

## Personal tax round up

(Lecture P1136 – 19.10 minutes)

### Is it a van or is it a car?

*Summary – Two similar looking vehicles provided by Coca-Cola to their employees were treated differently for benefit in kind purposes: one was a van and the other a car.*

At relevant times, Coca-Cola European Partners Great Britain Limited (“Coca-Cola”) employed Mr Payne and Mr Garbett as technicians. In connection with that employment, in the tax year 2016/17, Coca-Cola provided them with the use of a second generation VW Transporter T5 Kombi van (“Kombi 2”). In addition, in the tax year 2011/12, Coca-Cola provided other employees with the use of first generation VW Kombi Transporter T5 vans (“Kombi 1”) and Vauxhall Vivaro vans (“Vivaro”).

- Both Kombi vans were acquired with a second row of seats already fitted but which were removable without tools and were removed during working hours.
- The Vivaro was a van that was subsequently modified to add a second row of two extra removable seats, with some storage space to the side. These extra seats needed tools to remove them

The issue in this case was whether these vehicles were cars or vans for benefit in kind purposes. While a car is not a goods vehicle, a van is defined as a goods vehicle with a laden weight of up to 3.5 tonnes. The vehicle must be constructed primarily for the conveyance of goods and not people. Modified vehicles were the issue in this case.

#### *Decision*

The Upper Tribunal accepted the First Tier Tribunal’s ruling that the decision as to whether a vehicle was a car or van should be made after any adaptations that are made before it was supplied to the employee. Removable items, including seats, should be considered to be part of the construction

When considering whether it was primarily suited for the conveyance of goods, the Tribunal stated that we should consider the position as a whole. If a vehicle is equally suitable for both goods and passengers, then it has no primary suitability and cannot be a van.

The Upper Tribunal agreed with the First Tier Tribunal that the:

- Kombi vehicle was a car as it could be equally used to move passengers or goods;
- Vivaro was slightly more suited for goods given the storage to the side of its second row of seats, making it a van.

So the morale of the story is that you cannot just look at the outside of the vehicle and make a judgment call; we need to know what goes on inside.

*HMRC v Coca-Cola European Partners Great Britain Limited and others [2019] UKUT 0090 (TCC)*

## **Class 1 and the intermediaries legislation**

*Summary - The Social Security Contributions (Intermediaries) Regulations, SI 2000/727, apply where a hypothetical contract is one of deemed employment. There was no reason to give entertainers, lecturers and teachers special privileges.*

Robert Glenister, a well-known actor, owned a personal service company, Big Bad Wolff Ltd, with his wife. Through this company, he provided services to clients but this is not a standard IR35 appeal.

In February 2016, HMRC raised an assessment to collect some £147,000 of Class 1 NICs covering the period from 6 April 2004 to 5 April 2014. Prior to 6 April 2014, special rules applied to entertainers, whereby they would be categorised as employed earners for NIC purposes, even in circumstances where they would be deemed self-employed for income tax purposes. The NIC Categorisation regs were repealed in 2014, so from 6 April 2014 the normal rules apply. So this case considered the interaction between the NIC Categorisation and the IR35 regulations.

Under general principals, it was agreed between the parties that Robert Glenister would have been treated as a self-employed earner and so not liable to Class 1 NICs. However, under the NIC categorisation regulations, as there was a payment of salary as part of the money paid for Robert Glenister's services, it resulted in Robert Glenister being treated as an employed earner. Consequently, he was liable for the Employee's NIC, and his producer was liable for the secondary NICs due.

However, all monies were paid to his personal service company, Big Bad Wolff Ltd, and so no NIC had been paid over.

- With the introduction of IR35, HMRC believed that they could look through the company, treat Robert Glenister as being in deemed employment and so raise an assessment for the NIC due.
- Robert Glenister and Big Bad Wolff Ltd argued that IR35 should not be considered and also that was not fair as under the Categorisation regs, the class 1 secondary contributor would have been the producer, and not the Big Bad Wolff Ltd.

