

Business tax round up (Lecture B1256 – 16.27 minutes)

Employee or self-employed?

Summary – Determining his own working practices and remunerated on a commission basis, the taxpayer was not an employee but rather, in business on his own account.

C&G is a broker providing niche bespoke insurance products. Having worked at developing a medical malpractice product with an unrelated company, in May 2010 C&G decided to develop the product itself. This involved identifying an insurer who was prepared to underwrite the scheme and reach a binding authority agreement (a “binder”) with that insurer as to the relevant terms. When a surgeon purchased a policy, C&G would receive a commission on that policy.

C&G did not have the contacts or experience themselves to identify potential insurers or negotiate the terms of a binder and so the company engaged with Gareth Phillips, who had both the experience and contacts required and had been involved with the project from the start.

Gareth Phillips had identified Newline as an insurer interested in underwriting the scheme. He negotiated the terms of a binder with them months and notified C&G that he had secured an agreement with Newline, which C&G signed off on. C&G only became involved once the terms were largely agreed. The terms included a key man clause, which provided that Newline had the right to terminate the contract if Gareth Phillips ceased to be an employee or director of C&G.

No business was written under this binder with Newline and in March 2011 Newline terminated the agreement. Gareth Phillips negotiated a binder with another insurer, AmTrust. Some business was written under that scheme, that generated commissions for C&G in early 2012. However, around May 2013 AmTrust terminated the agreement and C&G and Gareth Phillips parted company.

Although there was a draft Contract for Services and an Employment Contract, there was no signed written contract between Gareth Phillips and C&G. A number of possible relationships between the two parties were considered at various times.

This case relates to the period from 28 May 2010 to May 2013. On 10 October 2011, Gareth Phillips wrote to HMRC stating that he had experienced difficulty in obtaining his P60 from his previous employer, C&G, which he needed to complete his self-assessment return.

HMRC wrote to C&G who responded by stating that Gareth Phillips had never been employed by them. On 9 December 2011 HMRC notified Gareth Phillips that the matter had been passed to a “Status Inspector” to consider his employment status. Later, C&G confirmed that Gareth Phillips had been self-employed, paid on a tiered commission basis with no salary entitlement.

Gareth Phillips made a claim for unfair dismissal, breach of contract, holiday pay and unlawful deductions. That appeal was heard by the Employment Tribunal and was struck out. He was found to be neither an employee nor a worker of C&G.

HMRC subsequently assessed him as self-employed.

Gareth Phillips appealed to the First Tier Tribunal.

Decision

The First Tier Tribunal acknowledged that Gareth Phillips had expertise and experience in the insurance industry, and in developing medical malpractice insurance products.

The Tribunal found that although C&G were prepared to offer an employment contract to Gareth Phillips, he did not accept the contract. In fact, he was reluctant to commit to any option. An email exchange in December 2010 contained the terms which were agreed between the parties and those terms (commissions, bearing a share of operating costs, recovery of amounts already paid, retention of IP rights) were consistent with self-employment. The agreement did not include a separate or additional right to salary on top of the commission arrangements. He did not receive regular wages, but rather irregular payments without payslips.

Gareth Phillips had argued that FSA rules required that he could only operate in this field under the umbrella of C&G's authorisation as an employee of C&G. However, with no sight of these FSA rules, the Tribunal rejected this argument.

The Tribunal considered the key man clause requiring that Gareth Phillips be an employee or director of C&G but rejected its relevance. There was no evidence provided that the binder with Newline was signed and further, no business was ever entered in to under that binder.

Although Gareth Phillips did not have PII in his own right and appeared to be within the scope of that of C&G, again no evidence as to the terms of C&G's coverage was provided. The Tribunal placed little weight on this factor.

The Tribunal found that Gareth Phillips was self-employed:

- He set his own working hours, arranged appointments with insurers and potential clients. There was little reporting back to C&G and what was reported was on an irregular basis;
- He negotiated the terms of the binders with insurers;
- He was remunerated on a commission basis and had received advance payments on account of future expected commissions. He did not receive regular payments by way of salary, or any payslips;
- He retained the IP rights in the insurance product.

Gareth Phillips was performing his activities as a person in business on his own account.

Gareth Phillips v HMRC (TC08074)

Partnership and IR35

Gary Lineker and his former wife Danielle Bux formed Gary Lineker Media, a partnership through which Gary Lineker provided his presenting services to the BBC (Match of the Day) and BT Sport (UEFA Champions League).

