

## Personal tax round up (Lecture P1376 – 17.05 minutes)

### Subsistence expenses

*Summary – Subsistence payments made to employees were not liable to income tax or NICs as they were covered by a dispensation where the relevant conditions had been met.*

This appeal related to payments made by NWM Solutions Limited to its employees for subsistence expenses using scale rates set by HMRC. In order for subsistence payments to be made, employees were required to submit the company's standard expenses form which included a statement clearly saying that employees did not need to submit receipts to support their claim but that "By making a subsistence claim, you confirm that you have incurred a cost on a meal (food and drink) after starting the journey and understand that you will be required to submit receipts to support the claim should NWM request that you do so". The form also contained a signed declaration made by the employee stating, "I declare that this claim relates to expenses incurred wholly, exclusively, and necessarily in the course of my work...".

However, HMRC issued determinations for £511,274.69 arguing that the payments were not the reimbursement of expenses incurred by the employees under a dispensation (S.65 ITEPA 2003) but rather, were "round sum allowances" with no evidence supporting the expenditure occurred. Consequently, the sums were liable to tax and national insurance.

NWM Solutions Limited appealed.

#### *Decision*

The Tribunal found that HMRC did not have the power to make determinations without first cancelling the dispensation.

It was common ground that the dispensation was in "full force and effect throughout the relevant period" and that provided the relevant conditions were met, the dispensation removed payments from the charge to tax completely. The expense payments were not 'round sum allowances' chargeable under s.62 ITEPA 2003.

The dispensation included HMRC scale rates to be used for subsistence claims. The Tribunal disagreed with HMRC regarding the receipt evidence that was required when a claim was made. It stated that if detailed receipts were required when the subsistence scale rates were being used, "one wonders what benefit would be derived from having the scale rates at all." After all, the scale rates are supposed to ease the administrative burden for all concerned (Employers, employees and HMRC). The First Tier Tribunal considered that the form submitted and signed by the employees was 'slim' evidence that the subsistence expenditure had been incurred and decided that 'on the balance of probabilities' the expenditure had been incurred as claimed. As the relevant conditions had been met, the dispensation applied.

The payments were not taxable round sum allowances. HMRC was not permitted to impose best practice conditions requiring the validating of expense receipts which were not specified in the dispensation agreement.

*NWM Solutions Limited v HMRC (TC08788)*

## Tennis commentator and IR35

*Summary – A late appeal against IR35 determinations was denied as the taxpayer’s advisors should have known better and the sum involved did not justify the appeal.*

Barry Cowan was a member of the partnership intermediary, *Cranham Sports LLP*. He performed services as a tennis commentator for matches broadcast by Sky UK Limited (Sky).

HMRC asserted that the arrangements between the partnership and Sky were such that had they taken the form of a contract between Barry Cowan and Sky, he would have been regarded as employed by Sky, with income tax and class 1 national insurance contributions falling due. HMRC issued determinations accordingly for the years 2014/15 to 2018/19.

The LLP’s representative complained about how the enquiry had been handled by HMRC including the fact that some of the correspondence from Sky was not disclosed to the LLP before the decision was made. HMRC invited the LLP to take up its offer of a review and made a 'without prejudice' approach to the LLP to settle the dispute.

Having confirmed that the determinations had been validly raised, HMRC gave the LLP’s advisors a 30-day window to request a statutory review or notify the tribunal of their intention to appeal. However, despite ongoing correspondence, no appeal was made until 10 March 2022, 60 days late.

The LLP appealed to the Tribunal to allow a late appeal.

### *Decision*

The Tribunal stated that where the statutory 30-day period had expired without the taxpayer requesting a review or notifying the appeal, s.49H TMA 1970 provides that notification of the appeal may be given only with the Tribunal’s permission. Further, the test to be applied in making this decision was provided by the Upper Tribunal in *Martland v HMRC* [2018] UKUT 178 (TCC).

The Tribunal considered the three stages:

1. HMRC’s letter of 8 December 2021 notified the need to act within 30 days but also requested a response by 22 January 2022. Up until this date, the Tribunal found that a failure to notify the appeal was not unreasonable conduct. After that date, the advisor “continued to lock horns with what he considered to be the outrageous conduct of HMRC.” He did not appeal to the Tribunal until 10 March 2022. This delay was found to be both significant and serious;
2. The reason for the delay was due to human error by the LLP’s advisors, which was not an adequate reason as they were Chartered Accountants who should have known better.
3. The Tribunal evaluated 'all the circumstances of the case' and concluded:
  - The sum at stake and the loss of the opportunity to challenge that sum did not carry significant weight.
  - Further, the Tribunal considered it inappropriate in an IR35 case to conclude anything other than “success is likely to be arguable.” Such cases are highly fact specific requiring a multifactual evaluation of the relationships between the parties. The Tribunal noted that there are cases which fall on both sides of the line and so expressed no opinion.

The First Tier Tribunal did not allow the late appeal and the case was dismissed.

## **Foreign special dividend**

*Summary – A special dividend, paid out as part of a merger, should be taxed as partly income and partly capital in line with Delaware law.*

John Buckingham held shares in the Dr Pepper Snapple Group. In 2018, using a special purpose vehicle, the company merged with Keurig Green Mountain Inc.