### *Decision*

The Upper Tribunal stated that Parliament did not intend the provisions to be limited to actual employment situations. The term 'employed earner' used in SSCBA 1992 s 4A(which permits the regulations) embraced both 'actual' employees and those who were treated as such by virtue of SSCBA s 2(3). The Tribunal did not think that the legislation was written so that entertainers, teachers and lecturers should enjoy the special privilege of being able to avoid NIC by contracting through personal service companies rather than directly. The aim of the tax provisions was to ensure that NICs were payable in the same way whether or not the services were provided through an intermediary or not.

The Upper Tribunal concluded that if Parliament had intended that reg 6(1)(c) should only apply to hypothetical direct contracts of actual employment, it would have said so expressly.

The appeal was dismissed.

*Big Bad Wolff Ltd v HMRC ([2019] UKUT 121 TCC)*

## **Managed service company**

*Summary – Costelloe Business Services Ltd was undoubtedly a managed service company provider and the companies were undoubtedly managed service companies.*

Costelloe Business Services Ltd set up Christianuyi Ltd, as well as other companies. Costelloe Business Services Ltd provided these companies with a number of services in return for a fee: provided the companies with a registered office; invoiced their clients for the fees charged for individual's services; paid salaries including PAYE; filed annual company accounts and returns; and submitted their tax returns and paid any corporation tax that was due. The individual companies negotiated their own contracts with their clients.

HMRC argued that Costelloe Business Services Ltd was a managed service company provider (S61B ITEPA 2003). The Upper Tribunal had confirmed that the personal service companies were managed service companies.

Christianuyi Ltd and others appealed against assessments of tax and NIC for their personal service companies. If liabilities to tax and NIC did arise, liability fell initially on the managed service companies, with facility for HMRC to transfer liability to the managed service companies provider, Costelloe Business Services Ltd.

### *Decision*

The Court of Appeal needed to consider the definition in section 61B(1)(d) ITEPA 2003 of a managed service company provider.

HMRC argued that for a company to be treated as a managed service company provider, their business must be of promoting or facilitating the use of companies by individuals through which the individuals provide their services to clients; the provider does not need also to promote or facilitate the services themselves.

The Court of Appeal confirmed that Costelloe Business Services Ltd was the kind of business that the government was aiming to catch under the definition of managed service company. Its business is in promoting a situation in which the workers provide their services through a company instead of directly to an end client and it thereby promotes the use of companies to provide those services.

The appeal was dismissed.

*Christianuyi Ltd and others v CRC, Court of Appeal, 19 March 2019*

## **Share options 'by reason of employment'?**

*Summary –Share options granted by an employer to an employee had not been granted by reason of employment and was not caught by the employment related securities legislation.*

Vermilion Software Limited was incorporated in 2003 with its office based in London. The company was involved in the marketing and implementation of its principal product known as 'VRS': an end-to-end client reporting solution for the fund management sector. Apart from software development, the Company's business included the sale, support, and servicing of its software product to the global asset management industry.

In 2006, an exercise to raise equity funding for the Company took place. It was understood that Quest, as corporate advisers, and Dickson Minto, legal advisers, would not be paid a fee for their services rendered in connection with the 2006 financing exercise. In return, the parties were agreed on an option package of 2.5% each of the equity in Vermilion after the financing exercise. As part of this exercise, Mr Noble, who owned Quest, was granted share options that were 'effectively payment for services which had been provided in the process of the fundraising exercise'. At this time he was not a director of Vermillion.

After the 2006 equity raising exercise, the Company's performance was monitored by the new investors against the business plan which had been agreed. By December 2006, it became clear that Vermilion was in financial difficulty, and the Company was significantly under-performing. A rescue plan was implemented and as part of this plan, Mr Noble was appointed as Chairman of Vermillion to drive and oversee the performance and report regularly to the investors. A second option plan was implemented in July 2007.

The issue was whether the 2007 options granted to Mr Noble were employment-related securities within the meaning of s 471(3). The key question was whether the opportunity to acquire the new options was made available by Mr Noble's employer by reason of his employment. HMRC argued that the deeming effect of s 471(3) was that the 2007 option was to be regarded as having been made available to Mr Noble by reason of his directorship.