HMRC believe that these arrangements fall within the intermediaries legislation and issued Determinations in respect of income tax deductible via PAYE as well as Notices in respect of Class 1 National Insurance Contributions totalling around £5 million.

HMRC's statement of case describes the main issue in the appeal as

“... whether each of the hypothetical contracts between Mr Lineker and the BBC/BT would have been contracts of service ...or contracts for services....”

HMRC has requested the Tribunal give a decision in principle only on the above issue and that a further hearing should be listed, if required, to resolve any outstanding issues regarding the quantum of any taxes due.

GLM disputes that IR35 applies, arguing that Gary Lineker would not have been regarded as an employee of the BBC and/or BT Sport.

In March 2020, Gary Lineker Media sought permission to amend its Grounds of Appeal so that the hearing, when it happens, considers both quantum and liability. This has been delayed for over a year due to administrative delays, exacerbated by coronavirus restrictions. However, on 14th April 2021, the First Tier Tribunal announced its decision, stating that as in most cases, the Tribunal should determine the quantum and liability issues at the same hearing.

It will be interesting to read the arguments and the Tribunal's decision when this appeal eventually comes to court. How will the use of a partnership rather than personal service company affect the technical arguments that are usually made in IR35 cases?

Gary Lineker & Danielle Bux t/a Gary Lineker Media v HMRC (TC08084)

Compensation for lost profits

Summary - Money received under a legal settlement against a former accountant and auditor was revenue in nature, representing compensation for lost profits.

Charlton Chauffeur Driver Limited provided international ground transportation services and ceased trading on 31 December 2015.

In early 2013, the directors became suspicious about the activities of the company's then Finance Manager, who had been employed since 2003 as a bookkeeper. Following investigation, it was established that she had been embezzling money between 2004 and 2012. She was prosecuted and sentenced to prison for four and a half years. Both the accounts and corporation tax returns were amended showing the embezzled funds as deductible business expenditure wholly and exclusively incurred for the purposes of the trade.

Following forensic investigation by KPMG, legal action was taken against both the negligent consultant accountant and auditor. This was settled out of court in August 2016, with Charlton Chauffeur Driver Limited receiving £566,000 that it treated as a capital receipt.

On 27 September 2018, HMRC opened an enquiry into the company's corporation tax return for that period, later concluding by Closure Notice that the company should bring the settlement into account as a trading receipt.

The company appealed.

Decision

The First Tier Tribunal found that the compensation received was not a payment for giving up the right to pursue the claims.

The Tribunal concluded that was clear that the settlement was a “decision commercially taken as being the best way to achieve optimal recovery of the losses incurred with the least cost and risk”. The compensation was for loss of profit, not loss of cash.

The embezzled funds had never been taxed but had been deducted for corporation tax purposes. The compensation was a revenue trading receipt.

The appeal was dismissed.

Charlton Chauffeur Drive Limited v HMRC (TC08042)

New residential property developer tax

In February 2021, the Government set out a five-point plan to bring an end to unsafe cladding, provide reassurance to homeowners and support confidence in the housing market.

To ensure that developers play their part and make a fair contribution, the plan included introducing an industry levy and a new tax on residential developers.

The government has now announced that it plans to introduce:

- A new Gateway 2 levy, which will be applied when developers seek permission to develop certain high-rise buildings in England;
- A new tax on the residential property development sector.

In an attempt to raise at least £2 billion over a ten-year period, the government plans to introduce a time-limited new tax, the Residential Property Developer Tax (“RPDT”) targeted at large developers.

A consultation explains that the new tax is planned to be effective for profits recognised in accounting periods ending on or after 1 April 2022 and will apply to the profits of companies undertaking residential property development, but only if they exceed an annual £25m allowance. The rate of tax has yet to be decided.

What is residential property?

The consultation refers to a number of definitions of ‘residential property’ with legislation and states that they intend the tax to apply to:

“a house or flat that is considered as a single residence, generally together with the grounds and garden or any other land intended for the benefit of the dwelling”

As for SDLT, the tax will include:

- any building that is suitable for use as a dwelling, where it is not so used at the relevant time;
- any existing building that is being adapted, restored to, or marketed for, domestic use;
- undeveloped land where a residential building is being or would be constructed on it.

These rules will be extended to include any undeveloped land or land undergoing a change in use, for which planning permission to construct residential property has been obtained.

