return on 28 January 2022.

This claim was rejected by HMRC and on 3 March 2023, HMRC issued a closure notice on the basis that Kaljinder Singh Kalay did not meet the conditions for an EIS income tax relief claim.

Kaljinder Singh Kalay appealed against HMRC’s decision to refuse to admit his late claim for EIS income tax relief claim.

HMRC applied to strike out the Appellant’s appeal.

Decision

The First Tier Tribunal confirmed that in order for EIS disposal relief to be allowable, an Appellant needs to have made a valid claim for EIS income tax relief. The time-limit for EIS income tax claims is provided for at s.202(1)(b) ITA 2007 and is not later than the fifth anniversary of the normal Self Assessment filing date for the tax year.

The shares were issued on 1 September 2013 so within 2013/14. The filing date for this return was 31 January 2015 and the 5th anniversary of this date was 31 January 2020. By submitting the EIS income tax relief claim in January 2022, the claim was clearly late.

The First Tier Tribunal found that it did not have “jurisdiction to entertain an appeal against the refusal to admit a late claim on public law grounds, nor indeed does it have the jurisdiction to exercise any supervisory jurisdiction over HMRC in relation to this issue.”

Given that the EIS income tax claim was late, the Tribunal was satisfied that the appeal against the closure notice had no reasonable prospects of success as no valid claim had been made. Consequently, the appeal against the closure notice was struck out.

Kaljinder Singh Kalay v HMRC (TC09155)

Substantial area of land

Summary – The property, together with all 41 acres of land, was residential property for Stamp Duty Land Tax purposes.

In August 2018, Simon and Joanne Holding bought Hall Farm. This was a five-bedroom country house with two-bedroom cottage, staff flat and extensive equestrian facilities, covering around 41 acres in total, roughly 24 acres of which was fields.

The couple accepted that all of the land, excluding the fields, was part of the property's grounds as it enabled the better enjoyment of the dwelling. However, they believed that the fields were non-residential property, resulting in the lower, non-residential rate of SDLT applying.

By contrast, HMRC argued that the property, together with all of the land, constituted the property and related grounds, meaning that the residential rates applied.

Decision

The First Tier Tribunal considered the nature of the land at the time of completion, the effective date for SDLT purposes but added that the use of the property since that date may shed some light on the question of whether the fields were part of the grounds at the time of the transaction.

The Tribunal pointed out that if just one of the fields, or indeed part of one of the fields did not form part of the grounds, then the land would fall to be treated as non-residential property and the lower rate of SDLT would be applicable. For example, Field 11 was argued not to be part of the grounds as it was not used for equestrian activities, it could not be viewed from the farmhouse and was used all year round for agricultural activities, namely the growing and cropping of grass for haylage.

The Tribunal stated that the most significant factor in identifying the grounds of a dwelling is the nature of the dwelling and the land, and the relationship between the dwelling and the land. At the time of the transaction, the property had been developed so that it had extensive equestrian facilities including stabling for 8 horses.

The Tribunal acknowledged that there was an informal agreement with an agricultural contractor to look after the fields in return for haylage but found that this did not constitute commercial use of the fields stating that "the fields were not being actively and substantially exploited on a regular basis for any commercial advantage to the vendors."

The fields, including field 11, were available for use by the vendors as winter grazing and for riding their horses. The fields also gave the option to keep other domestic animals, such as their donkey and alpacas.

Further, the fields add to the rural character of the property, providing a degree of privacy from neighbouring land.

The appeal was dismissed.

Simon and Joanne Holding v HMRC (TC09141)