

Business tax update (Lecture B1376 – 21.05 minutes)

SEISS incorrectly claimed

Summary –Self Employment Income Support Scheme claims were invalid as the taxpayer was not self-employed at the relevant time and had no legitimate expectation of receiving the support.

Thomas Ash had been self-employed as a TV and film editor until August 2018 when he incorporated and started working through a company, Ysgydion Ltd.

In May 2020, roughly four months after filing his return, HMRC emailed, informing him that he might be eligible for the coronavirus Self-Employed Income Support Scheme (SEISS).

When Thomas Ash logged on to the GOV.UK website he saw a screen that stated in large block capital letters 'YOU ARE ELIGIBLE TO MAKE A CLAIM' followed by a button saying 'continue'. He proceeded to make two claims for SEISS, one in May and the second in August 2020.

Meanwhile, his co-director had made Coronavirus Job Retention Scheme claims in relation to her work for the company, as well as a claim for Thomas Ash.

Not surprisingly, in October 2020 HMRC informed Thomas Ash that because he had stopped being self-employed in 2018, he was not eligible for the SEISS and would have to repay the two grants and raised an assessment accordingly. HMRC accepted that he had made an innocent error and so no penalties were charged.

Thomas Ash appealed arguing that he had a legitimate expectation to the money after being invited to apply for it by HMRC, even though he was ineligible.

HMRC argued that the First Tier Tribunal had no jurisdiction to allow an appeal on such grounds and that once they had proven a valid assessment for the correct amount, the appeal must be dismissed.

Decision

The First Tier Tribunal found that the assessment was valid. Thomas Ash was not entitled to the SEISS payments received as he was not trading on a self-employed basis at the relevant time.

The fact that the assessments were correctly issued was sufficient to decide the appeal in HMRC's favour as the First Tier Tribunal agreed with HMRC that it had no jurisdiction to consider Thomas Ash's further submissions. The Tribunal stated that:

“the terms of s.50 TMA 1970 are clear and leave no room for the importing of a consideration of the appeal by reference to public law grounds such as legitimate expectation.”

However, in case they were wrong, the Tribunal considered each of Thomas Ash's arguments in turn finding that:

- it was self-evident that this was a scheme for self-employed people and Thomas Ash knew he was working through a company;

- HMRC's email included a sentence that stated 'you can ask your accountant to help you'; and
- It was Thomas Ash's responsibility to check that he was making a valid claim and the published guidance did make it clear that claiming through a limited company was not permissible.

The appeal was dismissed.

NOTE: The Tribunal observed that had HMRC used clearer wording at the time and provided their published guidance, rather than simply referring to it, it was likely that Thomas Ash would never have made his claims.

Thomas Merlin Ash v HMRC (TC08749)

Business premises renovation allowance

Summary – Adopting a narrow construction of the words “on or in connection with the conversion” meant the BPRA claim was restricted to HMRC’s original view of qualifying expenditure.

In its 2010/11 tax return, London Luton Hotel BPRA Property Fund LLP claimed business premises renovation allowances (BPRA) of £12,478,201. This was the amount paid under a contract with a property developer for the conversion of a flight-training centre near London Luton Airport into a 124-room hotel.

The LLP said the full sum was eligible because it was negotiated at arm's length and used for works 'on or in connection with the conversion, renovation or repair' of a qualifying building into qualifying business premises.

HMRC disallowed £5,255,761 on the basis that some elements did not qualify.

The First Tier Tribunal allowed the taxpayer's appeal in part. The Upper Tribunal remade the decision, allowing some of the taxpayer's and HMRC's grounds of appeal.

Both parties appealed.

Decision

The Court of Appeal said both tribunals had given the words 'in connection with' in s.360B(1) CAA too broad a meaning. Instead, they should be construed relatively narrowly, as requiring a strong and close nexus with the physical work that enabled the building to become suitable for business use.

Further, the court said the Upper Tribunal had been wrong to conclude that the target of the BPRA was a functioning building which was open for business. The measure had as its focus the works of conversion, renovation or repair which led to business premises being either used or available and suitable for letting.

Finally, the court broadly accepted HMRC's claims that some disputed elements of a development sum paid by the taxpayer to the developer did not qualify for BPRA. The court also dismissed the taxpayer's appeal against the Upper Tribunal's finding that another element did not qualify, and that each constituent element of the development sum had to be considered separately.

Turmeric shots – food or beverage?

Summary – Turmeric shots used for personal health and wellness were found to be food and not a beverage, which made them zero-rated.

The Turmeric Co was launched in 2018 by Thomas Robson-Kanu (a former professional footballer) and his father. They had been using the home-made shots for the past decade to support their personal health and wellness and decided to make a business from selling these shots to others. Customer reviews on the company's website state that they consume the shots for the following reasons: energy boost, support immunity, pain relief, performance boost, recovery and general wellbeing. These reviews confirmed that the shots were consumed on a daily, long-term basis to help variously with knee pain, arthritis, joint pain, provide immune support, general wellbeing, exercise recovery and inflammation from physical activity.