### *Decision*

The First Tier Tribunal stated that the 2007 Option was made available to Mr Noble only because he already had the 2006 Option, and that he was willing to give up 40% of his 2006 Option. The Tribunal believed that if Mr Noble was asked why he received the 2007 option, he would have said: 'Because I got the 2006 option which had to been diluted to become the 2007 option.' The Tribunal concluded that Mr Noble's directorship was not the reason for the 2007 option; his right under the 2007 option emanated from the 2006 option. The 2007 Option was not 'made available' by the appellant, Vermillion.

Having reviewed the case law on deeming provisions, the Tribunal concluded that legislation was not designed with the intention to create an injustice or absurdity. The application of the employment related rules under S471(3) ITEPA 2003 should be limited in the present case, 'where the artificial assumption from deeming is at variance with the factual reason that gave rise to the right to acquire the option'.

The 2007 Option was not an employment-related securities option for the purposes of S 471 ITEPA 2003 and the appeal was allowed.

*Vermilion Holdings Limited v HMRC (TC07077)*

## **Treatment of interest and pension**

*Summary – Having proved that he held money on behalf of his father in a single bank account, the taxpayer was not taxable on the interest received. His pension income was fully assessable on him and should not be split with his ex-wife.*

Sean Kirby had earned interest from bank accounts held in his name. However, he argued that this interest was not taxable on him as he was holding the money for his father's money. Thus the first issue to decide in this case was whether the funds were held on a resulting trust basis for the benefit of his father and if so, what was the tax treatment of the interest that followed therefrom.

In 2012, Sean Kirby and his wife had divorced and had informally agreed that she would be entitled to receive half of his private pension income. From the date of divorce he had filed his tax returns on this basis, declaring only half of the pension income as taxable on him. As there was no pension sharing order, HMRC sought to amend the returns to include 100% of the pension income arguing that the payments were not qualifying maintenance payments. Thus the second issue in this case was whether the pensions receivable by Sean Kirby were fully assessable on him.

### *Decision*

The First Tier Tribunal stated that normally, the named account holder was the legal and beneficial owner of the underlying capital as well as any interest that was earned. However, this could be overridden where there was 'substantive proof to the contrary'. In this case, Sean Kirby was able to meet this burden of proof relating to one of the accounts but not for the others. The appeal was allowed in part in respect of the interest and the tax relating to this one account was reduced.

Under s579C ITEPA2003 the liability for tax charged on pension income is the person receiving or entitled to the pension under the registered pension scheme. As far as the pension providers were concerned, Sean Kirby was the only person entitled to the pension income and he was assessable on the full amount. The appeal relating to the pension income was dismissed.

*Sean Kirby v HMRC (TC07054)*

## **Matalan discovery**

*Summary – The discovery leading to an £84 million tax assessment was made in 2004, and since at least three years had passed since that date, the discovery had become stale and was invalid.*

John Hargreaves was born in England and was until May 1998 the majority shareholder in Matalan plc.

In May 1998, shares in Matalan plc became listed on the London Stock Exchange. John Hargreaves retained his own shareholding at that time.

On 15 March 2000, he submitted Form P85 to HMRC stating that he had left the UK on 11 March 2000 and that he intended to live outside the UK permanently. He disclosed that he would have accommodation in the UK while he was away as well as the following sources of income in the UK after he had left: Remuneration, Dividends and Bank/building society interest.

On 16 May 2000, John Hargreaves disposed of part of his shareholding in Matalan plc receiving proceeds of approximately £231 million.

John Hargreaves filed his tax return for 2000/01 on 31 January 2002 claiming to be “not resident in the UK” and “not ordinarily resident in the UK”. He gave additional information in the return in boxes 9.7 to 9.36. HMRC did not open an enquiry into this return but on 9 January 2007, issued a notice of assessment for that year charging tax of £84 million.

He filed his tax return for 2001/02 on 31 January 2003 on the same basis as being not resident and not ordinarily resident in the United Kingdom. HMRC claim to have become interested in Mr Hargreaves when an article was published, on 23 March 2003, in The Sunday Times where Mr Hargreaves was said to have “made £230m when he sold some of his shareholding in Matalan in May 2000”, and was now a “Monaco tax exile who spends three days a week at Matalan’s headquarters in Skelmersdale”. HMRC opened an enquiry into this return in January 2004 and the original HMRC officer was replaced by Mr West in November 2004. The 2001/02 enquiry was closed by closure notice dated 8 March 2012 concluding that John Hargreaves was “resident and ordinarily resident in the UK during 2001/02” and amended his self- assessment to charge additional tax of just over £6 million. During this period PwC had been asked for reams of detailed information concerning Mr Hargreaves residency status.