It is suggested that the tax will apply to companies developing affordable housing and communal dwellings.

However, the government is seeking views on excluding the development of purpose-built student accommodation in certain situations. So, for example, individual self-contained units with their own kitchen, bathroom and toilet could fall within the charge, while student accommodation with shared facilities could be excluded.

The government has suggested that specialist communal dwellings should be excluded from the definition of residential property.

This could include:

- Hotels;
- Residential homes for children or the elderly;
- Hospitals and hospices;
- Purpose-designed supported housing with communal facilities providing accommodation with care and/or support for homeless, rough sleepers, people with a disability, drug or alcohol dependency, poor mental health, people with a learning disability and/or autism and older people;
- Residential accommodation for members of any of the armed forces;
- Boarding schools;
- Monastery, nunnery or similar establishment;
- Prisons.

Models being considered

The consultation considers two possible models are being considered:

Model 1 — a company-based approach

Under this model, the tax would apply to all of a company's profits where activities included more than an "insignificant" amount of residential property development.

Model 2 — an activity-based approach

Here the new tax would apply to any company undertaking any UK residential property development, but the tax would only be applied to profits from the residential property development activities.

The consultation seeks views on how the relevant profits will be calculated, if and how old and new losses will be relievable by the company and how interest and other funding costs should be treated.

Other areas covered by the consultation include registration and reporting through the existing CT system as well as payment of the tax due through the quarterly instalments system for large companies.

The consultation closes on 22 July 2021.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/982206/20210427_RPDT_consultation_FINAL__002_.pdf

Car parking services or right to occupy land for car washing

Summary – The grant of a car wash facility within a car park was the taxable supply of a car park and not the exempt supply of a licence to occupy land.

RK Fuels Limited rented out the car park at its premises to a tenant who ran a car wash business, treating the income as an exempt supply of land. The company argued that it was supplying a licence to occupy the land and not a parking facility. The use to which the tenant put the land was not relevant. It was up to them how they used the land – as a car park, to run a car wash business or for some other purpose.

Following a visit, HMRC raised an assessment to collect output tax on the basis that the supply was standard rated. HMRC stated that the fact that RK Fuels Limited had permitted an alternative use of the car park to run a car wash did not cause the area to cease to be a car park, nor did it mean that it could not be used as a car park. There was a need for cars to be parked on the land whilst waiting to be washed, dried and cleaned. Without the ability to park a car on the land, the permitted use could not occur.

RK Fuels Limited appealed to the First Tier Tribunal relying on the section of the lease agreement that stated:

“The car park will be used for only the following permitted use (the Permitted use): as a car wash business. Neither the car park nor any part of the premises will be used at any time during the terms of this lease by the tenant for any purpose other than the permitted use.’

Decision

The First Tier Tribunal concluded that the supply was standard rated. Having considered the lease agreement in its entirety, the Tribunal found that there was considerable force in HMRC’s submission that the words “Car Park” featured frequently throughout the lease agreement. The area being leased was a car park, albeit under the terms of the lease agreement that car park enabled a car wash facility to operate.

The Tribunal was satisfied that a site for parking is any place where a car may be parked. The agreement was 'simply a means of allowing the supply; namely the right to operate a car wash'. HMRC's assessment was upheld.

RK Fuels Limited v HMRC (TC08053)

R&C Brief 5 (2021)

This brief explains HMRC's amended policy concerning the VAT treatment of installation of manual blinds and shutters. The policy change is effective from 5 October 2020.

The construction of a dwelling and building materials provided by the persons supplying the construction services are zero-rated for VAT purposes. Building materials covers materials ordinarily incorporated by builders in a building and includes bricks, timber, kitchen units, sinks and toilets.

Prior to the First Tier Tribunal's decision in Wickford Development Co Ltd, roller blinds could not be zero-rated. However, HMRC now accepts that the installation of manual blinds and shutters are building materials for VAT purposes and can be zero-rated when installed in a qualifying build.

HMRC confirms that the new treatment does not extend to window blinds that are motorised, that are considered 'electrical appliances' and so subject to the input tax blocking order (Value Added Tax (Input Tax) Order, SI 1992/3222).

The brief also states that DIY housebuilders can use a refund scheme to claim VAT charged on manual blinds.

<https://www.gov.uk/government/publications/revenue-and-customs-brief-5-2021-vat-liability-of-installation-of-blinds-first-tier-tribunal-decision>