The turmeric, sourced from farms in Peru, is hand prepared, crushed and the pulp sieved to extract the liquid. No apple juice, orange juice or water are added during the production process. However, small quantities of crushed, whole fresh watermelon and lemons are added as a natural preservative and fresh pineapple juice is added as it contains a digestive enzyme called bromelain which aids digestion. The shots come in special packaging and require refrigeration due to the short shelf life. The shots are sold in 60ml bottles (costing £1.99 each if a subscription is taken for 28 shots per month).

The Turmeric Co had originally treated the supplies as standard-rated but later sought to correct the VAT returns 06/2017 to 12/2019 inclusive, treating the supplies as zero-rated food, (Group 1 Sch 8 VATA 1994) and not an excepted standard rated beverage.

HMRC rejected the claim and the company appealed to the First Tier Tribunal.

Decision

The First Tier Tribunal adopted the multi-factorial approach taken in *The Core (Swindon) Ltd v HMRC (2018)* by considering:

- the four factors originally identified in *Bioconcepts Limited v HMRC [1993]* that a beverage is consumed to:
 1. increase bodily fluid levels;
 2. slake thirst;
 3. fortify;
 4. give pleasure.
- A fifth factor identified in HMRC's Internal Manual VFOOD7520 that requires it to be a drinkable liquid that is commonly consumed. It was commonly agreed that it was a drinkable fluid.

The Tribunal concluded that although it was a drinkable fluid, the small, 60ml shot size meant that it was not consumed to either increase bodily fluids or to slake thirst. Further, the shot did not fortify the body with an immediate, short-term boost. To benefit from its use, the user needed to consume the shots over a number of months. It was agreed that the shots had a strong and unpleasant taste. It seemed unlikely that anyone would consume these for pleasure.

The Tribunal went on to consider some further factors and concluded that:

- This would not be offered as a drink to an 'unexpected guest';
- The shots were not marketed like other beverages as it had a high price and strict storage requirements;
- The shots were more medicinal than ordinary beverages; and
- the shots would not be substituted at a meal to replace something else normally drunk as a beverage.

The First Tier Tribunal concluded that the shots were consumed to maximise daily ingestion of curcumin and should be zero-rated as a food, rather than a beverage.

The appeal was allowed.

Innate-Essence Limited (T/A The Turmeric Co) v HMRC (TC08792)

Football transfer fee

Summary – Commission received by the taxpayer was for the supply of services to Inter Milan, with no VAT due as the place of supply was Italy and not the UK.

Sports Invest UK Limited was a football agent. When dealing with a player transfer, the company could be acting for one or more of the old clubs, the new club and/or the player.

This case involved a Portuguese International, Joao Mario, who was playing for Sporting Clube de Portugal (Sporting). Sports Invest UK Limited was approached by Inter Milan who were interested in signing Joao Mario.

The transfer went ahead:

- The transfer price between the clubs was agreed at €40 million, with Joao Mario receiving a salary of €30 million a year.
- In a representation agreement between Sports Invest UK Limited and Inter Milan, Inter Milan were to pay Sports Invest UK Limited €4 million in quarterly instalments of €500,000 from September 2016 to June 2018.
- Under the Player's Representation Agreement with Sports Invest UK Limited, the company was entitled to receive 10% of the agreed salary, so €3 million. However, at the same time, Sports Invest UK Limited signed a waiver agreement, waiving their right to the 10%.

HMRC argued that supplies had been made to both the player (€3 million) and Inter Milan (€1 million). €3 million of the fee paid by Inter Milan was to cover the 10% included in Joao Mario's representation agreement. This was third-party consideration paid for services supplied to the player, who was a non-taxable person. With supplies taking place where the supplier was established, VAT was due on the sum as Sports Invest UK Limited was a UK company. HMRC issued assessments accordingly.

Sports Invest UK Limited disagreed, arguing that the full €4 million was consideration for services supplied by it to Inter Milan. Consequently, the place of supply of the services was Italy and no VAT was due on the payment.

Decision

For there to be a taxable transaction, the First Tier Tribunal stated that there must be a legal relationship between the supplier and the recipient. This should be determined by looking at the commercial and economic position of the arrangement.

It was clear from the Inter Milan agreement that payment by Inter Milan to Sports Invest UK Limited was for the supply of the company's services to the football club. Even without the Waiver Agreement, there was no contractual indication that the payment by Inter Milan was consideration for services supplied by the agent to the player.

The Tribunal considered the Waiver Agreement in some detail and concluded that this agreement meant that Sports Invest UK Limited had no right to recover the 10% commission theoretically payable. The football agent had a policy that it would not normally enforce its rights to commission, nor would it seek to recover that commission from the new club. This gave Sports Invest UK Limited a competitive advantage over other agents who insisted on being paid commission either by the player or by the club. The only time that the 10% commission would be enforced was if, at a later stage, the player chose to use a different agent, meaning the player was in breach of their contract. Then, and only then, the 10% market rate would become payable. The Tribunal found that the services provided to the player were provided for no consideration, meaning there was no taxable supply.