Mr Hargreaves initially appealed the 2000/01 assessment on two grounds:

1. He was not in fact resident or ordinarily resident in the UK;
2. The discovery assessment had become stale.

However, in September 2018 he amended his grounds of appeal, accepting that he was resident and ordinarily resident during the relevant period but maintaining his appeal against the validity of the discovery assessment.

This was not unsurprising for a number of reasons including the fact that he had retained his “home” in the UK, his role as CEO of Matalan meant he could show only “occasional residence” abroad and his personal interests meant that he continued to attend various dinners and balls, Wimbledon tennis finals and concerts in the UK.

### *Decision*

Referring to *Beagles v HMRC*, the First Tier Tribunal stated that Mr West, the HMRC officer in this case, could not argue that he had made a discovery following the receipt of the information received by PwC

The Tribunal stated that if it was Mr West who had made the discovery, he had done so when he had taken personal responsibility for the case in 2004. Indeed, it was likely that his predecessor had made the discovery, and that Mr West had simply found out something that was new to him. This is not a discovery.

The First Tier Tribunal concluded that at least three years had passed between the discovery and the issue of the assessment in January 2007. The discovery was therefore stale and the assessment could not stand.

*Hargreaves v HMRC, TC07090.*

## **Inaccurate P60**

*Summary – Although an honest mistake, the taxpayer should have known that his P60 was substantially understated and submitted his true earnings when filing his self-assessment return.*

During 2016/17, Ringo Scheithauer was employed by Dunhill Pontefract PLC and received taxable pay of £306,722.

However, HMRC established that the figure shown on his tax return showed taxable pay of £167,605.48 and tax paid of £71,679.17. He had omitted £139,116.92 of employment income from Dunhill. He had also received employment benefits of £5,411 (car benefit) and £1,288 that had not been included with the rest of his employment benefits on his tax return.

On 16 November 2017 Ringo Scheithauer confirmed HMRC's figures but stated that he had only repeated the figures shown on his P60 and that he could not understand why the employer did not include all of his pay on the P60.

The reason that his P60 did not include his earnings from April to August 2016 is because in September 2016 payroll arrangements were moved in-house, whereas previously the arrangements had been outsourced to external accountants. In consequence his PAYE reference changed from 567/VZ 53163 to 567/A6283. The P45 which his employer's received from the accountants had Ringo Scheithauer on a month one basis tax code throughout the April to August 2016 period and therefore his earlier earnings were not included.

On 22 January 2018 Ringo Scheithauer spoke to the HMRC and was asked whether he was aware that he had earned more than £300,000 instead of £167,605.48. He told HMRC that when he had received his 2016/17 P60 he noticed that the stated pay was low compared to the stated pay in his P60 for 2015/16. When he queried this with his employer he was told it was correct and so he completed his return using this figure.

Ringo Scheithauer argued that he should not be charged a penalty for this error as it was an honest mistake brought about by his employer's mistake. He appealed.

### *Decision*

The First Tier Tribunal believed that Ringo Scheithauer had made an honest mistake, possibly caused by erroneous assurances given to him by his employer.

However, he knew or should have known that his P60 employment income figure for 2016/17 was incorrect and was substantially understated. He knew his income was significantly lower than in 2015/16 and if he had simply added up the figures contained on his pay slips, he would have identified the problem. Sadly, as the Tribunal stated 'the law does not provide shelter for honest mistakes'.

The disclosure was prompted because Ringo Scheithauer did not inform HMRC about the inaccuracy before he had reason to believe HMRC either had discovered it or were about to discover it.

HMRC were therefore correct in applying a penalty calculated by reference to the potential lost revenue on the basis of a prompted disclosure of a careless inaccuracy. This had been calculated using the minimum penalty being 15% of the potential lost revenue.

The penalty was confirmed and the appeal dismissed.

*Ringo Scheithauer v HMRC (TC07091)*