Just before the merger, a 'Special Dividend' of \$103.75 per share was paid to Dr Pepper Snapple Group shareholders. John Buckingham received just shy of £110,000, which he included as a capital disposal on his tax return, as the capital value of his shareholding was significantly lower than before the merger.

HMRC received information under the Foreign Account Tax Compliance Act confirming that \$29.50 of the \$103.75 should be treated as income, with the balance being capital.

In 2020, with the income/ capital split confirmed within documentation published at the time of the Special Dividend, HMRC issued a discovery assessment treating \$29.50 of the Special Dividend as a distribution and the balance of \$74.25 as capital.

John Buckingham requested a statutory review, which subsequently found that the whole of the Special Dividend should be treated as income for UK tax purposes, and so the discovery assessment was "varied", increasing the tax due.

John Buckingham appealed accepting the initial income capital split but disputing the review decision.

### *Decision*

The First Tier Tribunal stated that "questions of foreign law are questions of fact for the Tribunal" and went on to say that in this case it was "for the Tribunal to determine whether the Special Dividend paid under Delaware law was income, capital, or part income and part capital." Interestingly, neither party sought to rely on expert evidence relating to the application of Delaware law.

The Tribunal found that under Delaware law, as a matter of fact, \$29.50 of the Special Dividend was income and \$74.25 was capital. The income portion of the Special Dividend was funded by earnings and profits, while the balance was funded by external investors and so was capital. The balance of the dividend "could not have been paid as a distribution of earnings or profits because there were insufficient funds of that nature to do so." Their decision was arrived at based on documentation provided by both Dr Pepper Snapple Group and Keurig Green Mountain Inc. and the split was in line with Delaware law and the principle confirmed in HMRC's own manuals.

The First Tribunal was critical of HMRC's review work as:

1. the officer had failed to take into account IRS forms confirming the income versus capital split. The Tribunal stated that it was 'not credible that the IRS would have signed off on a capital/revenue split which was not in accordance with the applicable company law';

2. the officer appeared to have ignored notes in the company's accounts explaining the nature of the dividend and said that it 'appeared to be described as a straightforward dividend' but was unable to find that reference when asked to refer to it by the tribunal.
3. when considering the documents after the hearing, the Tribunal stated that it appeared that the review decision was actually made out of time. However, 'this possibility was not identified by the parties so there were no related submissions.'

HMRC's original assessment was upheld. As neither party sought to adjust that split to allow for exchange differences and withholding taxes, the income element of the Special Dividend was £32,234 and the capital element £83,551.

*John Buckingham v HMRC (TC08782)*

### **Woodlands were grounds**

*Summary – Woodlands were found to be part of the property's grounds, meaning that residential rates of SDLT applied.*

In March 2018, The How Development 1 Ltd bought property for £2.8 million. This consisted of a main house, a lodge, outbuildings, areas previously used as market gardens, orchards, gardens, grounds and woodland that formed part of a larger area of woodland known as "The Thicket". The SDLT return was submitted on the basis that this was a residential property.

On 20 March 2018, the company claimed that the property should have been classified as mixed-use, on the basis that the woodland was non-residential property.

HMRC disagreed and denied the refund of £204,250.

The First Tier Tribunal agreed with HMRC, finding that:

- the whole property including the woodland was residential as there was no evidence of the woodland being used commercially;
- following both the *Hyman* and *Goodfellow* cases, the "grounds" should have a wide meaning reflecting the character of the property. The woodland formed a natural hillside barrier between the main house and the River Ouse, providing privacy and security to the house as well as enhancing its setting.

The company appealed to the Upper Tribunal arguing that the woodlands were inaccessible from the main house and would never be habitable for residential planning. Consequently, it must be non-residential. Further, certain oral evidence had not been considered.

### *Decision*

The Upper Tribunal found that the First Tier Tribunal had considered a non-relevant factor but had not based their decision solely on the fact that there was a lack of evidence of the use or exploitation of the woodland for commercial purposes. The use of the woodland was one factor, amongst other factors that they had been taken into account.

However, the Upper Tribunal accepted that as a result of the one-year delay between the hearing and the First Tier Tribunal issuing its judgement, certain oral evidence went unrecorded and that the

delay in producing the decision meant that the First Tier Tribunal “could or might not have had a clear recollection” of that evidence. Indeed, the decision did not reflect certain points emphasised in that oral evidence.

The Upper Tribunal weighed up the pros and cons of referring the decision back to the First Tier Tribunal.

To avoid additional costs and delay, the Upper Tribunal re-made the decision taking the following into account (all of which were taken into account by the First tier Tribunal):

1. There was no evidence supporting the woodlands’ use or exploitation as anything other than that of woodland;
2. The woodland did provide privacy and security for the main house for the same reason reached by the First Tier Tribunal;
3. The woodland was within the legal title of the property;
4. The woodland was not excessively far away from the house and its size and location increased the privacy and security of property.

On balance, the Upper Tribunal concluded that the woodland formed part of the grounds.