The €4 million paid by Inter Milan related solely to services supplied to the club and was not partially third-party consideration for services supplied to the player. No UK VAT was payable.

Sports Invest UK Limited v HMRC (TC08797)

Valid option to tax

Summary – HMRC's decision to treat an option to tax as validly exercised could not be appealed by the taxpayer.

On 28 January 2008, Roldeen Estates Limited opted to tax two properties that the company had bought, sending HMRC copies of Form VAT1614A as required. The Forms included confirmation that the company had made no exempt supplies in relation to either property.

In March 2008, HMRC issued a letter acknowledging that the properties had been opted to tax with an effective date of 10 January 2008. The company reclaimed VAT on repairs and other related property costs from that date and charged VAT on invoices issued to its tenants.

The two properties were sold in 2015 and 2017 respectively but in neither case was VAT added to the sale price. In August 2017 HMRC issued the company with VAT assessments which included £50,000 relating to the failure to charge VAT on the sale of property one and £4,710 relating to the failure to charge VAT on the sale of property two. The assessments were not appealed and applications for late appeals were not made.

Later, the company's new representative provided evidence showing that Rolldeen Estates Limited had made exempt supplies before the date of the option to tax. As a result, HMRC's permission to opt should have been obtained before the properties could be opted. This had not happened and so the options to tax were not valid.

Sch 10, Para 30, VATA 1994 is a rarely used provision that allows HMRC to retrospectively dispense with the requirement for prior permission to opt to tax and to treat a 'purported option as if it had instead been validly exercised'. HMRC issued a decision stating that they were exercising this discretion meaning that the properties were validly opted with effect from 10 January 2008.

Rolldeen Estates Limited appealed.

Decision

By the time of the hearing the company had conceded the case against property two as no exempt supplies had been made in relation to that property before the effective date of the option to tax.

From 1 June 2008, the option to tax legislation was rewritten introducing HMRC's power in Para 30 to retrospectively validate the option to tax in relation to supplies made. Both the company and HMRC had acted on the basis that the option to tax was valid and so HMRC invoked Para 30 to make this so. This power applied to the sale of the property (even though the original option to tax had an effective date before Para 30 was introduced). HMRC acted reasonably in issuing their decision.

S.83(1)(wb) VATA 1994 gives a right of appeal against "any *refusal* of the Commissioners to grant any permission under, or otherwise to exercise *in favour of a particular person* any power conferred by, any provision of Part 1 of Schedule 10". However, HMRC did not refuse to exercise a power in Rolldeen's favour but instead exercised the para 30 powers of its own motion to Rolldeen's detriment.

The appeal was dismissed.

Rolldeen Estates Limited v HMRC (TC08783)

Admission to agricultural show

Summary – Admission fees to an annual agricultural show were for exempt fundraising and HMRC had raised an out of time VAT assessment.

The Yorkshire Agricultural Society organises and runs The Great Yorkshire Show. The issue in this case was whether in 2016 and 2017 the supply of admission to that show fell within the fundraising exemption in Schedule 9 Group 12 Item 1 VATA 1994.

This exemption applies for the supply of goods and services by a charity in connection with an event:

- a) That is organised for charitable purposes by a charity or jointly by more than one charity;
- b) whose primary purpose is the raising of money; and
- c) that is promoted as being primarily for the raising of money.

In 2016, The Yorkshire Agricultural Society treated admission to the show as a standard rated supply but by 2017, the same income was treated as exempt, with no VAT charged.

The Yorkshire Agricultural Society argued that admission to the show was covered by the fundraising exemption and sought a net VAT repayment of £202,000, which HMRC rejected.

In December 2021, HMRC raised an assessment for the VAT period ending December 2017.

The Yorkshire Agricultural Society appealed against the:

- assessment raised relating to the 2017 show which they argued was out of time;
- refusal by HMRC to allow a claim for overpaid tax in 2016.

Decision

The First Tier Tribunal found the 2017 assessment to be out of time, as it needed to have been made within one year after evidence of facts, sufficient to justify the making of an assessment. HMRC argued this clock started running in May 2021, the date on a letter received from the society's advisers. However, the assessing officer had not given evidence, and so the Tribunal could not assess what evidence had come to be known at that time and concluded that the letter provided no new information entitling HMRC to start the clock in 2021.

Moving to the second ground of appeal, the First tier Tribunal considered the fundraising exemption. Both parties agreed that the supply met condition a). The Tribunal found that b) fundraising was a main purpose of the show and c) the show was promoted as being for the raising of money.

Both grounds of appeal were allowed.

Yorkshire Agricultural Society v HMRC (TC08803)