The appeal was dismissed.

*The How Development 1 Ltd v HMRC [2023] UKUT 00084 (TCC)*

### **Property previously used as a dwelling**

*Summary – Despite significant repairs and renovation being needed prior to occupation, the property bought was residential property for SDLT.*

In August 2019 Amarjeet and Tajinder Mudan bought a property in London for £1,755,000. The couple submitted their return and paid SDLT of £177,000 on the basis that the property was residential property.

In July 2020 they sought to amend their return on the basis that the property was not suitable for use as a dwelling and so was not residential property (section 116(1) Finance Act 2003). They supported this claim by stating that the house was infested and was not safe to live in. The house needed rewiring, the boiler was detached from the wall and there was a hole in the roof letting in rainwater. Further, external doors and windows were broken, the basement was flooded. The couple only moved into the property with their family in May 2020, once the building work was partially completed.

On 13 August 2020 a repayment of £99,750 was made to Mr and Mrs Mudan. However, the following April, HMRC opened an enquiry, later issuing a closure notice confirming that the property was residential property and that the SDLT payable was the original sum paid over.

### *Decision*

The First Tier Tribunal found that at the effective date, the property had been used relatively recently as a dwelling and was structurally sound. The Tribunal acknowledged that before a

reasonable buyer would consider the property “ready to move into”, the work that was undertaken was required.

The Tribunal stated that statute counts a dwelling as “any building which (as at the effective date) is used or suitable for use as a dwelling, is in the process of being constructed or adapted for such use or is to be constructed/adapted for such use by the seller.”

The First Tier Tribunal found that the property was a dwelling as it had been recently used as a dwelling and while empty, it had not been adapted for another purpose. With no structural issues, the property was capable of being used as a dwelling once more, once the repairs and renovation work had been carried out. None of this work was sufficiently fundamental to make it non-residential property.

*Amarjeet Mudan and Tajinder Mudan v HMRC (TC08777)*

### **No duty of care to investors**

*Summary - The High Court had not made an error of law. A tax barrister, who had advised a failed film finance tax scheme, did not owe a duty of care to investors in the scheme. However, the High Court was wrong to conclude that, had such a duty of care been owed, it would not have been breached.*

The appellants in this case were members of limited liability partnerships (LLPs). The partnerships were formed to acquire and exploit distribution rights to films. The scheme was marketed to potential investors on the basis that they would be entitled (as a member of the LLP) to tax relief for trading losses the LLP was anticipated to make and that these losses could be set off against their personal income or capital gains to reduce their tax liability. Mr Thornhill was engaged by the promoter of the scheme to provide a series of opinions on the tax consequences of the scheme.

HMRC challenged the purported tax benefits of investing in the scheme on the basis that the LLPs were not trading on a commercial basis with a view to a profit. The investors entered into a settlement agreement with HMRC in 2017. They also brought a claim against Mr Thornhill under the tort of negligence on the basis that his advice to the promoter, which was communicated to them, was negligent and breached the duty of care he owed to them. The High Court dismissed the claim, holding that no such duty of care existed and that, even if it had, Mr Thornhill's advice would not have breached it.

### *Decision*

The Court of Appeal applied the 'assumption of responsibility' test to determine whether Mr Thornhill owed a duty of care to the appellants. This test required consideration of whether:

1. It was reasonable for the investors to have relied on any representations made by Mr Thornhill;
2. Mr Thornhill should reasonably have foreseen that it was likely they would do so.

Both Simler LJ, who gave the leading judgment, and Carr LJ highlighted that there were factors pointing towards the existence of a duty of care, such as Mr Thornhill declining to add a disclaimer of responsibility to the information memorandum, which he approved.

However, as a totality, the factors weighed against the appellants. Crucially, the tax analysis in the information memorandum was qualified by the statement that prospective investors 'are advised to

consult their tax advisers' and Mr Thornhill only consented to his advice being made available to prospective investors on the basis that they took their own tax advice. Accordingly, the Court of Appeal concluded that:

1. It was objectively unreasonable for investors to rely on Mr Thornhill's advice; and
2. He could not reasonably have foreseen that they would do so.

On that basis, no duty of care arose.

Given this conclusion, it was not necessary for the Court of Appeal to consider the appellants' other grounds of appeal, namely that Mr Thornhill's advice was so negligent that it breached his duty of care.

However, it did address this question on the hypothetical basis that such a duty of care had existed. It did so, partly, because the Court of Appeal considered that the High Court had misconstrued the appellants' arguments on this point.

Simler LJ criticised the unequivocal terms in which Mr Thornhill expressed his view that the LLPs would be trading on a commercial basis with a view to a profit, without identifying the risk of HMRC challenging this view. If the High Court had properly considered the matter, it 'could not but have concluded that no reasonably competent tax silk could have expressed such an unequivocal view.' Accordingly, the High Court had been wrong to conclude that, had a duty of care been owed by Mr Thornhill to the appellants, it would not have been breached.

*McClellan and others v Thornhill KC [2023] EWCA Civ 466*

*Adapted from the case summary in Tax Journal (5 May 2023)*